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REPORTS OF CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT OF SOUTH CAROLINA

COVERING

ALL THE CASES (LAW AND EQUITY) FROM THE ORGANIZA-
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SOUTH CAROLINA REPORTS

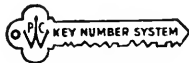
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VOLS. 23, 24, & 25, SOUTH CAROLINA REPORTS



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REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT OF SOUTH CAROLINA

VOLUME XXIII

CONTAINING CASES OF NOVEMBER TERM, 1884, AND APRIL TERM, 1885

BY ROBERT W. SHAND

STATE REPORTER

COLUMBIA, S. C.

JAMES WOODROW & CO., PUBLISHERS

1886

ANNOTATED EDITION

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JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST	CIRCUIT,	HON. BENJAMIN C. PRESSLEY.
SECOND	"	" ALFRED P. ALDRICH.
THIRD	"	" THOMAS B. FRASER.
FOURTH	"	" JOSHUA H. HUDSON.
FIFTH	"	" JOSEPH B. KERSHAW.
SIXTH	"	" ISAAC D. WITHERSPOON.
SEVENTH	"	" WILLIAM H. WALLACE.
EIGHTH	"	" JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

SOLICITORS.

1st Circuit—W. ST. J. JERVEY.	5th Circuit—R. G. BONHAM.
2d Circuit—F. H. GANTT.	6th Circuit—J. E. McDONALD.
3d Circuit—T. M. GILLAND.	7th Circuit—D. R. DUNCAN.
4th Circuit—H. H. NEWTON.	8th Circuit—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED
IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.
HON. HENRY McIVER, ASSOCIATE JUSTICE.
HON. SAMUEL MCGOWAN, " "

23 S. C. *1

*MEETZE v. CHARLOTTE, COLUMBIA &
AUGUSTA R. R. CO.

(November Term, 1884.)

[1. *Reference* ⇨100.]

Where the report of the referee, including the testimony taken with his conclusions of law and fact, and the exceptions taken to the report, are all submitted to the Circuit Judge, it is not in terms the "Case and Exceptions," required by the Code (§ 294), but it is substantially a compliance with the requirements of the law.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 157-168; Dec. Dig. ⇨100.]

[2. *Reference* ⇨100, 107.]

Where there is a consent order of reference in a law case of all the issues to be heard and determined by the referee, the Circuit Judge has the power to review the referee's findings of fact as well as his conclusions of law, and upon such review to affirm, modify, or reverse them. Simpson, C. J., dissenting.

[Ed. Note.—Cited in *Griffith v. Charlotte, C. & A. R. Co.*, 23 S. C. 42, 55 Am. Rep. 1; *Calvert v. Nickles*, 26 S. C. 311, 2 S. E. 116; *Gregory v. Cohen & Sons*, 50 S. C. 511, 27 S. E. 920.

For other cases, see *Reference*, Cent. Dig. §§ 167, 207; Dec. Dig. ⇨100, 107.]

[3. *Reference* ⇨100.]

Where a party is entitled to a trial by jury the cause cannot be referred without his consent; but his consent to a reference involves his consent to all the incidents of a reference, one of which is that the report of the referee, on exceptions taken, may be reviewed and affirmed, modified, or reversed. Simpson, C. J., dissenting.

[Ed. Note.—Cited in *Clayton v. Mitchell*, 31 S. C. 203, 9 S. E. 814, 10 S. E. 390.

For other cases, see *Reference*, Cent. Dig. § 167; Dec. Dig. ⇨100.]

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*Per Simpson, C. J.—

[4. *Licenses* ⇨43.]

Licenses, revocable and irrevocable, considered and defined.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 96; Dec. Dig. ⇨43.]

[5. *Licenses* ⇨58.]

Where the license is a power coupled with an interest of a permanent character, it is irrevocable; and if the interest be an interest in land, and the contract be by parol only, the Court of Equity will hold the contract binding, where the licensee has incurred trouble and expense in carrying out such contract.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 116-120, 121; Dec. Dig. ⇨58.]

[6. *Frauds, Statute of* ⇨137.]

Thus, where a railroad company, for certain privileges, was permitted by parol to construct upon the plaintiff's land a dam, a canal, and a water-wheel, for the purpose of keeping its tank supplied with water, the license was irrevocable and might be enforced in equity notwithstanding the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 301; Dec. Dig. ⇨137.]

[7. *Licenses* ⇨63.]

And this special contract being valid and therefore of force, the plaintiff, upon the withdrawal by the railroad company of such privileges, could not bring action for the value of the use and occupation of the land, but only for damages for breach of the special contract.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 126; Dec. Dig. ⇨63.]

Before Aldrich, J., Lexington, September, 1883.

This was an action by Henry A. Meetze against the Charlotte, Columbia & Augusta Railroad Company, commenced in August, 1881. On February 22, 1883, Judge Hudson

passed the following consent order: "Ordered, That all the issues arising in this cause be and they are hereby referred to William J. Assmann, Esquire, to hear and determine the same." The reference was held in August, and the report filed in September, of the same year. Upon exceptions to this report, taken by the defendant, the cause was heard before his honor, Judge Aldrich, who subsequently filed the following decree:

The report and exceptions were called for a hearing at the fall term of Lexington court, when, by the joint request of the attorneys for the plaintiff and defendant, I made the following entry in the calendar: "To be heard in Columbia by agreement of counsel made in open court." Subsequently, at the fall term of the court for Richland, the case was called for a hearing.

In limine, objection was made that there had been no "case settled," and I could not hear the cause. I ruled that the defendant, having furnished the court with all the papers in the cause copied by the referee, who is also the clerk, this was sufficient; that in all cases where a "case" is necessary the

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party may waive a "case" and present all the papers, provided, as in this cause, the testimony and other proceedings are in writing.

The pleadings were read by the plaintiff's attorney at the request of the attorney for the defendant, including the testimony and all the papers in the cause. After the reading the plaintiff objected to my jurisdiction, on the ground that the remedy of the defendant was to appeal directly to the Supreme Court, and that the findings of the referee had the force and effect of a special verdict which could not be reviewed by the Circuit Judge. I ruled that the appeal from the referee to the Supreme Court was in accordance with the New York practice, which clothed the referee with the power of a court; that this could not be recognized under our constitution, which vested all judicial power in the courts therein named; that I had never heard of a judgment being entered in our State upon a referred report in invitum, nor of the Supreme Court hearing an appeal directly from a referee; that whether this court would or would not have the power to pass upon a "special verdict," the finding here was certainly not a special verdict, for it not only reported the testimony but also the referee's deductions therefrom and his findings of law; that what the referee called findings of fact were for the most part mixed findings of law and fact, hence his report could not be regarded as a "special verdict" without violating the definition given in the code, to wit: "A special verdict is that by which the jury find the facts only, leaving the judgment to the court." I further held that those sections of the code copied from the New York code,

and which gave power to enter up judgment upon the report, or appeal directly therefrom, had been, in whole or in part, stricken out before the order of reference in this case was made (§§ 296, 302, code of 1870). The attorneys in the cause were directed to proceed with the argument.

During the argument the point was made how far this court could go in consideration of the report and exceptions, it being an action at law referred to a referee with power to pass upon all the issues. In my opinion, there being only two modes of trial in this court, by the court with a jury, and by the court without a jury, the consent order of a reference of all the issues to a referee was a waiver of a trial by a jury, and a submis-

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sion *of all the issues of law and fact decided by the court, the same having been first passed upon by the referee, who should, as in this cause he states he does, make his report "to the honorable the Court of Common Pleas." It then becomes the province of the court to take the testimony as reported, and to give due consideration to the referee's findings, without being bound by any. When the referee has found a matter of fact, purely and simply, not a deduction from facts proved, or a conclusion from applying the law to a fact proved, or what is called a mixed finding, such as a finding of "due diligence," "reasonable notice," or "negligence," as I have frequently said, I will, without some very good reason exists to overrule him, sanction his findings.

I now proceed to consider the case on its merits, as presented by the referee's report and all the papers in the cause. In 1874 the defendant railroad, at its Lexington station, with the consent of the plaintiff, built a dam to increase the head of water in a stream at that place, near its track, to run a water-wheel to force water into a tank, and also dug a ditch, some 150 yards long, to carry off the water. A portion of this dam, the whole length of the ditch, and the water-wheel are on the plaintiff's land. The defendants expended money in that construction. The dam was constructed, the ditch dug, the water-wheel built, and the tank placed with the knowledge and consent of the plaintiff, he then being the agent and local attorney of the defendant. The defendant has been using this water-power up to and since action brought.

Without doubt this tank has been of great benefit to the railroad company. It has furnished a never-failing supply of water to its engines, and saved the expense of employing a pump hand at this point. The plaintiff, in his testimony, says he was induced to grant this privilege on his land because as depot agent and local attorney he was permitted to ride on the defendant's trains free of charge and receive family supplies at half rates, a privilege he had been enjoying be-

fore the works were constructed and which all of the depot agents enjoyed. I see nowhere in the evidence that the plaintiff claimed these privileges in consideration of the water-power, or that he has ever even alluded to it until his letter to Mr. President

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Palmer. This employment as *local attorney was a separate engagement, for which he says he was liberally compensated, and doubtless produced good will toward the defendant. This employment of depot agent the plaintiff terminated himself, and his only complaint now is that the free pass has been withheld.

The evidence discloses that this free pass has been extended, except for a short time, to Mr. Meetze as a member of the legislature; but he says that he did not willingly receive them in that capacity. Great light is thrown upon this transaction, I think, in a letter written by plaintiff, which I give in full:

"State of South Carolina, Senate Chamber,
"Columbia, June 13, 1877.

"Col. J. B. Palmer.

"My Dear Sir: Your favor in relation to the ticket sent me on 3d May, and not received, and the request to make out a statement of railroad fare I was compelled to pay during the last session of the legislature, duly received, and in reply beg leave to decline to make out any bill as you request. I think the whole system wrong, and my only regret is that I have ever contributed to it in any way. For your kind proposition to refund, I tender you my thanks. There is one subject to which I beg to call your attention, and one which I think should not properly be classed under dead-head. The company has, for some two years or more, been using my water-power to drive their pump at this station. It is true the works stand on the right of way which I gave the road, but they never could have been successfully worked but for the privilege I gave the company to run a ditch through my land in order to obtain the necessary fall. Now, I feel that justice requires some consideration for this privilege.

"Very truly and sincerely,

"Henry A. Meetze."

This letter, clear in its terms, shows that, whatever motive influenced the plaintiff, the privilege granted was a gift. What means the acquiescence from the date of this letter to the commencement of this action? At the time of the gift the feeling moving the donor was public spirit, the convenience to the

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State *and his immediate locality, and the enhanced value of property along the line. Besides, he accepted the free pass, did not make a claim for compensation, and allowed the defendant railroad to continue the use of the works and the water until the suit

was instituted. I cannot resist the conclusion that the idea of compensation did not arise in the mind of the plaintiff until after he had become offended with Mr. President Haskell, and it is a well-received principle that what is intended as a gift cannot be converted into a charge.

It was contended by the plaintiff that this is a mere license that can be revoked at the will of the plaintiff; by the defendant that it is an easement not revocable. In my view of the case it makes no difference whether it is an easement or a license. As a principle of right, reason, justice, and equity, I hold that where a proprietor stands by and not only permits but consents to the erection of valuable structures on his land, he cannot come in after several years of permissive use and claim compensation. In this State, and especially under our present practice, this court has the power to consider an equitable defence. The expenditure of work, material, and money, as in this case, takes the case out of the statute of frauds. *Trammell v. Trammell*, 11 Rich., 472, 474; 2 Am. Lead. Cas., 546 to 587.

Again, the nature of this privilege, shown by the plaintiff to be necessary for the use of the defendant at this point, and having been used by the defendant railroad from 1874 to time of action, and originating in the consent and gift of the plaintiff, he is precluded from this action by Gen. Stat. § 1554; [*Teas v. Albright*] 13 Fed. Rep., 412.

It has been repeatedly held that a letter, or any other writing, identifying the privilege, when taken in connection with the structures, the proceedings, and the proof, will take the case out of the statute of frauds. That it is signed by only one party, and has been written subsequently, makes no difference if the other has acted upon it. *Rob. Frauds*, 105, 107; 1 Chit. Cont., 90, note on p. 95, note p. 96.

It is well understood that, while I am in favor, as a matter of right and policy, of holding railroads and all other corporations to the strictest accountability, and restrain-

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ing them from all *encroachments on the rights of the citizens by awarding full compensation when these rights are invaded, yet so great is the prejudice against them, and so prevalent the idea that a railroad must be made to pay for any privilege or injury, no matter how the former is acquired or the latter occasioned, without regard to the great benefits it has conferred to the section of country through which it runs, that I feel the necessity of protecting them from some of the extravagant demands set up, and with which the public too often sympathize. A railroad corporation stands in court like any other suitor, and while it is held to the severest tests and the most strict compliance with the law, it must be protected in its rights like any other citizen. I

adjudge that the plaintiff is not entitled to damages.

Before dismissing the complaint, however, it may be proper to say that if I was of the opinion that the plaintiff is entitled to damages, they could not be measured by the benefit arising to the defendant railroad, but by the injury done to the plaintiff, which he seems to compute is the value of the free pass withheld.

The defendant has tendered a free pass to the plaintiff as an offering for favors received, and while I do not so adjudge, I think it not out of place to suggest that as the defendant railroad is enjoying this water privilege by the consent of the plaintiff, that a free pass be again offered him from year to year during his life, or so long as the defendant continues to use the water-power.

Let the complaint be dismissed and the plaintiff pay the costs of this action.

The plaintiff appealed upon the following exceptions:

1. That his honor, the Circuit Judge, erred in ruling that in reviewing the report of the referee it was not necessary to have a case settled.

2. That his honor erred in ruling that the defendant, having furnished the court with all the papers in the cause copied by the referee, who is also the clerk, it was sufficient.

3. That his honor erred in ruling that the consent order of reference of all the issues was a waiver of a trial by a jury, and a submission of all the issues of law and fact decided by the court, the same having been first passed upon by the referee.

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*4. That his honor erred in holding that the privilege granted was a gift.

5. That his honor erred in holding that the idea of compensation did not arise in the mind of plaintiff until after he had become offended with President Haskell.

6. That his honor erred in holding that where a proprietor stands by and not only permits, but consents to the erection of valuable structures on his land, he cannot come in after several years of permissive use and claim compensation.

7. That his honor erred in holding that the expenditure of work, material, and money, as in this case, takes the case out of the statute of frauds.

8. That his honor erred in holding that the plaintiff was precluded from obtaining the relief sought under § 1559 of the General Statutes.

9. That his honor erred in holding that a letter, or any other writing identifying the privilege, when taken in connection with the structures, the proceedings, and the proof, will take the case out of the statute of frauds; and that it was signed by only one party, and has been written subsequently, makes no difference if the other has acted upon it.

10. That his honor erred in adjudging that the plaintiff was not entitled to damages.

11. That his honor erred in dismissing the complaint.

Messrs. Clark & Muller, for appellant.
Mr. J. H. Rion, contra.

April 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The complaint filed in this action alleges that in 1874 the appellant, in consideration of the privilege of at all times travelling upon the cars of the defendant free of charge and for certain other valuable considerations thereunto him moving, permitted the defendant to enter upon his lands located along the line of defendant's road, and there to erect and build a certain dam and water-wheel, and

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to excavate a certain canal for the purposes of running said water-wheel and supplying the water-tank of defendant with water; that the defendant continued to use these works for the purpose aforesaid until about March 1, 1880, having during this time extended the privileges aforesaid to the plaintiff; that about March 1, 1880, these privileges were discontinued, and the defendant has since refused to perform its part of the contract or in any manner to remunerate the plaintiff, although it has continued to use the water-wheel, canal, &c. Wherefore he demands the sum of \$225 for the use and occupation of the said land and the use and occupation of the water-wheel, canal, &c., from March 1, 1880, to August 1, 1881, the time of the commencement of the action, and for costs.

The answer of the defendant denied the allegations in the complaint except so far that it admitted the construction of the water-works on the plaintiff's land, and also the privileges extended to the plaintiff as claimed in the complaint; but it averred as to these privileges that they were not extended in consideration of the use of said water-works, but were extended to the plaintiff as one of the agents of the company during the years 1874 and 1875, and during the years 1877, 1878, and 1879 as State senator, and so expressed in the free pass given, but that during the year 1876, when the plaintiff was neither agent nor State senator, no free pass was given; and it further averred that the permission given to the defendant to erect the works mentioned was given because of the public spirit and kindly disposition of the plaintiff to the road, gratuitously, like the right of way had been given by various persons, and was intended for defendant to enjoy the privilege to the same extent and for the same period as such right of way. The answer also admitted that the defendant had continued the use of the works since 1874, and, while not admitting the plaintiff's right thereto, the defendant

tendered a free pass for the year 1880, to be continued from year to year so long as the defendant used said works, which was refused by the plaintiff.

The answer also set up a counter-claim of \$162.12 balance in plaintiff's hands as agent. The plaintiff replied to the counterclaim, asserting that he had paid all in his hands, and

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denying *that he was indebted to the defendant in any amount whatsoever.¹

Upon order of Judge Hudson, on motion of plaintiff's counsel and by the consent of defendant's counsel, the cause with all issues arising in it was referred to William J. Assmann, Esq., to be by him heard and determined.

The referee found as conclusions of fact: That from the spring of 1874 to March 31, 1880, the defendant used the water-works for supplying its tank, with the consent of the plaintiff; that the consideration which moved the plaintiff to this consent was certain privileges extended to him by the company, principally that of travelling free upon the road, which privileges were allowed during this time except during the winter of 1877, when he was required to pay the regular fare in travelling, and were entirely discontinued after March, 1880; that thereupon the plaintiff lodged complaint, and demanded his right to travel free of charge; that this demand was ignored until December, when an annual pass was tendered, which the plaintiff declined to accept; that since March 31, 1880, the defendant has used the water privilege without the consent of the plaintiff and without paying compensation therefor; and that the value of the use and occupation of the lands of the plaintiff is reasonably worth \$150 per annum.

As conclusions of law, he found (1) that the privilege granted the defendant was a "license" and not an "easement"; that this license was revocable at the will of the licensor; that said license was revoked on and after April 1, 1880. (2) That after said revocation, the use and occupation was upon the implied promise to pay what it was reasonably worth. He therefore adjudged that the plaintiff recover the sum of \$200 and costs.

These conclusions, with the testimony upon which they were based, were reported to the court, with numerous exceptions from the defendant. This report, including the testimony and exceptions, came up before his honor, Judge Aldrich, who—holding that the consent order of reference of all the issues in the case was a waiver of a jury trial, to which the parties were entitled in the first instance, it being a case at law, and that this was also a submission of all the issues

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to the court, the same having first *been

passed upon by the referee, and by him reported to the court, when it was the province of the court, after giving due consideration to the findings of the referee without being bound by any, to decide said issues, both of fact and law, for himself—proceeded to consider the case on its merits as presented by the report and all the papers in the cause, and finding that the use of the water privilege by the defendant was granted as a gift, whatever may have been plaintiff's motive in allowing it, and that whether it should be regarded as a license or an easement, yet having been granted, and the defendant in consequence of such grant having gone to considerable expense to make it useful, he held that the plaintiff could not come in after several years of permissive use and claim compensation. He further held that, by virtue of a certain letter of plaintiff, the statute of frauds did not apply; and further, that even if the plaintiff was entitled to damages, they could not be measured by the benefit arising to the defendant from the use of the water, but by the injury done to the plaintiff in refusing him the free pass and other privileges which he had enjoyed. He therefore dismissed the complaint with costs.

The appeal raises the following questions: 1st. Whether the Circuit Judge could review the report of the referee without a case and exceptions, although all the papers which were before the referee were submitted to him. 2nd. Whether in a case like this, it being a case at law, the Circuit Judge could hear it on its merits, disregarding the findings of the referee as to the facts; and whether he was not bound by the facts as found, having jurisdiction only as to the question of law involved, with power to grant a new trial upon the facts, for the reasons for which under the law a new trial may be granted in jury cases. 3rd. Whether his honor erred in holding the privilege granted to the defendant was a gift; and also in holding that plaintiff, having stood by and permitted the erection of valuable structures by the defendant, could not come in after several years of permissive use and claim compensation. 4th. Whether his honor erred in holding that the facts of this case took it out of the statute of frauds; and also in holding that plaintiff was precluded from relief by section 1554 of General Statutes.

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5th. Whether his honor *erred in holding that plaintiff was not entitled to damages and in dismissing the complaint.

The two first questions involve questions of practice, and their solution depends upon the interpretation which is to be given to the sections of the code bearing upon these points. These sections are mainly sections 290 and 294. Section 294, after providing how trials by a referee shall be conducted, provides the manner of reporting conclusions, directing that the facts found and the conclusions of law must be stated separately,

¹At the reference, defendant withdrew its counter-claim, and stated that it had been put in under a misapprehension.—REPORTER.

and the decision given, and then it provides that this decision may be excepted to and reviewed in "like manner" and with "like effect" in all respects as in cases of appeal under section 290, and the referee may in like manner settle a case or exceptions.

Section 290, which section 294 refers to and incorporates, has two subdivisions. In the first of these it provides that for the purpose of appeal either party may except to a decision on a matter of law arising upon a trial within ten days after written notice of the filing of the decision, order, or decree, as provided in sections 344 and 345. So that where a party intends to except to the report of a referee who has tried the case on a matter of law, he must do so within ten days as above. Subdivision 2 provides that if either party desires a review upon the evidence appearing on the trial, either of a question of fact or of law, he may at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of the court, make a case or exceptions in "like manner" as upon a jury trial, except that the judge, in settling the case, must briefly specify the facts found by him and his conclusions of law. Now, in conforming to this subdivision, so that the report of the referee may be reviewed by the Circuit Judge, it seems that a case or exceptions must be made within ten days, &c., in like manner as upon a jury trial, in which the referee, in settling the case, must briefly specify the facts found by him, and also his conclusions of law. These requirements were not observed formally in this case, but all the papers, including the report of the referee, the testimony taken, the facts found, the conclusions of law, and the exceptions, were submitted to the Circuit Judge. This we think was a substantial compliance with

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the demands of *this section. Nothing seems to have been left out that could have been brought up in a more exact and formal observance of the rule. So that while it would be better to conform in terms, yet for the reasons given the failure in this instance should not be held fatal.

The second question is surrounded with greater difficulties, which are the more perplexing for the reason that we have no case in our reports to which we can look, and upon which we can stand as authority, as to the full import of the question raised, though there are several, to be cited hereafter, which seem to lead in the direction of the conclusion which we have reached. We must again look up the sections of the code supra, which are also applicable to this question, but before doing so it may be best to consider briefly the nature of trials in civil causes, and the circumstances and authority under which trials by referees may be had. A trial is defined to be a "judicial examination of the issues between the parties, whether they be issues of fact or of law." Code, § 273.

Issues of law must be tried by the court, as also cases in chancery, unless they be referred as provided in chapter 5 of title 8, part II., Code, § 274. Issues of fact in actions for the recovery of money only, or of specific real or personal property, must be tried by a jury, unless such trial be waived, as provided in section 288, or a reference be ordered as in section 274. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it as provided in sections 292 and 293.

It will be seen from these sections of the code, which constitute our chart, that there are two general modes of trial of causes provided by the law, without reference to the consent or otherwise of the parties litigant, i. e., trials by the court and trials by a jury. To the court belong all issues of law and all cases in chancery, with the power on his part to order a reference for his own enlightenment, not, however, to be controlling on him. To the jury belong all questions of fact in cases at law, for the recovery of money only, or of any specific real or personal property. But either of these modes of trial may be changed by the action of the parties if they choose to do so. For in-

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stance, a *jury trial may be waived in favor of a trial by the court, as provided in chapter 6, section 288. Or all issues, whether of fact or law, in any action may be taken from the jury or the court and referred to a referee upon the written consent of the parties (§ 292), and the court may, even without the consent of the parties in certain cases, direct a reference (§ 293). It appears, then, that a party has the right to demand a trial by the court, or the jury, as the case may require, and that he cannot be deprived of his right, unless by his own consent, except in the few cases referred to in section 293, where the judge has the power to refer even without the consent of the parties. Yet he may consent that a case at law may be tried by the court, or that all issues in any case may be tried by a referee.

Now, the case at bar was originally a case at law. It was an action for the recovery of money only, demanded for an alleged breach of contract. It was, therefore, a jury case, pure and simple. The parties, however, consented that all the issues involved might be tried by a referee, and it was so ordered. The question now arises, what was the effect of this consent? Did it involve the further consent that, after the referee had heard and tried the case, his findings of fact might be disregarded by the Circuit Court, and the case be reheard and tried by the Circuit Judge upon its merits, and upon the evidence reported by the referee? There can be no doubt that parties may waive a jury trial, either in favor of a trial by the court, or by a referee (Code, §§ 288 and 292); but

the question is, where a jury trial has been waived and a referee trial elected, can such a waiver, under any circumstances, carry the trial upon the merits back to the court without the consent of the parties? This must depend upon the construction which should be given to section 294, in connection with section 290, *supra*, as applicable to this precise point.

Section 294, as we have already seen, provides for a review of the decisions of referees in all cases where that mode of trial is adopted under section 292, until the recent amendment in the general statutes. Judgment might be entered upon the decision of the referee when he had been substituted by the parties at the trial court, with the right of appeal upon exceptions—to what court in this State it was never decided, but to the

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general *term in New York. This last provision has been, however, stricken out of our code (Gen. Stat.), and as it now stands, the decision of the referee is subject to review by the Circuit Court upon a case or exceptions. But what is the extent of the power of the Circuit Court in this review? Section 294 declares that it shall be had in like manner and with like effect in all respects as in cases of appeal under section 290. Section 290 provides the manner of appeal to this court in jury cases tried by the court upon a waiver of a jury trial. It does not say in terms what the effect shall be, but we know that in appeals to this court in cases at law when tried by the court, questions of law can only be brought up by such appeal. The facts cannot be reviewed.

It is true, subdivision 2 of section 290 does say that either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may make a case or exceptions in like manner as upon a jury trial. What this means exactly we are at a loss to conceive, but it certainly could not have meant that this court should have the power to review the facts as well as the law in a case at law, when the case had been tried by the court. Because the constitution has invested this court in cases at law with the power only to correct errors of law, which, by implication at least, inhibits the power to correct errors of fact in such cases. This being so, the legislature could not enlarge this power. We do not know what could have been the intent of this expression then, except, perhaps, it was to give power to have the facts reviewed in such cases where the facts, according to the law and practice, were reviewable on appeal, i. e., cases in chancery.

This construction would confine the Circuit Court, in the review of the decisions of referees where the parties had elected that mode of trial, to questions of law in cases at law, but with power in chancery cases to correct errors, both of fact and law. It would make the practice uniform and sym-

metrical, and would conform to the intent of parties in selecting their own mode of trial. And we think this is the proper construction of section 294, where it provides that the decisions of the referee shall be subject to review in like manner and with like effect as appeal cases. We are of opinion,

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therefore, that his honor erred in *considering any other questions below, except the legal ones presented in the exceptions, except that he might have granted a new trial if in his judgment the facts warranted such an order.

The prominent cases in our own reports, where this question has been somewhat discussed as to chancery cases, are, *Flinn & Hart v. Brown*, 6 S. C., 209; *Thorpe v. Thorpe*, 12 Id., 154; *Gadsden v. Whaley*, 9 Id., 147. In the first case, which was an equity case, all of the issues were referred under section 270 to a jury, and the court held that the verdict was not necessarily to be accepted as the conclusion which was to govern and control the case, but that the judgment in such a case must be the result of the conclusions of the judge, both on the law and the facts—the court saying: “That it was entirely within the power of the judge to have disregarded the verdict and decreed in the face of it.” This case seems directly in point as to chancery cases, because this case was referred by virtue of the provisions of the code under discussion. The cases at law are, *Ross v. Linder*, 18 S. C., 605; *Griffin v. Griffin*, 20 Id., 486; and *Caulfield v. Charleston*, 19 Id., 600. In the last case it was said that the report of a referee as to the facts in a case at law has the force and effect of a special verdict.

We think, therefore, that his honor, the Circuit Judge, transcended his powers when he found as a fact that the privilege extended to the defendant was a gift, in face of the fact as found by the referee that it was based upon a consideration and was the result of contract; and it being error in the judge thus to reverse this finding, the principle of law which he applied to the fact when reversed was not of force, however correct it may be as a general principle.

Coming next to the other questions presented, let us inquire first, what is the precise cause of action upon which the plaintiff has come into court. In looking at the complaint, we find that the greater part of it is taken up in detailing a special contract between himself and the defendant: and near the close thereof a breach is alleged in these words: “That on or about the first day of March, 1880, the defendant discontinued the accommodations previously extended, and has ever since refused to perform its part of the contract.” But no damages are demand-

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ed for *this breach: on the contrary, just at this point it is alleged that, after such discontinuance and failure to perform its part

of the contract, the defendant continued the use of the works, without compensation, which use the plaintiff then claims is worth the sum of \$350 per annum, and judgment is demanded for the value of such continued use and occupation. We conclude from this that the action is upon an implied contract, and not upon the special contract alleged to have been made between the parties. The referee certainly so understood it, and such we suppose was the understanding of the plaintiff. Now the question arises, can an action be maintained upon a quantum meruit, or implied contract, when the proof shows the presence of a specific contract?

It is said, however, that the specific contract was a mere license, revocable in its nature; that it was revoked; and that since said revocation the implied contract has sprung into existence, and in that view the action is maintainable. We have looked into many cases on the subject of "licenses" and "easements" without reaching a very definite and satisfactory conclusion as to the precise distinction between them. They seem often to shade into each other, and the line of demarcation between them is so indistinct that neither the cases in which they have been discussed nor the text-books afford any well-defined rule as a test. Without attempting here to establish such a test for general application, the following general principles, we think, may be extracted from reliable authorities. *Prince v. Case* [10 Conn. 375, 27 Am. Dec. 675], and *Rerick v. Kern*, discussed in 2 Am. Lead. Cas. (Hare & Wall), 736, and the cases there cited; 2 Story Eq. 60, § 761.

A general definition of a "license" merely is that it is an authority, a power, to do some act, derived from one who can give such power, and its effect is to make the act lawful which, but for the power granted, would be unlawful. Such a license (in its implied form) is essentially revocable, both before the act is performed or afterwards. An illustration of a power of this kind would be where one was authorized to hunt in another's park, or to cut down another's timber. If the authority went no further than to do acts of this kind, it is a mere license and is revocable at the will of the licensor. But the license may be coupled with an interest in the licensee beyond the mere execu-

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*tion of the power; as, for instance, in the example above of hunting in another's park, the license may extend to a vested right in the game killed by the licensee, and then the license would not be revocable so as to deprive the licensee of his property. It might be revocable so as to prevent a continuance of the license, if the interest beyond the license was of a temporary character, as in the case referred to, though the license could not be revoked, after the game was killed, so as to deprive the licensee from taking possession, yet it could be revoked so

as to prevent a repetition or continuation of the hunting. But if the interest over and above the license is of a permanent character, and such as could not be enjoyed except by a continuance of the license, and that interest has become legally vested in the licensee, then the license is irrevocable, because the interest to which it is a necessary incident is irrevocable. A license then may consist of two parts—first, a mere power; and second, a transfer of an interest to the licensee, permanent or otherwise, to which the power is a necessary incident. A license of the first kind is always revocable, but whether the second kind is so or not depends upon the fact whether the interest is legally vested and whether it is permanent and continuing.

In the case at bar, the license is of the latter kind. It is a power coupled with an interest. The power consisted in the defendant being allowed by the plaintiff to enter upon his land to dig the canal, to build the dam, and to erect the water-wheel, all of which acts would have been unlawful without the license. And if the license had halted at this point, while the license would have been a protection against an action of trespass, yet it could have been revoked either before the works had been erected or afterwards. But the license did not stop at that point. The complaint states that in consideration of certain privileges, &c., extended to him, he permitted (licensed) the defendant to enter upon his lands and erect these works, for the purpose of supplying defendant's tank with water. Here was an interest, an easement, beyond the mere authority to erect the works, to wit, the purpose of the erection. They were to be used by the defendant, and they were so used.

Now, according to the principles stated

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above, where the license *covers not only a power but an interest, whether it can be revoked or not depends upon the character of the interest and whether according to law the interest has become vested. The difficulty in these cases is where the interest is an interest in lands. Because, in addition to the license, before an interest in lands can become vested in law, certain technical rules, so to speak, must be complied with, as, for instance, lands cannot be conveyed at law without an instrument executed under seal, &c., and the statute of frauds interposes too and declares that the sale of no interest in lands, &c., shall extend beyond a mere estate at will, unless in writing; and it further provides that no action shall be brought upon such sale, unless in writing, &c. When a question arises, then, in a law court as to an interest in land, unless these rules have been complied with, the objection is fatal. In the equity courts, however, it has been held that where the license as to an interest in land, though verbal, has been so far executed that its revocation would work a

great wrong in the licensee, the chancery courts will hold it binding and irrevocable, and especially where the licensee, relying on the contract, has incurred considerable expense and trouble in carrying it out. Where the licensor stands by, permits and encourages the transaction as a sale, and allows the licensee to go to expense upon the faith of a sale or vested interest, he will be estopped in equity from denying it, and it may be specifically enforced.

Now, applying these principles to the case at bar, it is clear that the original contract between these parties, as alleged in the complaint and as found by the referee, was more than a mere license revocable at the will of the plaintiff. Because it embraced not only a power to do certain acts, but the exercise of this power was intended to create, and did create, an interest to be enjoyed and used by the defendant. This interest was attached to the railroad of the defendant, which was a permanent structure. It was intended to supply this permanent structure with water, a continuous want, and therefore we must conclude that the interest was understood to be of a permanent character.

It was, however, an interest in land, and not in writing, simply verbal, and the plaintiff contends that therefore it was nothing more than an estate at will under the stat-

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ute of frauds, and on *that account was still revocable. This position of the plaintiff would be entirely correct, under the statute of frauds, in an ordinary case of verbal contract, for the sale of an interest, certain or uncertain, in lands in a law court; but we think in this case, before a court combining both law and equity jurisdiction, under the equitable principles referred to above, that the canal, the dam, and the water-wheel, erected at considerable expense by the defendant, with the knowledge and consent of the plaintiff, constitute a complete bar to the interposition of the statute, which places the contract beyond the reach of revocation.

If this be the correct view of the case, then the special contract between the parties is still of force, and the plaintiff's suit should have been based on that as his cause of action, founding his claim for damages on its breach, and not for the value of the use and occupation of the premises.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McIVER. In this case I concur in the result, but I cannot assent to the doctrine that a Circuit Judge has no power to review and reverse a referee's findings of fact in a law case. On the contrary, in my judgment, it is his duty to do so when a case proper for that result is made. Even under the old code it always seemed to me a misuse of terms to speak of a trial by referees. A trial is defined as "the judicial examination of the issues between the parties,

whether they be issues of law or fact." Old Code, § 275; New Code, § 273. The word "judicial" implies the action of a court, or some agency thereof under its direction. Hence there is no impropriety in speaking of a trial by jury, for that is conducted in the presence and under the direction of the court, and the judgment is entered on the verdict by the direction of the court, either express or implied. A referee, however, is not a court. He is not mentioned among the several courts provided for in the constitution, nor among those established by the legislature under the authority of the constitution. See Code, § 9, where the several courts are mentioned. The Circuit Court has no authority to delegate its powers to a referee. It can only use him as an agency, or as a

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*part of its machinery to facilitate the disposition by the court of such business as may be brought before it. But it cannot invest him with power to determine any issues, either of law or fact, except subject to its supervision and review.

Hence I always believed that, notwithstanding the somewhat equivocal language of section 296 of the old code, no judgment could be entered upon the report of a referee until it was confirmed by the Circuit Court, and such I understand to have been the practice even under the old code. In the case of *Kirkland v. Cureton* (4 S. C., 122), which is sometimes cited in opposition to this view, it will be found by reference to the last paragraph on page 124, that the judgment was entered on the report of the referee "by order of the court," and the appeal was from the judgment so entered. So that this case confirms my view as to the prevailing practice. But the question now presented arises under the new code in which the language which was supposed to give authority for the entry of a judgment on the report of a referee, without any confirmation by the court, has been omitted, evidently with the intention of abrogating such provision, and must be determined by the provisions of the present code.

Section 294, in speaking of referees and masters to whom the issues in an action have been referred, declares: "They must state the facts found, and the conclusions of law separately; and their decision must be given, and may be excepted to and reviewed in like manner and with like effect in all respects as in cases of appeal under section 290; and they may in like manner settle a case or exceptions. When the reference is to report the facts, the report shall have the effect of a special verdict. When the case shall have been heard and decided upon the report of the referee and exceptions, the decision may be reviewed on appeal to the Supreme Court." It is clear from this language that the referee is required to report, not merely the general conclusion at which he has arrived, as in case of a jury, but he

must report separately the facts and his conclusions of law therefrom; and his decision, which must necessarily be the combined result of his findings of fact and law, "may be excepted to and reviewed." By what court is not expressly stated, but it is manifest from the other portions of the sec-

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tion that the Circuit Court *is intended, and not the Supreme Court: for the provision at the end of the section that the case, after being heard and decided upon the report and exceptions, may be reviewed on appeal to the Supreme Court, furnishes conclusive evidence that the intention was that the report and exceptions should be heard by the Circuit Court: and this, as I understand, is not controverted.

Now, if the section had stopped at the words last quoted, would it not necessarily follow that the permission to except to and review the decision of the referee, compounded of findings of fact as well as of law, involved the right to review questions of fact as well as law? But the section does not stop there, but goes on to provide the manner in which such decision may be excepted to and reviewed, "in like manner, and with like effect in all respects, as in cases of appeal under section 290." This is precisely the same as if the language of section 290 had been incorporated in the section. Turning to that section we find the following language: Subdivision I. "For the purpose of an appeal, either party may except to a decision on a matter of law arising upon such trial within ten days after written notice of the filing of the decision," &c. Subdivision II. "And either party desiring a review upon the evidence appearing on the trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, or within such time as may be prescribed by the rules of court, make a case or exceptions in like manner as upon a trial by jury, except that the judge, in settling the case, must briefly specify the facts found by him and his conclusions of law."

Now, if this language be incorporated into section 294, that section would then read: "Their decision (that is, referees') must be given, and may be excepted to and reviewed in like manner, and with like effect, in all respects, as in cases of appeal under section 290, that is to say: 1. Either party may except to a decision on a matter of law arising upon such trial within ten days after written notice of the filing of the decision. * * * 2. And either party desiring a review upon the evidence appearing on the trial, either of questions of fact or of law, may, at any time within ten days after notice of the judgment," &c. Clearly if the section read in this way, as it practically

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does, *there could be no doubt that the report of a referee could be excepted to and reviewed for error in his findings of fact

as well as of law, for it is distinctly, and in terms, provided for. It seems to me clear, therefore, that the Circuit Court has jurisdiction to review the findings of fact as well as of law by a referee.

But it is contended that this power of review, so far as findings of fact are concerned, is limited to the ordering of a new trial, and does not warrant the reversal of such findings. It being conceded, as I understand, that the power to review embraces the power to reverse findings of law, I am unable to perceive any reason why the power to review does not likewise embrace the power to reverse findings of fact. The power to review both of these classes of findings is given in the same section, and practically in the same language: and not finding in the section any distinction between them in respect to the extent of the power conferred, I am unable to discover any warrant for such distinction. But in addition to this, so far as I have been able to discover, the Circuit Court has not been invested with power to grant new trials, except in cases tried by a jury (Gen. Stat., §§ 2113, 2652), and in the absence of any such grant of power in a case tried otherwise than by a jury, the power to review must necessarily include the power to reverse, affirm, or modify.

Indeed, it seems to me that the power to order a new trial in a case which had been referred to a referee would lead to singular, if not unfortunate, results. Before whom would the new trial be had, the same referee or another? If before the same referee, is he to surrender his deliberate judgment at the dictation of the Circuit Court? If he is not, then no practical good would result from the new trial, but simply delay and additional expense. If he adheres to his original opinion, can a new trial be ordered toties quoties? If before another referee (which, however, could not be without the consent of the parties), and he should reach the same conclusion as the first, how often would the process be repeated? These, and other considerations which might be mentioned, may afford the reason why the power to grant new trials has only been given in cases tried by a jury, the constituent members of

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which are changed at every court. But *be that as it may, as I am unable to find any authority for a Circuit Court to order a new trial, except in a case which has been tried by a jury, I am forced to the conclusion that the power undoubtedly vested in a Circuit Judge to review the findings as well of fact as of law, necessarily includes the power to reverse, affirm, or modify such findings.

The argument drawn from the fact that the Supreme Court has no power to reverse findings of fact in a law case does not strike me with much force. That limitation upon the power of this court is found, not in the sections of the code above cited, which deal with the question under consideration, but

in the constitution, in which no reference is made to such question. Indeed, the argument would prove too much, for inasmuch as this court has no power to review in a law case the facts even for the purpose of granting a new trial, it would follow that the Circuit Court would have no power to review the findings of fact by a referee even for the purpose of granting a new trial. If the jurisdiction of the Supreme Court in appeals was defined only in the sections of the code which we have cited, unaffected by the provisions of the constitution, as is the case with reference to the jurisdiction of the Circuit Court to review the report of a referee, then such jurisdiction would not be limited to the correction of errors of law only, but would extend to the correction of errors of fact also by the express terms of those sections: but as the constitution, which is of superior authority, does place such a limitation upon the jurisdiction of the Supreme Court, the comprehensive language of those sections, when applied to the Supreme Court, must necessarily be narrowed down to the limits fixed by such superior authority. But when we are called upon to construe the language of those sections, with a view to ascertain the extent of the jurisdiction of the Circuit Court in reviewing the report of a referee, as to which there is no constitutional limitation, we are bound to give that language its ordinary and plain meaning, and so construing it there can be no doubt that the power of review extends to findings of fact as well as of law.

Nor will it do to say that the language of subdivision 2 of section 290, which in terms gives the power to review findings of fact, must be regarded as referring only to cases

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in chancery. *and not to law cases. There is no warrant in the language of the section, or anywhere in the chapter in which it is found, for such a construction. On the contrary, it is found in a chapter entitled "Trial by the Court," and the first section of it (288) prescribes how a trial by jury may be waived in actions on contract, plainly referring to law cases, and not cases in chancery. The next section (289) treats of the trial of a question of fact by the court, and then follows the section which is referred to in section 294 as prescribing the manner in which the decision of a referee may be excepted to and reviewed in any case—whether at law or in chancery, is not specified; and hence I conclude that the same mode of proceeding applies to both classes of cases, and it being conceded, as I understand, that a Circuit Judge, in a case in chancery, may reverse, affirm, or modify the referee's findings of fact as well as of law, I see no reason why he has not the same power in a law case.

This conclusion does not abridge a party's

right to a trial by jury in a case in which he is entitled to such a mode of trial, for it is only by his consent that such a case can be referred to a referee, and when he gives such consent, he must be regarded as consenting to the necessary incidents to a reference, one of which is, that the report of the referee can be excepted to and reviewed by the Circuit Court, and upon such review that the findings of the referee, both of law and fact, may be reversed, affirmed, or modified.

Mr. Justice McGOWAN. I concur in the result of the case, and in this opinion of Mr. Justice MEYER as to the question of practice involved.

Judgment affirmed.

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GRIFFITH v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO.

(November Term, 1884.)

[1. *Appeal and Error* ⇨1022.]

Where all the issues in a law case are referred by consent to a referee to hear and determine them, his findings of fact may be reviewed and reversed by the Circuit Judge; and the judge's decision upon the facts is final.

[Ed. Note.—Cited in Gregory v. Cohen & Sons, 50 S. C. 511, 27 S. E. 920.

For other cases, see Appeal and Error, Cent. Dig. § 4017; Dec. Dig. ⇨1022.]

[2. *Property* ⇨1.]

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*Property defined; and its essentiality to the plaintiff in an action for damages considered.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 1; Dec. Dig. ⇨1; Reference, Cent. Dig. § 207.]

[3. *Dead Bodies* ⇨9.]

An administrator has no property in the cadaver of his intestate, and therefore cannot maintain an action for its wilful and negligent mutilation, but he may sue for injury to the wearing apparel of the deceased.

[Ed. Note.—For other cases, see Dead Bodies, Cent. Dig. § 13; Dec. Dig. ⇨9.]

Before Aldrich, J., Lexington, September, 1883.

This was an action by David J. Griffith, as administrator of W. Scott Hook, deceased, against the Charlotte, Columbia & Augusta Railroad Company, commenced October 6, 1881. The decision of the Circuit Judge was as follows:

This cause was argued before me in Columbia, on exceptions to the report of the referee, Mr. Assmann, the clerk of the court of Lexington. The case was called for a hearing at the fall term of the Lexington court, when, by consent of the attorneys for plaintiff and defendant, I made the following entry on the calendar: "To be heard in Columbia, by agreement of counsel made in open court."

When the case was called for a hearing in Columbia, several objections were made, as in the case of Meetze v. same defendant [23

S. C. 1]. First. That no case had been settled and I could not hear it. I ruled, as in Meetze's Case, that all the papers and proceedings being in writing, the party may waive a "case." Second. After the reading of the papers, the plaintiff objected to my hearing the case for want of jurisdiction. Since filing my opinion in the Meetze Case, I have had the opportunity of consulting with eminent members of the bench and bar, and find that the practice is as stated in argument, that unless the appeal comes up from the Circuit Court the Supreme Court will not hear it. This being so, it will be unnecessary to repeat the reasons which governed me in deciding to hear the case on the papers. I refer to that case if it be necessary.

I now proceed to consider the case on the report of the referee, who has awarded \$10,000 damages against the defendant for mutilating the corpse of the plaintiff's intestate. When I first heard of the action, I naturally inquired what property has the administrator in the corpse of his intestate. It cannot

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be appraised. "It cannot be assets in his hands for the payment of debts. It cannot be an estate for distribution among the heirs at law, for the corpse would be buried and in a state of decomposition before letters of administration could be granted." But after hearing the very able and exhaustive argument of Mr. Youmans for the plaintiff, and the equally competent and learned argument of Mr. Rion for the defendant, I confess I have been exercised in coming to a conclusion in a case of this novel impression.

The fact is the intestate was murdered and his corpse put on the railroad track to conceal the crime. The assassin has been twice tried, twice convicted, and is now serving his term of life imprisonment in the penitentiary, the governor having commuted his sentence. So that the first question is, who is responsible for the mutilation of the dead body? The murderer who put it on the railroad track or the railroad company whose engines ran over it? The doctrine of contributory negligence is explicit and very well settled. If an individual, by his own act, contribute to his own injury, he cannot recover damages. Suppose, instead of killing the intestate, the assassin had tied him on the track and the trains run over him, who would have been the murderer? Now, does it follow if A kills B and places his body on the railroad track to conceal his crime, that the railroad company, and not the murderer, is liable? I think not. The man who committed the murder and then to conceal his crime placed the body on the track, thereby trespassing on the right of way of the railroad company, is the responsible person. It would be an unusual state of the law to indict one man for the killing of another and recover damages from a railroad company

for the mutilation of the corpse which he has slain and placed in the track of the engine and train to conceal his crime.

Who has been hurt? The man was dead when he was put there; he has suffered no pain, no mental anxiety, no doctor's bill, no loss of time; there is nothing on which to assess damages. It is true, the dead man did not contribute to the mutilation, but after he was murdered, the assassin placed his lifeless body on the track, caused the mutilation, and was the active agent in the injury

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complained of in this action. But what interest has the administrator in a dead body? It is not assets to pay debts, not an estate to be distributed, it can never come into his possession for any purpose whatsoever, because before he can take out his letters of administration it will be rotting in the grave, food for worms. What can he do with a dead, buried, and decomposing body? Literally nothing, the worms are rioting in the corpse before the administrator has the right to possess the estate; and in this case, as I gather from the report, the intestate had no estate but his corpse.

So I conclude, if there is any damage, it is not to the administrator, but to the family of the intestate, and the only damage they can suffer is the injury to their feelings and sentiments. If, therefore, any right of action exists in any one, it is not in the administrator, who has neither possession nor property in the corpse, but in the family of the deceased, who may be able to say, we have been injured in our feelings and sentiments. It is like an action for the recovery of real estate: the heirs at law must sue, the administrator has no title. The action cannot be maintained. But as this is a novel question and has been pressed with singular ability on both sides, it may not be improper to consider it more at large.

On the night of October 8, 1879, the dead body of Scott Hook was placed on the track of the defendant railroad company. It will appear from the testimony that Hook was killed on October 8, 1879, by one Squire Clark, who was twice convicted of the murder, and that the dead body was placed in the centre of a curve, between Gilbert Hollow and Summit, near half or three-quarters of a mile from the latter place. Early next morning the body was discovered, horribly mangled, three trains having passed over it in the following order: First, freight train north, at 11 p. m.; second, freight train south, at 3.20 a. m.; third, passenger train south, at 6.30 to 7 a. m. Certainly if these trains, managed by three sets of employees, had intentionally mutilated the corpse of the dead man, against whom they had no cause of enmity, who they did not know was on the track, and who could have been discovered by ordinary care and diligence, it would have shown such wanton negligence,

hearts so destitute of social duty, as to de-

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mand some punishment. But *by what proceeding and in what court, it is not necessary for me to inquire.

Do the facts proved make out a case of negligence? I think not. This question turns on the facts, how far off the engineer could have discovered the dead body on the track; in what distance the trains could have been stopped. Let us examine these questions, giving full force to the testimony of the plaintiff's witnesses. It is naturally to be supposed that the body of the murdered man was placed on the track so as not to be easily discovered. Hence it was placed in a curve, where the head-light of the engine would not be thrown upon it until near that point where the body had been placed. I think this is clear from the fact that the engineer of the first freight train going north at 11 p. m. did not know he passed over the body until he was telegraphed to at Wilmington, when, on examination, he discovered blood on the under works of his engine. It had rained the evening before and was hazy when Clarkson's train passed the next morning with his head-light burning. Trains 1 and 2 passed in the dark of the night. These trains were heavy freight trains, and the managers of them not likely to observe any jar occasioned by running over a soft and yielding body.

The plaintiff does not say how far the body could have been observed. He gives it as his opinion one hundred and sixty yards, but with great candor adds: "I will not say how far a body on the track can be seen by head-light;" but says, "I have no experience in running engines." The Rev. Mr. Crouse, of Georgia, thinks a heavy freight train could have been stopped in fifty yards, but properly qualifies his opinion by saying, "I am no railroad man." This is the proof of negligence by these nonexpert witnesses on the part of the plaintiff, and it would be hard to say that a *prima facie* case of negligence has been made out. But assume that it has, what does the undisputed proof of the defendant railroad establish? As to all the trains, the track was slippery from the rain, and they could not be so easily stopped. The first passed at 11 p. m. Alexander, an engineer of eleven years' experience, says it was a heavy train; could not see a body further than forty or fifty yards by head-light, and could not stop train within three hundred yards. As to the sec-

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*ond train, he also testifies, going north as it was, the body could have been seen at same distance; but being up grade, the train could have been stopped in about one hundred yards. As to this train, the defendant's counsel had made a mistake as to who were the employees, and offered to produce them, but it was understood no advantage would

be taken of their non-production. As to the third train, Mr. Clarkson, a conductor for thirty years, and Mr. Fell, an engineer for twenty-two years, say that the body could not have been discovered more than thirty yards, and the train stopped within one hundred yards. The difficulty in seeing was of course increased by the body having been run over by two heavy freight trains. The trains were proved to have been in good order, head-lights lit, all usual precautions taken, and the body not discovered until after it was run over the third time.

Now, if we apply the rule in Danner's Case [4 Rich. 329, 55 Am. Dec. 678] to this, and the defendant, the railroad company, has not met the requirements of that rule, then we are forced to the conclusion that practically the Danner rule means that the fact of killing stock means that the company is liable unless it can disprove negligence, which it cannot do. This question of negligence is a mixed question of law and fact, and may properly be considered by the court. It is hardly to be conceived that three trains on the same railroad, at the same point, on the same night, were manned by fiends in human shape, if the act was intentional, or if by gross negligence, who were so neglectful of their own lives and limbs, as well as the safety of passengers, merchandise, and trains, as to wantonly run the risk of derailing the train and producing a general wreck.

I do not see how the conclusion of negligence was reached. The body was clothed in blue cloth, placed in the middle of a curve, two heavy freight trains passed over it without knowing there was an obstruction. The third, a passenger train, and not so heavy, discovered the jar and stopped. The only evidence of carelessness is that of the plaintiff and the Rev. Mr. Crouse, who both acknowledged to their want of experience. Against this is the positive declaration of Mr. Clarkson, Mr. Alexander, and Mr. Fell (the former has thirty years' and the latter

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twenty-two *years' experience), who all say that the body could not have been seen over forty yards, or the train stopped under one hundred.

Ordinarily the finding of a referee, like the verdict of a jury, will not be disturbed, unless the same be manifestly against the weight of evidence, for the reason so frequently assigned that the witnesses are known to them, examined in their presence, and they have the best opportunity of judging of the credibility of the testimony of each. In this case, however, there is not the slightest allegation, or most remote suspicion, that these witnesses on either side have testified with prejudice. It so happened here that I have known Mr. Clarkson and his father's family for many years; he is a gentleman of birth, character, and education,

as reliable a gentleman, I would say, as any man in the State. It is impossible to suppose that such a man would testify falsely to save his life, much less his position as a railroad conductor. Much stress was laid in the argument that after the train was stopped, and Mr. Clarkson had gone to the rear end, he saw the body lying on the track. He does not say that. "From rear end of train to body 125 or 150 yards; run it very quickly. I saw it from rear end of train, but was so indistinct, could not tell what it was." I am at a loss to conceive how the conclusion of negligence was attained. It would be a libel on human nature, under these circumstances, to come to such a conclusion. My conclusion of law, therefore, is that the defendant railroad is not liable for any injury caused by its trains running over the corpse.

But suppose the facts proved showed culpability on the part of the defendant railroad, would it be liable for more than the value of the clothing? A corpse has no value, and, what is more, this corpse has no value proved. I would stop here, but for the learned and classic argument of Mr. Youmans to disprove the time-honored maxim that a corpse is no one's property. I am not prepared to dispute the confident assertion of the learned counsel that my Lord Coke made a mistake in his etymology of the word cadaver, for I am not sufficiently versed in the classics to do that, but the argument inclines me to the opinion that he did; nor that he meant to say, "the right of burial," and not "a dead body." And here, I think,

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is the view of the argument: *the learned counsel has treated the right of burial the same as the right of property. Undoubtedly, if we threw a corpse in the street or dug it from the grave for dissection, an action would lie, not for the injury to the property in the corpse, but for the trespass; and the jury, in assessing damages, might well take into consideration the outrage against decency and humanity and the violence done to the feelings and sentiments of the family and friends of the deceased.

Coke was understood to say that "a dead body was the property of no one." No matter what he did say; this understanding, or misunderstanding, has come down to us as law. As to the meaning of "cadaver" there can be no doubt. It is now an English as well as Latin word. Webster and other lexicographers say it is a dead human body, a corpse. The maxim of Lord Coke, *cadaver nullius in bonis*, has been translated to our day in verbis, or in equivalent terms. Blackstone says: "But though the heir has a property in the monument and escheatons of his ancestors, yet he has none in their bodies or ashes." In Jacob Fisher's Digest it is said: "A dead body belongs to no one by law, and is, therefore, under the protec-

tion of the law." Wharton says: "*Corpus humanum non recipit estimationem.*" Bishop has it: "There can be no property in a person deceased, consequently larceny cannot be committed of his body." And even the novelist says: "The heir has a property in the monuments of his ancestors, but none in their ashes."

This judgment is already longer than is my habit, but as the case has been very earnestly and elaborately argued, I am anxious to show to the learned counsel that I have given it a careful consideration. One more reflection. Formerly if a person was injured on a railroad by the negligence of the agents and servants of the company, the person so injured could maintain an action and recover damages against the company; but if the person was killed, the administrator could not maintain the action, it does not survive. An act of the legislature was required to enable the personal representatives to institute the suit. See A. A. 1859; Gen. Stat. 1872, 507; Gen. Stat. 1882, § 2183. Why? Because there was no prop-

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erty in the corpse. Certainly *that is the legislative construction in this view of the judicial construction above quoted.

If the administrator, before this special legislation, could not sue for the killing of his intestate, when the act might have been the grossest negligence, how can it be maintained that when the intestate was killed by an assassin, who placed the cadaver on the railroad track to secrete suspicion or discovery, the administrator may maintain an action for injury to the corpse in which there is no right of property, which never came into his possession, but had been buried out of sight two weeks before he could obtain his letters of administration? It seems to me this is conclusive. The right of action was granted because the railroad was the immediate cause of the death, and the killing deprived the family of the intestate of his protection and support. But here the murder was already done, the family had already been deprived of the protection and support of the murdered man. He was cold in death before the first train passed, suffered no pain, no terror, nor agony of a violent death; the spirit had taken its flight, and he lay a lifeless mass in the track of the fury-snorting iron monster that pursued its accustomed way night and day in the service of the public, under the sanction of the legislature. It does seem to me to establish such a precedent will open a wide door for fraudulent and painful litigation.

It is urged that cases decide there is a right of burial for the corpse. There is or ought to be. But the plaintiff only claims damages for running over, disfiguring, and mutilating the dead body—not a word about the right of burial, nor is there any evidence

on the subject. In fact, there was no hindrance to the burial or the right of burial. Conductor Clarkson, I suppose acting under the popular idea that a murdered man, or one killed accidentally, could not be moved until the coroner was notified, left the body where he found it and gave the first notice of a corpse needing burial. In fact, it could not have been legally buried before an inquest was holden.

Let the complaint be dismissed.

Plaintiff appealed.

Messrs. L. F. Youmans and H. A. Meetze, for appellant.

*I. (1) This being an action at law, referred by consent to the referee to hear and determine the whole issue, who had found all the controverted questions of law and fact in favor of plaintiff, the plaintiff was at liberty to enter up judgment on the referee's report, and the jurisdiction of the Circuit Judge, if any he had, over the referee's action was only to confirm the report, and order judgment to be entered up thereon. Code, §§ 292, 294, 290, 344, 345; Gen. Stats., § 2739; Rules of Circuit Court, No. XXX.; 14 Stat., 528; Code of 1872, §§ 473, 474,—of 1882, §§ 450, 451; 18 Stat., 56; 4 S. C., 125; 5 Id., 293.

(2) That if the Circuit Judge had other or further jurisdiction, in the most adverse view which he could legally take of plaintiff's rights, he could only have ordered a new trial, and have done that only in the event of the necessary preliminary steps being taken to warrant the exercise of such jurisdiction, which was not done. Code, §§ 286, 287,—of 1872, § 302; Gen. Stats., § 2113; Rules of Circuit Court, Nos. XLVII., LI.; 20 S. C., 295, 486; 19 Id., 601; 18 Id., 605, 231; 15 Id., 612; 3 Bl. Com., 406; 1 S. C., 1; 2 Id., 388; 6 Id., 312; 12 Id., 168.

II. There is such property, or quasi property, or interest, in the dead body of a human being as to sustain a civil action for its willful or negligent mutilation. 10 R. L., 227; 14 Am. Rep., 667; 4 Bradf., 622; 13 Ind., 138; 42 Penn., 293; 4 Amer. L. T., 127, 129; 3 Amer. L. Rev., 182; 2 Ad. & E. (N. S.), 246.

(2) A living human being has a right of burial of his body when dead, and mutilating his dead body is such an interference with this right as to sustain a civil action. Authorities immediately supra; 12 Ad. & E., 773; 2 Hagg. Con. R., 348; 3 Phill., 335; 1 Chit. Pr., 50; 1 Burns' Eccl. L., 251, 271, 372; 3 Phill., 264; Tyler Am. Eccl. L., §§ 971, 1161.

(3) The administrator is the proper party plaintiff in a civil action for mutilating the dead body of his intestate. Gen. Stat., §§ 1893, 1926; Com. Dig., Tit. Administration B., 10; 19 Barb., 473; Toll. Exors, 133; 1 Wms. Exors, 784, 786; 2 Id., 831; 2 Shep. Touch., 474; 2 Redf. Wills, 227; 10 Pick.,

154; 13 N. J., 150; 42 Penn., 293; 10 S. C., 182.

Ubi jus, ibi remedium. Co. Lit., 197, b; 1

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Thomas' Coke, *902; L. Raym., 938; 6 Mod., 45; 1 Sm. Lead. Cas., 342, 356; 6 R. L., 463, 468.

Boni judicis est ampliari justitiam. 1 Burr., 304; 9 M. & W., 818.

Mr. J. H. Rion, contra.

April 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought by the plaintiff, appellant, as administrator of W. Scott Hook, deceased, to recover damages for the mutilation of the dead body of the intestate, and the destruction of the apparel in which it was clad, and of a silver watch at the time on the person of the deceased, all of which is alleged to have occurred by the gross negligence of the defendant company in running a train of cars over said dead body three several times. The defence denied negligence, and claimed that the complaint did not state facts sufficient to constitute a cause of action.

The whole issue was by consent referred to a special referee to hear and determine the same. The referee found as matter of law that the action by the administrator could be sustained. As matter of fact, that the mutilation of the dead body, and the destruction of the wearing apparel resulted from the careless and negligent action of the defendant, and that the amount of the recovery was not limited to the value of the clothing, \$30, and he found for the plaintiff \$10,000 damages. The decision of the referee was reviewed by his honor, Judge Alrich, upon exceptions, who, finding that the alleged negligence by defendant had not been proved, and that the plaintiff could not maintain the action, as administrator, because he had no property in the dead body of his intestate, dismissed the complaint.

The plaintiff has appealed upon numerous exceptions, all of which, however, have been condensed by appellant's counsel in his argument into certain propositions found below, which we have considered, and upon which we will now announce our conclusions, without reference to the exceptions seriatim. The two first involve questions of procedure, as follows: 1. "This being an action at law, referred by consent to the referee to hear

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and deter*mine the whole issue, which being found in favor of the plaintiff both as to the law and fact, the plaintiff was at liberty to enter judgment on the referee's report; and the jurisdiction of the Circuit Judge, if any he had, was only to confirm the report and order judgment thereon." 2. "That if the Circuit Judge had other and further juris-

diction, in the most adverse view which he could legally take of plaintiff's rights, he could only have ordered a new trial, and have done this only in the event of the necessary preliminary steps being taken to warrant the exercise of such jurisdiction, which was not done."

If the reference in this case had been ordered and had before the adoption of the general statutes of 1882, the point raised in the first proposition above would not be so difficult, because then there was a section in the code which provided in terms that the report of a referee upon the whole issue should stand as a decision of the court, and judgment might be entered thereon in the same manner as if the action had been tried by the court. Old Code, § 296. And the practice under this section had been somewhat determined by the decisions of this court, especially in the case of *Kirkland v. Cureton* (4 S. C., 124), where the Circuit Court ordered judgment upon the report of the referee, subject to appeal to this court, and upon appeal this court held that in a case at law, as that was, the decision below upon questions of law only, material to the case, could be reviewed here, the facts found by the referee being regarded as finally adjudicated, and beyond review; citing the case of *Sullivan v. Thomas*, 3 S. C., 531. This section, however, has been since stricken out (Gen. Stat. of 1882), and it is now no longer a part of the code, nor was it a part in 1883, when the order of reference was made in this case. It therefore has no application to the question now under discussion; nor has the case of *Kirkland v. Cureton*, supra, nor *Chalk v. Patterson*, 5 S. C., 290, relied on by appellant. On the contrary, sections 294 and 290 are the sections which now control in cases of this kind.

These sections, instead of authorizing judgment to be entered upon the report of the referee in the first instance, as formerly, and thereby becoming the judgment of the court, provide that the referee shall make his decision, stating the facts found and

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*conclusions of law separately, when it may be subject to review upon a case or exceptions in like manner and with like effect as in cases of appeal; and although the court authorized to make the review is not mentioned expressly, yet from the subsequent provisions in the same section, where it is provided that when the case shall have been heard and decided upon the report of the referee and exceptions, the decision may be reviewed by the Supreme Court, the implication is manifest and necessary that the Circuit Court is the court authorized to review in the first instance. So that there can be no doubt as to the jurisdiction of said court in such cases.

Now, what is the extent of the jurisdiction of the Circuit Court in a case at law

tried by a referee, when the decision of the referee is brought before it for review, as in the case at bar, is the next question. Section 294, supra, is the authority for the review, and it declares the extent of the power conferred. It provides that said review may be had in the same manner and to the same extent as appeal cases under section 290. In other words, it confers the same power upon the Circuit Courts as belongs to this court in appeals here. What is that power? This court, in cases at law, has jurisdiction only for the correction of errors of law. It has nothing to do with the facts, except to apply the law to the facts as found; the facts, as was said in *Kirkland v. Cureton*, supra, must "be regarded as finally adjudicated," whether found by a jury, or a referee substituted for the jury, and cannot be modified or reversed on appeal. Nor has the Circuit Court on the review of the referee's decision any such power. This court, as we have said, has power to correct and review the rulings of law below, and this may sometimes lead to a new trial, and sometimes to a dismissal of the complaint, and so may the action of the Circuit Court upon the review of the referee's decision, as that review is expressly authorized in like manner and with like effect as in cases of appeal. But neither this court nor the Circuit Court is empowered in a case at law to disregard the findings of fact by the referee or the jury, and to re-try the case on its merits. It is conceded, too, that the Circuit Court has power to set aside the decision of the referee

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*and to order a new trial for the reasons for which new trials are usually granted when the necessary steps are taken to that end.

Such being our judgment as to the power of the Circuit Court in such cases, it follows that we must hold that his honor, the Circuit Judge, was in error when he undertook to review the findings of fact of the referee, and to apply the law to the new state of facts as found by himself. We think he should have taken the facts as reported—should have regarded them as finally adjudicated, and have applied the law as they might demand, reversing or affirming the conclusions of law of the referee as, in his judgment, they were erroneous or correct.

Apart from the question of procedure, the appellant contends, next, that there is such property or interest in the dead body of a human being as to sustain an action for its wilful or negligent mutilation, and that the right of action in such cases belongs to the administrator of the deceased. This proposition raises three questions as applicable to the case at bar: 1. What is meant by the term property? 2. Can this property attach to the dead body of a human being? And, 3. If so, does it belong to the administrator?

The term property may be defined to be the interest which can be acquired in ex-

ternal objects or things. The things themselves are not, in a true sense, property, but they constitute its foundation and material, and the idea of property springs out of the connection, or control, or interest which, according to law, may be acquired in them, or over them. This interest may be absolute, or it may be limited and qualified. It is absolute when a thing is objectively and lawfully appropriated by one to his own use in exclusion of all others. It is limited or qualified when the control acquired falls short of the absolute, which may be the case sometimes for several reasons not necessary to be adverted to here. Now, to entitle one to bring action for an injury to any specific object or thing, he must have a property therein of the one kind or the other mentioned. If he has no such property, he can have no cause of action, however flagrant or reprehensible the act complained of may be. Can property, either absolute or qualified, be acquired in a corpse, and especially as in-

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involved in the case under investigation, *can such property be acquired by the administrator of the deceased? As to absolute property, Mr. Blackstone says: "Though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes." 2 Bl. Com., 429. In *Jac. Fish, Dig.* it is said: "A dead body by law belongs to no one, and is therefore under the protection of the public." Mr. Bishop says: "There can be no property in a person deceased, consequently larceny cannot be committed of his body, but it can be of the clothes found upon the body, or of the shroud." *Bish. Crim. L.*, § 792. Citing *East P. C.*, 652; *Hawkins' and Hale's Pleas of the Crown*. Mr. Wharton says: "*Corpus humanum non recipit estimationem.*" *Whart. L. Max.*, 228. Lord Coke said: The "burial of the cadaver, nullius in bonis, caro data vermibus"; flesh given to the worms. Mr. Blackstone said again: "This is the case of stealing a shroud out of the grave, which is the property of those, whoever they may be, that buried the deceased, but stealing the corpse itself, which has no owner, (though a great indecency) is no felony, unless some grave's clothes be stolen with it." 4 Bl. Com., 235.

These are strong expressions from leading and distinguished authors, all tersely conveying the same doctrine and concurring to the full. We have been referred to no case by appellant in conflict with this doctrine, nor have we been able ourselves to find a case, or a single expression in any text-book, which affects it in the slightest degree. And that this should be so is not surprising. Because, while it is natural that we should all feel that the remains of ancestors and loved ones should be tenderly watched, and their decent interment carefully guarded, and the mutilation of their dead bodies and the dis-

turbance of their sepulchres severely punished, and while all laws necessary to that end should be passed and strictly and sternly enforced, yet even for this purpose, to make such venerated remains the absolute property of any one, in the sense of objective appropriation, would be abhorrent to every impulse and feeling of our natures.

It is true, it is said that in some portions of Europe during the middle ages the law allowed a creditor to seize the dead body of his debtor, and in ancient Egypt the corpse of the father might be hypothecated by the

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son in order to borrow money. But *these were in semi-barbarous and heathenish times, and such ideas have no existence now in any portion of the globe. On the contrary, wherever civilization at least has dawned, or has commenced to throw even a flickering light upon the people, reverence for the dead has become a universal and a most sacred sentiment, one which would revolt at the idea of their remains becoming property, much less property in the sense of being appraised and placed upon the inventory of the administrator, subject to the payment of debts, and to distribution among the next of kin, which would be required by the law of this State if such remains could be regarded as property, and on that account passing to the administrator.

But can there not be a qualified property in the dead? one which gives control to some one with the view to protection, to decent interment, and to undisturbed repose, while they are dissolving and returning to the dust from which they were created? Can it be that there is no legal guardianship of the dead? And that when the life escapes the body is left, so far as the law is concerned, without protection, even from wanton and malicious depredation, and that those to whom it was bound in life by the tenderest of ties can invoke the aid of no court in preventing its mutilation? And must they resort to violence and force for this purpose? If such be the fact, it is a reproach to our judicial system, and one which calls earnestly for legislative interposition. And yet such seems to be the fact, at least the matter is left in great doubt, so far as our limited examination of the cases, both in this country and in England, amid the press of our duties, has enabled us to ascertain.

Certainly the administrator has no legal control or authority over the dead body of the person upon whose estate he has administered. His entire authority is derived from the act, by virtue of which his letters have been granted to him, and that gives him charge only of the "goods and chattels, rights and credits," which were of the deceased. The body of the intestate belongs to neither of these classes, and there is, therefore, no law for him to take it in charge. True, he is required to pay, as the first of

debts, the funeral expenses, but it would be a violent assumption to conclude on that account that he becomes the legal custodian

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*of the remains, or even if he should, it could only be so as to the funeral and burial, because the expenses extend no further—they stop at the grave. The question would then arise, who could legally protect beyond that point, and in whose behalf could the law be invoked to redress an invasion of the tomb?

We have looked diligently through the common law reports of England, and have found no case in which the civil courts have been appealed to in matters connected with the bodies of the dead. On the contrary, their burial, the grave-yards and cemeteries in which they are interred, and the religious ceremonies observed, have been left exclusively to ecclesiastical cognizance, the civil courts universally holding, in the language of Lord Coke, that the burial of the cadaver is nullius in bonis. In some of the States upon this continent, especially in Rhode Island, Indiana, Pennsylvania, and New York, the courts, endeavoring to escape from this reproach, have held in general terms that the corpse belongs, not to the administrator, but to the next of kin, and that is as far as the cases referred to by appellant's counsel seem to go.

In the case of *Pierce v. Proprietors of Swan Point Cemetery* (10 R. L., 227 [14 Am. Rep. 667]), it was held that while a dead body is not property in the strict sense of the common law, it is quasi property, over which the relatives of the deceased have rights which the courts will protect. In the case of *In re Widening Beekman Street* (4 Bradf. Sur. [N. Y.] 503), it was held that the right to bury the corpse and to preserve its remains is a legal right which the courts will protect; that such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. In *Bogert v. City of Indianapolis* (13 Ind., 135), it was held that the bodies of the dead belong to the surviving relatives in the order of inheritance, as property. In *Wynkoop v. Wynkoop* (42 Pa. St., 293 [82 Am. Dec. 506]), it was held: "That a wife has no right or control over the body of her husband deceased, after burial. The disposition of the remains of the deceased belongs thereafter exclusively to his next of kin; that though it was her duty to bury the body, that as widow after interment her right ended."

Upon what authority or established principle of the common law these decisions were founded, even to the extent of legalizing the right of the nearest of kin, does not

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fully appear, but they *afford no support to the position that the administrator has any control whatever, which is the question here.

We have no case in our own reports upon the subject, certainly no case bearing upon the precise point before us, i. e., the rights of the administrator. In the absence of all authority, and looking at the act which authorizes administration, and defines the duties and powers of administrators, and describes the property which by operation of law becomes his, we are constrained to the conclusion that so far as this action is founded upon the mutilation of the deceased by the defendant company, whether accidental, wilful, or negligent, it cannot be sustained by the plaintiff, and that his honor, the Circuit Judge, was correct in so holding.

This, however, does not apply to the clothes in which the body was clad, and the silver watch upon the person. As to these, the administrator was the legal owner, and his appointment, though made after the occurrence, reached to the death, his title commencing at that time. As to these, then, the action was maintainable, and we think that his honor was in error in not so holding. *Vauters v. Elders*, 2 Mill Con. R., 184; *Dealy v. Lance*, 2 Speers, 487.

But the majority of this court having, in the case of *Meetze v. C. C. & A. R. R. Co.* (ante 1), determined that the Circuit Judge had the power to review and reverse the findings of fact of the referee, and he having exercised that power in this case—

The judgment of this court, therefore, is that the judgment of the Circuit Court be affirmed.

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FIELDS v. WATSON.

(November Term, 1884.)

[1. *Deeds* ⇨120, 123, 124, 128, 129.]

A deed conveying land to A "to have and to hold unto the said A during her natural life, and after her death to be equally divided between the lawful heirs of her body," is not governed by the rule in *Shelley's Case*. Mr. Justice McIver reserving his opinion.

[Ed. Note.—Cited in *Simms v. Buist*, 52 S. C. 554, 560, 30 S. E. 400.

For other cases, see *Deeds*, Cent. Dig. § 421; Dec. Dig. ⇨120, 123, 124, 128, 129.]

[2. *Deeds* ⇨123, 128.]

The act of 1853 (12 Stat., 298; Gen. Stat., § 1862), has not abrogated the rule in *Shelley's Case*. Mr. Justice McGowan dissenting.

[Ed. Note.—Cited in *Bethea v. Bethea*, 48 S. C. 443, 26 S. E. 716.

For other cases, see *Deeds*, Cent. Dig. § 414; Dec. Dig. ⇨123, 128.]

[3. *Appeal and Error* ⇨1106, 1178.]

In action to try title, it appearing that the defendants were tenants in common with the plaintiffs, and no ouster being proved, the Cir-

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cuit *Judge granted a non-suit, and no motion was made before him for leave to amend. *Held*. That there being no error of law in granting the non-suit, the cause could not be remanded for the purpose of permitting plaintiffs to amend

their complaint and demand partition. Mr. Justice McGowan dissenting.

[Ed. Note.—Cited in *Rollins v. Brown*, 37 S. C. 348, 16 S. E. 44.]

For other cases, see Appeal and Error, Cent. Dig. §§ 4391, 4618; Dec. Dig. ☞1106, 1178.]

[4. *Tenancy in Common* ☞14.]

The refusal of a tenant in common to comply with the demand of a co-tenant for the surrender of the entire premises, and the plea of the statute of limitations to an action by such co-tenant for the recovery of the whole land, do not constitute an ouster.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 30–41; Dec. Dig. ☞14.]

[5. *Husband and Wife* ☞15.]

A deed of conveyance by husband and wife in 1856 of the wife's land without a renunciation by the wife of her inheritance, did not convey the wife's interest, and at her death the land descended to her heirs at law.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 96; Dec. Dig. ☞15.]

Before Cothran, J., Marion, April, 1884.

The opinion of this court fully states the case.

Messrs. Evans & Evans, for appellant.

Mr. C. A. Woods, contra.

April 22, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to recover a tract of land in Marion County, containing three hundred acres. The land was originally granted to Samuel Smith, Sr., who died intestate in 1843, leaving three children, viz., Samuel Smith, Jr., Elizabeth Moody, and Frances Page, wife of William Page, and among these heirs the lands of the intestate were divided by consent, the tract in question here falling to Frances Page.

It seems that William Page, by request of his wife, Frances, put his daughter, Isabella Platt, and her husband, David W. Platt, in possession of the land, at what time does not appear; but within a year after the division of her father's estate, Frances Page died, leaving as her heirs and distributees her husband, William, and children, viz., Samuel J. Page, John S. Page, Pinckney C. Page, Isabella (Mrs. Platt), Rena (Mrs. Bethen), Frances (Mrs. Watson), Polly (Mrs. Deer), Betsy (Mrs. Hayes), and William J. Page. On January 6, 1854, William Page executed a deed of the premises to Isabella Platt, "to have and to hold during her life, and after her

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death to be equally divided *between the lawful heirs of her body." On December 5, 1856, the sheriff of Marion County, under executions against D. W. Platt, sold all his interest in the premises, which was purchased by William J. Page and conveyed to him by the sheriff. On December 25, 1856, Samuel J., John S., Pinckney C., Rena (Mrs. Bethen), and Frances (Mrs. Watson), conveyed all their respective interests in the premises

to W. J. Page, "in trust for the sole and separate use of Isabella Platt." The conveyance of Watson and wife did not, however, contain a relinquishment of Mrs. Watson's inheritance.

Isabella Platt, the life tenant, died in 1882, and the plaintiffs, her children, instituted this action for the recovery of the land against W. J. Watson and Catharine S., his wife, who, in some way or other not clearly explained, had "gone on the lands in 1873," and were still in possession. They insisted in their answer that they were in possession under Samuel Watson (brother of W. J.), who purchased the land for a valuable consideration, which, however, was not made to appear.

Upon hearing the pleadings and evidence, Judge Cothran granted a non-suit, and the plaintiffs appeal upon the grounds:

1. "The objections made by the defendants that the rule in *Shelley's Case* applied to the deed of William Page to Isabel Platt of date January 1, 1854, is erroneous. 1. That it is contrary to the decisions of our courts. 2. That the act of 1853, in force at the time of the execution of the deed of William Page to Isabel Platt, abrogates the rule in *Shelley's Case*, and this act is made of force by the general statutes of 1882.

II. "That the interest of David W. Platt, the husband of Isabel, was sold at sheriff's sale in August, 1855, and that interest vested in defendants, and there being no alienation by Isabel, the estate of Isabel at her death vested in the plaintiffs, at least to the extent of two-thirds, even under the rule in *Shelley's Case*, as, according to that rule, Isabel was entitled to the whole estate in fee, and the husband was entitled to one-third as distributee of his wife, and the sale in 1855 did not vest even that interest in defendants.

III. "Because his honor erred in holding that the defendants could not be sued at law, for the reason that W. J. Watson was a

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*co-tenant with plaintiffs, notwithstanding the proof that possession of the premises was demanded before suit, to which he replied, admitting that he was in possession, but denying title of the plaintiffs, and set up the statute of limitations as a bar to plaintiffs' claim, which was a complete ouster of the plaintiffs, and entitled them to sue at law even a co-tenant.

IV. "It was urged in argument that there might be an estate by the curtesy in David W. Platt, the surviving husband. To this it is submitted: 1. That the estate by the curtesy in this State only obtains when there is a fee conditional, and the deed here does not create a fee conditional. 2. That to constitute an estate by the curtesy there must be a seizin in fact at the time of the death of the wife, and Isabel was divested of possession by the sheriff's sale in 1855. 3. That

even if there was an estate by the curtesy in David W. Platt, it could not avail the defendants, who claim by assignment under sheriff's sale in 1855, before the estate originated.

V. "Because his honor, having intimated the opinion that this was a proper case for equity jurisdiction, should, according to the liberal provisions of the code, have allowed plaintiffs to amend their pleadings and make it a case in equity." &c.

The Circuit Judge did not assign his reasons for granting the non-suit, and therefore we will have to consider the whole case to ascertain whether there is in the order error of law. As we understand it, the land in question, by the division of the estate of Samuel Smith, Sr., became the property of Frances Page, the wife of William Page, in 1843. She lived only about a year after she became the owner in severalty, and during that time she did not alienate it. True, her husband, William Page, with her consent as it is said, put it into the possession of his daughter, Isabel Platt, but there is no pretence that she joined her husband in a regular deed and relinquished her inheritance as was then required by law; and therefore at her death the land was her property and descended to her heirs—one-third to her husband, William Page, and the remaining two-thirds to her children, Samuel J., John S., and Pinckney C. Page, and Isabella (Mrs. Platt), Rena (Mrs. Bethen), Frances (Mrs. Watson), Polly (Mrs. Deer), Betsy (Mrs. Hayes), and William

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J. Page. After the death of his wife, viz., January 6, 1854, William Page did undertake to convey the land to his daughter Isabel, "to have and to hold unto the said Isabel Platt during her natural life, and after her death to be equally divided between the lawful heirs of her body," but that deed conveyed no more than the third which belonged to William Page as heir of his wife.

At this point the estate divides, and we must consider the branches separately. First. As to the third inherited by William Page. Did the deed executed by him to Isabel Platt give her as expressed only a life estate with remainder over to the heirs of her body, or was her estate, under the operation of the rule in Shelley's Case, enlarged into a fee conditional giving her husband, Platt, who is still alive, a life estate therein by the curtesy? We incline to think that, according to terms of the deed itself, without regard to the provisions of the act of 1855, the rule in Shelley's Case is not applicable. The words are "to have and to hold unto the said Isabel Platt during her natural life, and after death to be equally divided between the lawful heirs of her body."

It is always open to inquiry whether the words "heirs" or "heirs of the body" are used in their proper technical sense or in a more inaccurate sense to denote children, issue, or

next of kin, &c. It seems to us that the words here used indicate an intention to give in remainder to those described as heirs of the body of Isabel, not in indefinite succession as heirs, but at a particular time, absolutely as individuals creating "a new stock of inheritance." *Myers v. Anderson*, 1 Strobb. Eq., 314 [47 Am. Dec. 537]; *McLure v. Young*, 3 Rich. Eq., 576; *Evans v. Godbold*, 6 Rich. Eq., 26; *McIntyre v. McIntyre*, 16 S. C., 290. In the case of *McLure v. Young*, in delivering the judgment of the court, Chancellor Dunkin said: "The authorities all agree that if the estate limited to the heirs of the body or issue be of a quality to be given to be enjoyed in a way incompatible with the idea that they are to hold it in indefinite succession (as that it be given to them as tenants in common or to be equally divided between them), this takes it out of the rule in Shelley's Case, and the immediate heirs or issue take as purchasers."

But if we should be in error as to the gen-

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eral doctrine (and *we confess that the cases upon the subject are not all in accord), we suppose that the act of 1853 (Gen. Stat., § 1862) must have some bearing upon the question. The deed was executed after and therefore subject to the act, which declares that "whenever in any deed * * * an estate either in real or personal property shall be limited to take effect on the death of any person without heirs of the body, or issue, or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person."

There can be no doubt that this provision has special reference to the question of remoteness, with a view to sustaining remainders; but it would be strange if this statutory interpretation of certain words and phrases should not have some bearing also upon the construction of these identical words when used to designate those who are to take in remainder. The question of remoteness, if not entirely, is almost always identical with that as to indefinite succession, one being in most cases the cause of the other. If the terms of the deed to Isabel had been to her and the heirs of her body, and in default of such heirs then over, it is clear that the words "heirs of her body," under the statute, could not have been construed to mean an indefinite failure of issue, but a failure at the time of the death of Isabel. As was said by Mr. Justice McIver, in *Simons v. Bryce*, 10 S. C., 365: "In construing a will [and deed] which took effect after the passage of that act [1853], we are required to read a devise to one and the heirs of his body or to one and his issue, and in case of his death without heirs of his body or without issue then over to some one else, as if the gift were to one and the heirs of his body,

and in case of his death without leaving issue living at the time of his death then over, in which case the limitation would undoubtedly be good," &c.

Now, as we understand it, the rule in *Shelley's Case* does no more than to turn an estate expressly for life into one precisely such as we have described above. When an estate for life is given to the ancestor, and a remainder be thereon limited to his heirs, or heirs of his body, the rule comes in and executes immediately the remainder in possession of the

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ancestor, who takes an estate in fee or in tail according to the terms of the limitation (*Williams v. Foster*, 3 Hill, 193): that is to say, it takes the words "heirs of the body" from the remainder and incorporates them in the gift to the first taker, thereby changing an estate expressly for life to one of inheritance, to him and "the heirs of his body." This being the case, and the statute forbidding that a particular interpretation shall be placed on the words "heirs of the body" when found in express terms, it can hardly be that the forbidden interpretation of the very words must be allowed where they are merely supplied by operation of the rule in *Shelley's Case*. So far as we are informed, this is a new question under the act of 1853. The argument was not full upon the subject, but from the lights before us, we do not see why the interpretation required by statute to be given to the words "heirs of the body," when found in a deed or will, should not also be applied to the same terms when raised and inserted merely by implication.

Assuming, then, that Mrs. Isabel Platt took only a life estate under the deed, it follows that the sale of the premises by the sheriff in 1856, under executions against David W. Platt, the husband of the life tenant, could give an interest only during the life of the said Isabel, and she being now dead, that such interest has terminated. It seems that the interest of David W. Platt thus sold by the sheriff was conveyed to William J. Page, trustee of Mrs. Isabel Platt. It was, however, assumed in the argument that that interest had been, in some way or other, transferred to the defendant, Watson. We have not been able to find any such statement in the "Case"; but if it were as claimed, we do not see how that could now benefit the defendant. The whole one-third interest, which was well conveyed by the deed of William Page, vested, at the death of Isabel Platt, in the persons who at that time answered the description of "heirs of the body" of the said Isabel: not, however, as such heirs, but as individuals by purchase.

Second. Then as to the two-thirds interest not covered by the aforesaid deed, but which, upon the death of Frances Page, descended to her heirs. In the first place, the plaintiffs, children of Isabel Platt, are enti-

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tled in their own right to the share *proper of their mother, Isabel. Besides, the other distributees, Samuel J. Page, John S. Page, Pinckney C. Page, Frances Watson and her husband, and Rena Bethea and her husband (seemingly for the purpose of carrying out the purposes of the deed from their father, William Page, to Isabel), conveyed, or attempted to convey, their respective shares to William J. Page, in trust "for the sole and separate use of Isabel Platt." None of the other distributees are claiming any interest in the land except W. J. Watson, who, being a son of Frances Watson and a grandson of Frances Page, claims through his mother (supposed to be dead) an interest in the lands as heir of his grandmother. It appears that his father, Samuel Watson, and wife, Frances, in January, 1857, conveyed, as before stated, their interest in the lands to W. J. Page, trustee for Isabel. But it seems that the wife, Frances, did not renounce her inheritance, and W. T. Watson now insists that her share was not well conveyed, and, as one of her children, he has an interest as tenant in common with the plaintiffs; and therefore their action at law for the land cannot be maintained. On the other hand, the plaintiffs insist that the defendant, being in possession, refused on demand to yield possession, in whole or in part, and thereby ousted them and subjected himself to an action at law for the land.

We do not think it necessary to go into the matter of ouster, or to consider the question whether, under the facts as developed, an action at law for the land was the proper proceeding. The decision of that question either way would not tend to adjust the complicated interests of the parties. We agree with the Circuit Judge that this is a proper case for equitable jurisdiction. The parties are numerous, and in several ways and in different amounts are interested as tenants in common. The rights of the parties are somewhat involved, and can be more certainly reached under the flexible rules of equity. Both law and equity are now administered by the same court, and as the spirit of the code favors amendments in the interest of justice, we do not see any insuperable difficulty in the way of allowing plaintiffs to amend their complaint so as to ask partition according to the rights of the parties. *Small v. Small*, 16 S. C., 72; *Graveley v. Graveley*, 20 S. C., 110.

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*In the case of *Small v. Small*, Mrs. Mary Small claimed a tract of land which she had purchased at sheriff's sale, but it turned out that the execution under which she purchased was good only against two of the parties who owned the land. It was held that the sheriff's deed only conveyed the interest of two to Mrs. Small, which made her a tenant in common with the other owners, who

had a right to partition, and for that purpose the cause was remanded.

In the case of *Graveley v. Graveley*, it is said: "The spirit of the code is in favor of amendments, and of having all cases which have a status in court tried and decided upon their merits. In most cases where it can be done without surprise or injustice to the defendant, leave will be given to amend. We think the law upon the subject properly stated by Mr. Pomeroy in his work on Remedies, § 580: 'The prayer for relief is generally regarded as forming no part of the cause of action, and as having no effect, and as furnishing no test or criterion by which its nature may be determined. * * * The fact that, after the allegation of facts relied upon, the plaintiff has demanded judgment for a sum of money by way of damages, does not preclude the recovery of the same amount upon the same state of facts by way of equitable relief,' and authorities."

As it has turned out that the defendant is a tenant in common with the plaintiffs, I think that the cause should be remanded, with leave to make the question of partition. But as my brethren think that this court has not the power to remand with a view to amendment, and that the non-suit should be affirmed, the judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON (concurring in the result). The land in question originally belonged to Mrs. Frances Page, assigned to her in the partition of the real estate of her deceased father in 1843. Immediately after this assignment Mrs. Platt was put into possession by Mr. and Mrs. Page. Mrs. Page died in 1844, leaving a husband, William Page, and nine children as her heirs at law, Mrs. Platt being one of the children. At the death of Mrs. Page the land descended to

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her heirs in the proportion of one-third to William Page, and one-ninth of two-thirds to each of the children. In 1854 William Page conveyed this land "to Mrs. Platt for life, and at her death to be equally divided between the lawful heirs of her body." Of course, this conveyance only covered his interest therein, i. e., one-third. I do not think that the rule in *Shelley's Case* applied to this conveyance. The fact that the grantor directed the estate to be "equally divided between the heirs of the body" of Mrs. Platt at the termination of her life estate shows, I think, that those words were used as words of purchase, and not of limitation. And this view is sustained by the authorities cited in the opinion of Mr. Justice McGowan.

I do not concur, however, in that part of the opinion in which it is held that the act of 1853 has abolished the rule in *Shelley's Case*. That act, as I understand it, was intended to remedy a certain evil which had

grown up in the construction of deeds and instruments where limitations had been made upon the contingency of the first taker dying without heirs of the body. These words, "without heirs of the body," and similar words, had been interpreted to mean an indefinite failure of such heirs, or issue, and being thus interpreted, it was universally held that limitations made upon such a contingency were too remote, being in violation of the well established principle that no limitation could be made upon a contingency which might not happen within a life or lives in being, and twenty-one years thereafter. This construction, it was seen, had the effect of defeating many limitations against the evident intent of the parties. Hence the act of 1853, which provides that in such limitations, the parties in the use of such words, shall not be held to mean an indefinite failure of issue, but a failure at the death of the first taker, thus bringing the contingency within the legal time, removing this remoteness and saving the limitations. This, it seems to me, was the only purpose of the act of 1853, and it should not be extended so as to abolish the rule in *Shelley's Case*.

According to my conception of the rights of the parties in this case, the children of Mrs. Platt, the plaintiffs here, at her death took one-third interest in the land under the deed of William Page, as purchasers, that they

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took two-thirds of the one-ninth *which Mrs. Platt inherited from her mother, and two-thirds of the shares of those who conveyed to William J. Page in trust for her, supposing that these shares were validly conveyed, and in fee, the father, if he is alive, being entitled to one-third of these two latter interests. This construction makes the plaintiffs joint tenants with such of the children of Mrs. Page as did not convey their interests to William J. Page, as trustee, and the defendants belong to this last class. The action below was the ordinary action of trespass to try titles, which cannot be sustained by one joint tenant against another, unless there has been ouster. There was no sufficient proof of ouster at the trial. Hence, as it appears to me, there was no alternative but for his honor below to order a non-suit, which having been ordered, there is no room left for an amendment of the character allowed in the opinion.

It is true that the prayer for relief constitutes no part of the complaint, and consequently a mistake in the prayer is not fatal under the reformed procedure; inasmuch as all forms of actions have been reduced to one, the courts look to the cause of action as stated in the complaint, and will grant such remedy as the cause stated may demand, but that relief, whatever it is, must be appropriate to allegations in the complaint constituting the cause of action. I do not understand that a party can sue upon one cause of ac-

tion and obtain relief upon another not stated in the complaint. Nor can a plaintiff who has lost his case, as stated in the complaint, after such loss abandon that cause, and then incorporate a new and entirely different cause in the same proceeding and go on. This, it seems to me, is what the opinion of Mr. Justice McGowan permits to be done.

The plaintiffs began a law case, an action to try titles; there was no equitable feature therein, no facts claiming partition, or any facts upon which the court could grant any other relief than that prayed for in the complaint. In appeals to us in a case at law, our power extends to the correction of errors of law only. I do not understand that the Circuit Judge made any ruling upon the question of amending the complaint, and therefore I do not see how we can take any action upon that question, as there is no error of law alleged. For these reasons I concur in the result.

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*Mr. Justice McIVER (also concurring in the result). It seems to me that, in any view which may be taken of this case, there was no error in the judgment appealed from. If the deed from William Page to Isabella Platt created in her an estate in fee conditional, then upon her death her husband, David W. Platt, became entitled to the premises as tenant by the curtesy, and until his death, of which there is no evidence, the plaintiffs would not be entitled to recover. Whether the defendants hold the interest thus vested in David W. Platt is wholly immaterial, as long as it does not appear that the plaintiffs have acquired such interest, for nothing is better settled than that in an action of this kind the plaintiffs must recover upon the strength of their own title, and not upon the weakness of their adversaries. It is quite sufficient for a defendant to show an outstanding paramount title in some third person, whether he connects himself with such title or not, in order to defeat a recovery by the plaintiff.

But if, on the other hand, the rule in Shelley's Case does not apply, and Isabella Platt took under the deed above mentioned an estate for her life only with a valid remainder to the heirs of her body, then it is clear that plaintiffs, being tenants in common with defendants, could not recover in this action without proof of ouster: and in my judgment there was no such proof in this case. Two things are relied upon by the appellants as evidence of ouster: 1st. The refusal of defendants to comply with the demand of the plaintiffs for the possession of the premises. 2nd. The plea of the statute of limitations. It will be observed, however, that the demand was not to be let in possession as tenants in common, which, if refused, might possibly have been regarded as sufficient evidence of ouster, but the demand was that defendants should surrender the posses-

sion of the premises to the plaintiffs, and this a tenant in common might well refuse, inasmuch as he would be just as much entitled to the possession as the plaintiffs. So, too, as to the effect of the plea of the statute of limitations that was pleaded to a complaint demanding, not an undivided share or shares of the premises, but for the whole of the land, and the plea of the statute to such a demand certainly should not be regarded

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as any evidence of ouster. I think, therefore, that the Circuit Judge was clearly right in granting the non-suit.

The only remaining inquiry is whether this court, after finding no error in the judgment appealed from, can grant an amendment for the purpose, not of repairing any defect or omission in the action which the plaintiffs elected to bring, but for the purpose of enabling the plaintiffs, who had failed to establish the cause of action upon which they relied, to substitute an entirely new and different cause of action to which the evidence in the case shows they may be entitled. It must be remembered that this was an action at law, in which our jurisdiction is confined solely to the correction of any errors of law which may be discovered in the judgment appealed from. If, therefore, no such errors have been discovered, it seems to me plain that we have no other alternative but to affirm the judgment. I am aware that under the liberal provisions of the code this court has gone very far, perhaps too far, in allowing amendments; but it seems to me that we are asked in this case to go further than we ever yet have done. There was no application in the Circuit Court for leave to amend, which, if made and refused, might possibly have afforded us the opportunity of reviewing such refusal, although such applications, being addressed to the discretion of the court, are ordinarily not appealable. But there being no ruling upon the subject below, we do not see what there is for us to review.

Nor is this like the case of Finley v. Robertson (17 S. C., 435), where this court, having discovered such errors in the judgment appealed from as rendered it necessary to remand the case to the Circuit Court, allowed the plaintiffs to amend their complaint so as to fit the new aspect which was put upon the case by the judgment of this court; for in the present case we have not discovered any error in the judgment appealed from which renders it necessary, or even proper, to remand the case to the Circuit Court, and I do not see by what authority this court can reverse a judgment in which no error has been discovered simply to enable the plaintiffs to make not only a substantial, but a radical change in the nature of the action which the plaintiffs themselves elected to bring. In-

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deed, even under the liberal provisions of

the code, the privilege of amendment is not unlimited, for in section 194 this privilege is limited to such amendments as do not "change substantially the claim or defence."

The case of *Small v. Small* (16 S. C., 64) was a case originally for partition, in which the devisees of Mary Small set up title in themselves, and their claim was sustained by the Circuit Judge, but this court on appeal reversed or modified the Circuit decree upon this point, and held that these devisees were only entitled to two shares in the land, and not to the whole land. The case was therefore remanded to the Circuit Court for the purpose of enabling the parties to have partition as originally asked, in the proportions fixed by the judgment of the Supreme Court. I am unable to see, therefore, how that case affects the question now under consideration. Nor do I see the application of the case of *Graveley v. Graveley* (20 S. C., 93), for in that case also this court found it necessary to remand the case, not simply for the purpose of amendment, and then allowed the plaintiff to insert additional allegations in the complaint, which, however, did not change substantially the claim originally made.

It seems to me, therefore, that this court has no power to remand this case to the Circuit, simply for the purpose of enabling the plaintiffs to make the proposed amendment, but that the judgment of the Circuit Court should be affirmed.

I desire to add, however, that I do not assent to the view presented by Mr. Justice McGowan as to the effect of the act of 1853 upon the rule in *Shelley's Case*. Nor am I prepared to agree to the view of the Chief Justice that the rule in *Shelley's Case* does not apply to the present case. It does not appear to me that the decisions in *Myers v. Anderson* (1 Strobb. Eq., 344 [47 Am. Dec. 537]); *McLure v. Young* (3 Rich. Eq., 571); and *McIntyre v. McIntyre* (16 S. C., 290), sustain that view. In *Myers v. Anderson*, after the bequest for life, the limitation was to the issue to be their "absolute property for ever," and these words were held to mean the same thing as if the limitation had been to the issue and their heirs, which would create a fee in the issue and rebut the idea that the testator intended that the property should go to the issue in indefinite succession. In *McLure v. Young* the limitation was to the lineal descendants of the life tenant, "absolutely and for ever," creating in them a fee which, upon the authority of *Myers v. Anderson*, was held to negative the idea that the intention was that the property should go to the lineal descendants in indefinite succession. So in *McIntyre v. McIntyre* the limitation was to the issue "and their heirs for

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ever," the appropriate words to create a fee; and there, too, it was held that the idea of indefinite succession was negated.

It seems to me, therefore, that these cases only hold that where the limitation to issue or heirs of the body is expressed in terms which import an intention to create in them an estate in fee simple—a different estate from that which they would take if the rule in *Shelley's Case* should be applied—then that rule would not apply. In the present case, the limitation is not to the issue and their heirs, nor to the issue "absolutely and forever," nor to the issue to be their "absolute property forever," but the limitation is, "after her death to be equally divided between the lawful heirs of her body." These cases cannot, therefore, be regarded as authority for the proposition that the rule in *Shelley's Case* does not apply in the present case. It is true that in *McLure v. Young*, Chancellor Dunkin, quoting the language of Johnstone, Ch., in *Myers v. Anderson*, does say: "The authorities also agree that if the estate limited to the heirs of the body or issue be of a quality, or be given to be enjoyed in a way, incompatible with the idea that they are to hold it in indefinite succession (as if it be given to them as tenants in common, or to be equally divided between them), this takes it out of the rule in *Shelley's Case*, and the immediate heirs or issue take as purchasers."

This, however, was a mere dictum so far as it relates to the effect of superadded words expressive of an intention that the issue should take as tenants in common or that the property should be equally divided between them, for there were no such words either in *Myers v. Anderson* or *McLure v. Young*, and the decisions in those cases rested solely upon the ground that the superadded words were expressive of an intention that the issue should take estates in fee simple, and not upon the ground that they were to take as tenants in common, or that the property should be equally divided between them. Now, while even the dicta of such eminent chancellors are entitled to be regarded

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ed with "the greatest respect (and I do not wish to be regarded as disposed to question them), yet they are not authority. All that I desire to say is that I do not regard the cases above cited as authority for the proposition that the rule in *Shelley's Case* does not apply in the present case; but as, according to my view, it is not necessary now to decide that question, I prefer to reserve my opinion until I can have an opportunity to examine the question more carefully than I have been able now to do, owing to the pressure of other official duties.

Judgment affirmed.

23 S. C. 57

FELDMAN & CO. v. CITY COUNCIL OF CHARLESTON.

STANLEY v. SAME.

(November Term, 1884.)

[1. *Municipal Corporations* ⇨910.]

A large portion of the city of Charleston having been laid waste by fire, the legislature authorized the City Council to issue its bonds and lend them to persons who desired to rebuild in the burnt district. Bonds of said city, called "Fire Loan Bonds," were accordingly issued and lent after the year 1868, and put upon the market. *Held*, that these bonds were not valid obligations of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1897, 1898, 1900; Dec. Dig. ⇨910.]

[2. *Taxation* ⇨38.]

The legislature has no power to levy taxes for the purpose of assisting private individuals in carrying out private enterprises, even though incidental advantages may result to the public.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 67; Dec. Dig. ⇨38.]

[3. *Taxation* ⇨38.]

Under art. I, § 41, of the constitution of 1868, the taxing power of the legislature, even in the absence of any express restrictions upon them, can be exercised only for some public purpose.

[Ed. Note.—Cited in *State ex rel. C. C. & C. R. Co. v. Whitesides*, 30 S. C. 584, 9 S. E. 661, 3 L. R. A. 777; *McCullough v. Brown*, 41 S. C. 249, 19 S. E. 458, 23 L. R. A. 410; *State ex rel. George v. Aiken*, 42 S. C. 244, 246, 20 S. E. 221, 26 L. R. A. 345; *Milster v. Spartanburg*, 68 S. C. 34, 46 S. E. 539.

For other cases, see *Taxation*, Cent. Dig. § 67; Dec. Dig. ⇨38; *Municipal Corporations*, Cent. Dig. § 1897.]

[4. *Municipal Corporations* ⇨861.]

Authority given to a municipal corporation to issue bonds, necessarily involves the power to levy taxes for their payment.

[Ed. Note.—Cited in *Floyd v. Perrin*, 30 S. C. 17, 8 S. E. 14, 2 L. R. A. 242; *State ex rel. Russell v. Bacon*, 31 S. C. 124, 9 S. E. 765; *Wilson v. Florence*, 40 S. C. 429, 19 S. E. 4.

For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1819-1823; Dec. Dig. ⇨861.]

[5. *Municipal Corporations* ⇨910.]

Where bonds were issued by a city to be lent "to such applicants as will build up and rebuild the waste places and burnt districts of said city, or erect improvements upon their lots." *Held*, that the bonds so issued and lent were for private purposes, notwithstanding advantages might incidentally accrue to the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, see Cent. Dig. §§ 1897, 1898, 1900; Dec. Dig. ⇨910.]

6. This case distinguished from cases sustaining local taxation in aid of railroads; and also from the case of *Herndon v. Moore*, 18 S. C. 339.

[7. *Constitutional Law* ⇨48.]

In doubtful cases the constitutionality of an act of the legislature will be affirmed, but it is for the courts, not the legislature, to determine whether a statute is beyond the powers

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granted to the legislature; and *when that body has clearly overstepped its constitutional powers, it is the right and the duty of the courts to so declare.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. ⇨48.]

[8. *Municipal Corporations* ⇨934.]

As the City Council had no power to create the obligation, their payment of interest on these Fire Loan Bonds, their suits upon the securities received in exchange therefor, and the purchase by them in market of such their bonds, do not estop the city from now disputing the validity of these bonds.

[Ed. Note.—Cited in *Bascom v. Oconee County*, 48 S. C. 59, 25 S. E. 984; *Milster v. Spartanburg*, 68 S. C. 34, 46 S. E. 539.

For other cases, see *Municipal Corporations*, Cent. Dig. § 1950; Dec. Dig. ⇨934.]

Before Witherspoon, J., Charleston, November, 1883.

The opinion of this court fully states these two cases. The Circuit decree in the cause first stated, *B. Feldman & Co. v. The City Council of Charleston*, was as follows:

This cause came on for trial by the court. The complaint is filed in this case to establish the liability of the defendants for coupons due on certain obligations known as "Fire Loan Bonds." The defence set up in answering is that the "defendants are advised that the issue of said bonds was unconstitutional, and that the City Council are not liable for the same." It appears that the bonds in question were issued subsequent to the adoption of the constitution of 1868.

The history of the bonds now in issue is briefly stated. On August 28, 1866, the City Council of Charleston, "for the purpose of aiding in the rebuilding of the city of Charleston, a great part of which is now (then) lying in ruins," passed an ordinance authorizing the mayor of the city, in the name of the City Council, to issue certain bonds, not to exceed in amount \$2,000,000. In the ordinance special provision is made to secure the city, as far as it could be done, against loss, because of the assistance so afforded in rebuilding the city. On December 19, 1866, the ratification of this ordinance was made by the legislature of the State in its act "giving authority to the City Council of Charleston to proceed in the matter of a fire loan, with a view to aid in building up the city anew." On February 28, 1870, the legislature declared that "authority is hereby given to the City Council of Charleston to amend an ordinance entitled 'An ordinance to aid in rebuilding the burnt district and waste places, ratified the 28th August, 1866,' which said ordinance was confirmed and ratified by an act of the general assembly passed September 19, 1866.

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*The issue of the bonds in question depends on the power of the legislature to give validity, by its ratification of it, to this ordinance of the City Council. It is otherwise stated simply, equivalent to the question of the power of the legislature to issue these bonds. This question must be regarded as having been too distinctly decided by the highest tribunal in this State to be now disturbed. In *Copes v. City of Charleston* (10 Rich., 491), the Court of Errors said, in de-

judging the question whether the terms of the charter were "sufficient to cover the power exercised by the City Council in subscribing to railroads," that there were "no restrictions in legislative power which in this State is vested by the constitution in the general assembly except those which deny certain powers, or which by implication arise because certain powers are conferred by Congress. So far as legislative power is concerned, subject to the restrictions suggested, the general assembly have all the powers of the parliament of Great Britain." The validity of the subscription was sustained. In 1872, the principle of this decision was brought under review in the case of *Gage v. Charleston* (3 S. C., 491), and the court reaffirmed the decision in *Copes v. Charleston*. In *Brown v. C. & L. R. R. Co.* (13 S. C., 290, November term, 1879), the court said: "There is no constitutional restriction depriving the legislature of the power of authorizing counties to incur obligations."

In this case, the general assembly of the State was fully advised of the purpose contemplated by the City Council for which this and the like bonds were to be issued. The ratification of the ordinance manifested by the act giving authority to the City Council was so clearly the expression that it was for a public and not a private purpose, that without the judicial exposition of the legislative power, and the subsequent ratification in 1870, it cannot be supposed that the power given to the City Council was outside of the power it had under the constitution.

If the question before the court was involved in doubt, the language of the State Supreme Court, in *Ex parte Lynch* (16 S. C., 32), would direct me in the judgment I must render. "The constitutionality of the law (said the court) must be presumed until the violation of the constitution is proved beyond

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all *reasonable doubt, and a reasonable doubt must be solved in favor of the legislative action and the act be sustained." This act is not of recent date. These bonds have been issued; have passed through various hands without question as to their validity, and it would be necessary that the alleged violation of the constitution should be plainly demonstrated before the court would declare the bonds invalid. I must conclude that the legislature did not exceed its power in authorizing the issue of these bonds, and the judgment of the court is that the plaintiff is entitled to the relief asked for.

It is therefore ordered and adjudged that the above named plaintiff do recover judgment against the City Council of Charleston for, &c.

In the case of *Robert B. Stanley v. the same defendant*, the same decree was rendered.

From these two decrees, the defendants appealed upon the following exceptions: "I. That his honor erred in not dismissing the

complaints in the said cases when he found that the bonds and coupons set forth in the complaints were issued by the defendants after the adoption of the constitution of 1868. II. That his honor erred in not dismissing the complaints on the ground that the issue of the bonds and coupons set forth in the complaints were in violation of section 23 of article I., and section 8 of article IX., of the State constitution of 1868. III. That his honor erred in holding that the bonds and coupons sued on in the complaint stand on the same footing as bonds issued in aid of railroads and are governed by the same principles. IV. That his honor erred in not dismissing the complaints on the ground that the issue of said bonds and coupons was in violation of article 5 of the amendments of the constitution of the United States."

Messrs. G. D. Bryan and B. H. Rutledge, for appellants.

Messrs. A. G. Magrath, S. Lord, and Simmons & Seigling, contra.

April 23, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, in-

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volving the same *principles, were argued and will be considered together. They grow out of the following state of facts: All the buildings on a very large portion of the city of Charleston having been destroyed by fire, the City Council passed an ordinance on August 28, 1866, providing for the issue of bonds of the said city to an amount not exceeding \$2,000,000, to be loaned to individuals for the purpose of enabling them to "build up and rebuild the waste places and burnt districts of the city of Charleston, or erect improvements upon their lots," under such terms and regulations as were prescribed in the ordinance. Doubts being entertained as to the power of the City Council to accomplish the proposed object "without the permission and license of the general assembly," an act was passed by that body September 19, 1866, which, after setting out in full the ordinance which had been passed by the City Council, declared: "That all and singular the provisions of the aforesaid ordinance of the City Council of Charleston be, and the same are hereby, authorized and confirmed; and authority is hereby given to the said City Council of Charleston to proceed in the premises and to carry into effect the foregoing provisions."

In pursuance of the provisions of this ordinance, the City Council of Charleston, from time to time, issued its bonds, commonly called "Fire Loan Bonds," and loaned the same to various individuals, under the terms and regulations prescribed. The plaintiffs in the cases above stated, being the owners and holders of some of these bonds, all of which were issued after the adoption of the constitution of 1868, brought these actions

on certain past due coupons of said bonds, and the defence set up was that the act authorizing the issue of these bonds is unconstitutional, and that therefore the City Council is not liable for the same. The Circuit Judge held that the question was concluded by the cases of *Copes v. City of Charleston* (10 Rich., 491), *Gage v. Charleston* (3 S. C., 491), and *State ex rel. Brown v. C. & L. R. Co.* (13 Id., 290), and rendered judgment for the plaintiffs in both of these cases. From these judgments defendants appeal and present for our adjudication the single question as to the constitutionality of the law authorizing the issue of the bonds in question.

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*It is not denied that if the legislature could itself lawfully authorize the issue of the bonds, it could lawfully delegate such authority to the City Council, and therefore the real question for us to determine is whether the legislature had the power to issue the bonds for the purposes stated. It will not be denied that the power to issue the bonds necessarily implied the power to levy taxes to provide for the payment thereof; and therefore the inquiry is narrowed down to the question whether the legislature has the power to levy taxes for the purpose of assisting private individuals in carrying out private enterprises, even though such private enterprise may result in incidental advantages to the public.

The power to levy taxes is essential to the existence of any government, but it is not, and from the very nature of the subject cannot be, an unlimited power. Even in the absence of any express constitutional restriction it cannot be said that the power of the legislature to impose taxes is unlimited, for that would necessarily imply that the legislature, under the guise of imposing taxes might exercise the power of confiscation. Hence it seems to be universally conceded, even by those who are disposed to enlarge the taxing power of the legislature to its greatest extent, that a law authorizing taxation for any other than a public purpose is void. As is said by Cooley in his work on *Constitutional Limitations* (p. 487): "Everything that may be done under the name of taxation is not necessarily a tax; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

In *Allen v. Jay* (60 Me., 124, 11 Am. Rep., 185) it is said: "A tax is a sum of money assessed under the authority of the State on the person or property of an individual for the use of the State. Taxation, by the very meaning of the term, implies the raising of money, for public uses, and excludes the raising if for private objects and purposes." In *Lowell v. City of Boston* (111 Mass., 454, 15

Am. Rep., 45) we find this strong language: "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental func-

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tions *of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion." To the same effect see *Loan Association v. Topeka* (20 Wall., 655 [22 L. Ed. 455]), and *Parkersburg v. Brown* (106 U. S., 487 [1 Sup. Ct. 442, 27 L. Ed. 238]).

When in addition to this we find that the constitution of 1868, in art. I., sec. 41, expressly declares that "the enumeration of rights in this constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people," we think there can be no doubt that even in the absence of any express restriction upon the taxing power of the legislature such power can only be exercised for some public purpose, and that whenever it is attempted to be exercised for a private purpose, it is the duty of the courts to declare such legislation void.

Our next inquiry is, whether the purpose for which the bonds in question were issued, and which necessarily involved the power to levy taxes for their payment, was a public purpose. The purpose, as declared by the ordinance, which has been ratified by the act of the legislature, was "to make loans of said bonds to such applicants as will build up and rebuild the waste places and burnt districts of the city of Charleston, or erect improve-

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ments *upon their lots." That this was a private, and not a public purpose, seems to us clear. The real object was to loan the credit of the city to private individuals to afford them aid in repairing their losses oc-

casioned by a disastrous fire. It was practically nothing more nor less than lending the credit and funds of the city to private individuals to aid them in building on their own lots dwellings, stores, warehouses, or such other structures as their interest or convenience might prompt, for their own individual use, and to promote their own individual comfort or gain. There was nothing whatever in it of a public nature. The public were not to have any interest in, or control over, the structures which were thus to be erected by the aid of the public funds, but they were for the sole use, and under the exclusive control, of the individual owners, precisely like any other private property owned by any other private individuals residing or owning property in the city.

We cannot conceive how it is possible to invest the manifest purpose of this loan on the part of the city with a public character. It is true that there would be incidental advantages accruing to the city by the increase of its taxable values, and in various other ways that might be suggested, but these are mere incidental advantages which attend any improvements made in a city, even where they are exclusively the work of private individuals, made with their own private funds, and cannot, therefore, have the effect of converting the purpose from a private into a public purpose. These views are fully sustained by the cases of *Allen v. Jay*, *Loan Association v. Topeka*, *Parkersburg v. Brown*, and *Lowell v. City of Boston*, cited above.

It is argued, however, and the Circuit Judge rested his decision upon such argument, that the question is concluded by the decisions which maintain the constitutionality of acts affording aid in the construction of railroads. It is true that the constitutionality of such legislation seems to be settled by the weight of authority, though grave doubts have been entertained by some whose authority is entitled to the highest consideration as to the correctness of such decisions. Conceding, however, for the purposes of this case, that such legislation is constitutional, we think that it does not by any means follow that such decisions are con-

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clusive of the question now under consideration. Most of these cases recognize fully the doctrine which we have laid down in this opinion, that the power of taxation is not unlimited, and that it cannot be exercised except for some public purpose. In one of the leading cases on the subject (*Sharpless v. Mayor of Philadelphia*, 21 Penn. St., 160 [59 Am. Dec. 759]), in which Black, C. J., in an elaborate opinion, sustains the constitutionality of legislation in aid of railroad companies, that distinguished jurist expressly admits "that a law authorizing taxation for any other than public purposes is void," and he rests his decision upon the ground that the construction of a railroad is a pub-

lic purpose, and hence that it is one of the objects for which taxation may be used.

So in *Olcott v. The Supervisors* (16 Wall., 678 [21 L. Ed. 382]), while considering a similar question, Mr. Justice Strong says: "No one contends that the power of a State to tax, or to authorize taxation, is not limited by the uses to which the proceeds may be devoted. Undoubtedly taxes may not be laid for a private use." But he goes on to argue that railroads, although owned and constructed by private corporations, are public highways; that the right of eminent domain, which can only be exercised for public purposes, may be exerted to facilitate their construction; and that they are open to the use of the public under such regulations as may be prescribed, and therefore he concludes that the construction of a railroad is such a public purpose as to warrant the imposition of taxes in aid of its construction.

In *Dillon on Mun. Corp.*, § 105b, after speaking of the various decisions which seem to have established the constitutionality of legislation in aid of the construction of railways, that distinguished author says: "But it is obvious, from this statement of the grounds upon which the validity of such legislation rests, that it furnishes no support for the validity of taxation in favor of enterprises and objects which are essentially private. We consider the principle equally sound and salutary, that the mere incidental benefits to the public or the State, or any of its municipalities or divisions, which result from the pursuit by individuals of ordinary branches of business or industry, do not constitute a public use in the legal sense which justifies the exercise either of the power of eminent domain or of taxation."

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"We are satisfied that the conclusion reached by the Circuit Judge cannot be sustained by the decisions sustaining the constitutionality of legislation in aid of the construction of railways.

It may be, and has been, said that while the power of taxation is limited, so that it can only be applied to a public purpose, yet it is for the legislature, and not for the courts, to determine what are public as contradistinguished from private purposes; and that when the legislature has passed an act granting aid to any enterprise, it must be assumed that they had first determined that the purpose or object which they had in view was a public purpose, as it cannot be properly assumed that the legislature would wilfully transcend its constitutional powers. If, as we have seen, the power of taxation is limited by the use to which it is to be applied, and if the legislature is restricted in the exercise of the taxing power by the use to which the taxes are to be applied, it would be strange indeed if it was to be the final judge as to the limits within which its own power is restricted. This, as we have

said, in discussing a similar question in the recent case of *Whaley v. Gaillard*, Treasurer (21 S. C., 560), would amount to no restriction at all.

If the same body whose power is intended to be restricted is to finally determine when it has reached the limits beyond which it is forbidden to go, there would be, practically, no limitations upon its powers. As we understand it, one of the very objects for which this court was constituted, was to determine finally, not only the construction, but also the constitutionality of the laws passed by the law-making power. True, as has been well said, in *Ex parte Lynch* (16 S. C., 32): "It is a delicate thing to declare an act of the legislature unconstitutional. * * * Implied limitations of legislative power are only admissible where the implication is necessary. * * * The constitutionality of a law must be presumed until the violation of the constitution is proved beyond all reasonable doubt, and a reasonable doubt must be solved in favor of legislative action, and the act be sustained." But when the legislature has clearly overstepped its constitutional powers, it is not only the right, but the duty, of this court so to declare.

We are satisfied that it is settled beyond

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all dispute that the legislature has no power to impose taxes, except for some public purpose, and we think it equally clear, not only from reason, but from authority entitled to the highest consideration, that the purpose of the act under consideration was to aid private individuals in carrying out private enterprises, and therefore that the purpose of the act was private, and not public, although such enterprises might prove of incidental advantage to the public. In *Allen v. Jay*, supra, an act authorizing a town to loan its credit to certain private individuals to aid them in establishing a mill and factory in such town was declared unconstitutional, although the establishment of such an enterprise in the town would prove to be of incidental advantage to the public. In *Loan Association v. Topeka*, supra, an act authorizing the city of Topeka to issue bonds to be used in aid of the establishment by a private corporation in said city of shops for the manufacture of iron bridges and works of that kind was declared unconstitutional, because of the fact that the purpose to be accomplished was a private and not a public purpose, although it was conceded that the establishment of such works would be of collateral advantage to the public. In *Parkersburg v. Brown*, supra, an act authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing in or near said city was declared to be unconstitutional on similar grounds. Finally, in *Lowell v. Boston*, supra, an act, which in no essential particular differs from the one now under consideration, authorizing the city of

Boston to issue its bonds and loan the same "to the owners of land, the buildings upon which were burned by the fire in said Boston," for the purpose of aiding such persons in rebuilding, was declared to be unconstitutional upon the same grounds, notwithstanding the magnitude of the calamity from the effects of which it was desired to relieve the sufferers.

Now, there can be no doubt that, in each and all of these cases, as well as in the case now under consideration, the principal motive which prompted the legislature to adopt the legislation in question was the belief that thereby the public welfare would be promoted by securing the completion of enterprises which would add to the taxable values of the

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several towns or cities, and in various other ways promoting the interests of the public. But this was not held to be sufficient, and could not properly be so held; for the same reasoning would authorize the extension of aid to any enterprising private individual who desired to enlarge his business, and did not have the means of doing so without aid from the public treasury: for if his business was enlarged, the taxable values of the community would be increased, and many other incidental advantages would accrue to the public. Yet no one would contend that a grant of legislative aid in such a case would be valid, notwithstanding the incidental benefits which the public might thereby receive, because the purpose to which the public money was to be applied would be essentially private and not public, and therefore wholly unauthorized. So in the case now under consideration the purpose to which it is proposed to apply the public money is essentially private and not public. The buildings to be erected by the aid of the public money would still remain the private property of the owners, under their exclusive control and for their sole use, just as much so as any other private property in the city.

We are entirely satisfied, therefore, that the act in question is without constitutional authority and void. From this it follows that the bonds in question constitute no valid obligation of the city of Charleston and hence no action can be maintained to enforce their payment.

It is argued, however, that the usage and practice of the various departments of the State government have so fully recognized these bonds that it is too late now to question their validity; and the case of *Herndon v. Moore* (18 S. C., 339) is relied upon. That case, however, differs in many essentials from this. There, the power of the Court of Probate to make partition of real estate had been repeatedly recognized both by the legislative and judicial departments of the government, and rights had been acquired, titles vested, and money paid upon the faith of such recognitions of these two departments of the government, and to relieve parties who

had thus acted upon the confidence which they might naturally repose in the combined action of these two departments of the government, the doctrine of *communis error facit jus*, admitted to be an exceptional doc-

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trine, was applied. But in the case now under consideration, we do not find any such combined action of these two departments of the government. On the contrary, on every occasion where these bonds have been brought before the courts, the constitutionality of the legislation authorizing their issue has been assailed; and we are not informed of any instance in which any court has assumed or acted upon the assumption that such bonds constituted valid obligations of the city of Charleston.

It is true that there are instances in which the old fire loan sterling bonds, issued by the State, under the act of 1838, have been recognized as valid obligations, though no instance has been brought to our attention in which the constitutionality of the act authorizing their issue has been raised. But we are not dealing with that class of bonds. They were issued under the former constitution of the State, and rest upon a different foundation from the fire loan bonds issued by the city of Charleston since the adoption of the constitution of 1868, and it is the validity of these alone that we are now called upon to consider.

Again, it is said that the City Council of Charleston are estopped by their own acts from disputing the validity of these bonds; by paying interest on them from time to time, by purchasing them in the market, and by suing the bonds of private individuals to whom these fire loan bonds have been issued. If the City Council was never invested with power to issue the bonds, it is difficult to understand how any act they might do could estop them from disputing their validity. If they could not create the obligation by the formal act of signing the bonds, through their proper officer, under the seal of the corporation, we cannot conceive what other act could give the bonds any greater validity. It may well be that it is not only the right, but the duty of the City Council to collect from those who have borrowed the amounts due by them, and apply the same to the payment of the fire loan bonds; and that by proper proceedings they may be compelled so to do (*Parkersburg v. Brown*, 106 U. S., 487 [1 Sup. Ct. 442, 27 L. Ed. 238], and *City Council of Charleston v. Caulfield*, 19 S. C., 201), but that is not the question now before us. All that we are now called upon to determine is whether the bonds, from which the coupons sued upon in these cases were taken, constitute valid obligations of the City

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*Council of Charleston, which can be enforced by judgment; and we hold that they are

not. That the payment of interest on these bonds does not constitute an estoppel. See *Loan Association v. Topeka*, supra.

The judgment of this court is that the judgment of the Circuit Court in each of the cases named at the head of this opinion be reversed, and that the complaint in each of said cases be dismissed.

23 S. C. 70

CHAMBLEE v. TRIBBLE, Treasurer.

(November Term, 1884.)

[1. *Appeal and Error* ⇨169.]

A point not determined in the court below cannot arise or be reviewed in this court.

[Ed. Note.—Cited in *Bomar v. Railroad Co.*, 30 S. C. 455, 9 S. E. 512; *Aultman v. Utsey*, 41 S. C. 311, 19 S. E. 617; *Willis v. Tozer*, 44 S. C. 16, 21 S. E. 617.

For other cases, see *Appeal and Error*, Cent. Dig. § 1034; Dec. Dig. ⇨169.]

[2. *Taxation* ⇨608.]

Section 269 of the General Statutes inhibits the courts from issuing a writ of injunction to stay the collection of any tax, whether legal or illegal, and provides for the taxpayer another efficient remedy.

[Ed. Note.—Cited in *Western Union Telegraph Co. v. Town of Winstboro*, 71 S. C. 235, 50 S. E. 870.

For other cases, see *Taxation*, Cent. Dig. §§ 1230-1241; Dec. Dig. ⇨608.]

[3. *Taxation* ⇨605.]

The assessment upon certain townships of Anderson County to pay for their subscriptions to the Savannah Valley Railroad Company, is a tax, and as such is within the terms of section 269 of the General Statutes.

[Ed. Note.—Cited in *Carolina, C. G. & C. R. Co. v. Tribble*, 25 S. C. 264.

For other cases, see *Taxation*, Cent. Dig. § 1229; Dec. Dig. ⇨605.]

[4. *Constitutional Law* ⇨55.]

This section is not in conflict with those sections of the constitution that give to the Supreme Court and to the Courts of Common Pleas power to issue writs of injunction. *State v. Treasurer*, 4 S. C., 520, and *State v. Gailard*, 11 Id., 309, recognized and followed.

Mr. Justice McGowan, dissenting.

[Ed. Note.—Cited in *State ex rel. National Bank of Newberry v. Cromer*, 35 S. C. 228, 14 S. E. 493; *Ware Shoals Mfg. Co. v. Jones*, 78 S. C. 214, 58 S. E. 811.

For other cases, see *Constitutional Law*, Cent. Dig. § 58; Dec. Dig. ⇨55.]

[This case is also cited in *Floyd v. Perrin*, 30 S. C. 20, 18 S. E. 14, 2 L. R. A. 242; *Congaree Const. Co. v. Columbia Tp.*, 49 S. C. 538, 27 S. E. 570, without specific application.]

Before Witherspoon, J., Anderson, July, 1883.

This was an action commenced January 30, 1883, by Lawrence C. Chamblee in behalf of himself and other taxpayers of certain townships of Anderson County against Milton P. Tribble, treasurer, and Thos. J. Webb, auditor of said county, to restrain the threatened sale of their property for the non-payment of the taxes or assessments laid upon them to

meet the subscriptions made by their townships to the Savannah Valley Railroad Company. By order of court the railroad company was also made a defendant. The complaint alleged that there was no tax; that the assessments were levied under the direc-

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tion of the railroad company; that the act of March 12, 1878, authorizing the subscription and assessments was in violation of art. II., § 20, of the constitution, being defective in its title; also of art. IX., § 8, the taxes not being for corporate purposes; also of art. I., § 14; and that the assessments had not been properly entered by the auditor upon his duplicate.

The answer denied plaintiffs' right to an injunction, and set forth the regularity of all proceedings under the law leading down to the distress under tax executions; and the illegality of the tax was denied.

Upon these pleadings, and the evidence taken by a referee, the Circuit Judge passed the following decree:

When the case was called for hearing defendants' counsel denied the jurisdiction of the court, contending that under section 269 of the General Statutes, 1882, this court could not entertain this action, seeking to enjoin a levy under execution for the collection of taxes. If the assessment, levy, and advertisement of plaintiffs' property is for the purpose of collecting a tax, it is clear that under section 269 this court is expressly forbidden from granting any order, writ, or process of any kind whatsoever, staying or preventing the collection thereof, whether such tax is legally due or not.

Plaintiffs' counsel have argued with much force that the assessment and levy by defendants was not for public governmental purposes, which is necessary to constitute a tax, but must be regarded as a special assessment for local improvements. The case of *Hanson v. Vernon* (27 Iowa, 28 [1 Am. Rep. 215]); *People v. Township of Salem* (4 Am. Rep., 400, 20 Mich., 452), and other authorities, were cited to establish the distinction between special local assessments and taxes. Taxes are defined (Cool. Tax., 1) as being "the enforced proportional contributions of persons and property, levied by the authority of the State for the support of the government, and for all public uses." Taxes are also defined as "burdens, or charges imposed by the legislative powers of the State, upon persons or property for public purposes." Black. Tax Tit., 1.

Whether or not the legislature intended that the payment of the subscriptions in aid

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of the Savannah Valley Railroad should be regarded and enforced as a tax, can best be determined by reference to the provisions of the acts of the general assembly above referred to. In the act of March 12, 1878, § 10, granting the charter to said railroad company (16 Stat., 438), as well as the

amendatory act, December 24, 1878, § 10 (16 Stat., 816), it will be observed that the county auditor of Anderson County is required to assess annually upon the property of the townships so subscribing such per centum as may be necessary to pay the instalments of subscriptions, which shall be "known and styled on the tax books as the Savannah Valley Railroad tax," and shall be collected by the treasurer at the same time and under the same regulations as are fixed and provided by law for the collection of taxes in towns, cities, or counties so subscribing.

By joint resolution of the general assembly, approved February 20, 1880 (17 Stat., 314), the president and the board of directors of the Savannah Valley Railroad Company were authorized and empowered to direct the "collection of the taxes" voted to said railroad in Anderson County. Thus at different times by expressions of the legislative will that body has declared and provided for the collection of subscriptions in Anderson County to the Savannah Valley Railroad as a tax, and has directed the same methods for the collection of said subscriptions as provided by law for the collection of State and county taxes.

I am constrained to conclude and decide that the assessment and levy upon plaintiffs' property was made by defendants to collect taxes, as contemplated in section 269, and that the collection of said taxes by sale of plaintiffs' property cannot be enjoined by this court under said section 269 of the General Statutes, 1882.

This court having no jurisdiction in the premises, neither the constitutionality of the acts of the legislature referred to, nor the liability of the conduct of defendants, can be considered or determined in this action.

It is therefore ordered and adjudged, that the temporary injunction heretofore granted herein by his honor, Judge Wallace, be, and the same is hereby, dissolved, and that plaintiffs' complaint be dismissed with costs.

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*From this decree the plaintiffs appealed upon the following grounds:

I. His honor erred in holding that he had no jurisdiction in the premises under section 269, General Statutes, 1882.

II. His honor erred in holding that the constitutionality of the acts of the legislature referred to in the complaint, to wit, the act chartering the Savannah Valley Railroad and the subsequent acts amendatory thereto, could not be considered or determined in this action.

III. His honor erred in holding that the liability of the conduct of the defendants could not be considered or determined in this action.

IV. His honor erred in holding that the township assessments or subscriptions levied or assessed on plaintiffs' property in aid of the Savannah Valley Railroad were taxes.

V. His honor erred in holding that the as-

assessment and levy upon plaintiffs' property was made by defendants to collect taxes.

VI. His honor erred in holding that the sale of plaintiffs' property could not be enjoined under section 269, General Statutes, 1882.

VII. His honor erred in holding that the plaintiffs sought in this action to enjoin a levy under execution for the collection of taxes.

The appeal was argued January 14, 1884, after which this court passed the following order:

Inasmuch as, in our judgment, the question of the constitutionality of section 269 of the General Statutes of 1882 is necessarily involved, though not formally made, in this appeal, and inasmuch as such question has heretofore been decided by a divided court, we think it desirable that a question of such importance should be maturely considered before it is reaffirmed. It is therefore ordered that the question whether the above mentioned section is in conflict with the provisions of the constitution, be set down for argument at the next term of this court during the call of cases from the Eighth Circuit.

The re-argument was had November 25, 1884, upon the point directed.

Messrs. W. C. Benet and H. G. Scudday, for appellants.

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*Messrs. B. F. Whitner and Frank C. Whitner, contra.

April 25, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Certain townships in the County of Anderson, under an "act to charter the Savannah Valley Railroad Company," passed March 12, 1878 (16 Stat. 435), and other acts amendatory thereto approved December 24, 1878 (16 Stat., 816), and December 21, 1880 (17 Stat., 418), voted a subscription to said road. The appellant, Chamblee, and twenty-six other land owners and taxpayers in these townships, refused to pay their portion of this subscription. They were published as "delinquent taxpayers" and their lands were advertised to be sold by the auditor and treasurer, with a penalty of fifteen per cent.

The appellants applied to his honor, Judge Wallace, for an injunction, which was granted temporarily until the case could be heard on its merits. The case was afterwards heard by his honor, Judge Witherspoon, who decreed adversely to the appellants, on the ground that, the assessment and levy made upon appellants' property being made to collect taxes, he had no jurisdiction under section 269, General Statutes, 1882, and having no jurisdiction "neither the constitutionality of the acts of the legislature referred to above, nor the liability of the conduct of the defendants, could be considered or determined by him." He, therefore, ordered and ad-

judged that the temporary injunction be dissolved and the complaint be dismissed. Hence the appeal.

Three questions have been discussed in the appeal. First. The appellants deny the constitutionality of the act of March 12, 1878, and the acts amendatory thereto, chartering the Savannah Valley Railroad Company, under which the subscription was made, alleging that it is in violation of art. II., § 20, of the constitution of this State, "in that its title is defective." Second. They deny that the assessment and levy made by the defendants were for the purpose of collecting a tax in the sense of section 269, General Statutes, 1882; and Third, they deny the constitutionality of said section 269, which forbids the courts and judges of this State from granting any order or process of any kind staying the collection of taxes, whether said

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tax is legally *due or not, and under which the Circuit Judge determined that it was his duty to dismiss the complaint.

Inasmuch as the Circuit Judge made no ruling upon the first question, i. e., the constitutionality of the act chartering the company, we do not regard that question as before us, as we can only review such questions of law as may be adjudged and determined below. In the absence of any ruling by the Circuit Judge, no question can arise in this court. We have not, therefore, considered this first question, it being put aside as not necessarily arising in the appeal.

Second. Was it error in the Circuit Judge to hold that the assessment and levy upon appellants' property was for the collection of taxes, and on that account subject to the provisions of section 269, General Statutes, 1882, which, as we have seen, inhibits injunction and all other process issuing from the courts, intended to stay such collections? This is a grave question and one not free from doubt, but in our opinion the Circuit Judge was correct in his ruling. It is admitted in the argument of appellants' counsel, that "if the assessment, levy, and advertisement of appellants' property is for the purpose of collecting a tax, it is clear that under section 269 the Circuit Court is expressly forbidden to grant any order, writ, or process of any kind whatsoever, staying or preventing the collection thereof, whether such tax is legally due or not." It is also said in the argument that the provisions of this section are wise, sustained by good authority, and grounded in good sense. Because it is better that the taxpayer, if he conceives the taxes to be unjust or illegal for any cause, should pay them notwithstanding, under protest, and then bring an action against the county treasurer, for the recovery thereof, as the act allows.

But it is urged that this is no tax, and consequently that section 269 does not apply, and many authorities are referred to as defining and determining what constitutes a

tax; and the conclusion reached is, that a tax can only be legally raised for a public purpose, for the proper needs of government, and for a public use; and it is urged that this assessment not being for a public use, it is not a tax in the sense of section 269, *supra*. There can be no question as to the soundness of this principle; and it is con-

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*ceded that should the general assembly at any time attempt to levy a tax for any purpose except a public one, the act would not only be unconstitutional, but would be transcending the powers of the general assembly in a direction the most dangerous and fatal. The mistake, however, in appellants' argument, as it seems to us, is not in the principle itself, but in its application. The argument assumes that if the tax be an illegal tax, that section 269 does not apply, and therefore the case is discussed as if the question before the court was, is this a legal or illegal tax? If that was really the question before us, the authorities cited and the argument based thereon would be pertinent, but this is not the question; on the contrary, the real question is, were the defendants below attempting to collect a tax legal or illegal when the injunction was applied for? If so, section 269 stayed the hands of the court at once and in express terms.

It should be remembered in this connection that the object of this section was not to deprive the taxpayer of all remedy in the event that the tax levied should prove to be illegal, nor to enforce the payment of an illegal tax, without remedy, as well as a legal one, but its purpose was simply to postpone the question of illegality to a subsequent proceeding, thereby relieving the tax gatherer from responsibility and preventing delay. It thus assumed, in the first instance, the legality of all taxes imposed by an act and forbade the courts from inquiring into that question, upon proceeding by injunction to stay their collection. The act may seem harsh and imperious, and in some instances may be oppressive, but is it not vindicated by the necessities of government, and the importance of public interests, which concern all, and which rise higher than mere personal and private affairs? Be this as it may, however, the meaning of the act cannot be misunderstood. It inhibits the courts in no doubtful language from stopping the collection of taxes, whether legal or illegal, and therefore wherever and whenever a tax is being collected, it is present to shield the tax gatherer.

What then is a tax? is the question. Can there be no tax but a legal one? A tax, in general terms, may be defined to be a pecuniary burden assessed upon the citizen, to be levied upon his property and collected un-

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der laws enacted for that purpose. It may be legal or illegal, dependent upon the purpose of the collection, i. e. whether for a pub-

lic or private use, but in either case is it not a tax imposed and collectible until, if illegal, the illegality is adjudged and determined by proper authority? Section 269 assumes primarily that all assessments imposed by the authority of an act are taxes, and it prevents any interference in their collection in the first instance, reserving the right of the taxpayer to have the amount paid refunded in the event that the tax is subsequently held illegal.

The question, then, below and now here is, was the burden from which the appellants seek relief imposed upon them as a tax? The answer to this question is plain and free from doubt. In the act of March 12, 1878, chartering the railroad company, and the amendments thereto, it is styled a tax—a railroad tax. The county auditor is authorized and required to assess it annually on the property of citizens as a tax. It is required to be entered in the tax books as a tax. By the joint resolution of February 20, 1880, the president and directors of the road are empowered to direct its collection as a tax; and, finally, the general State tax machinery is made use of in its collection, with all the incidents and appliances employed in the collection of all other taxes, State and county. Under these circumstances, and in the face of section 269, assuming it to be constitutional, the Circuit Judge was not required to enter into the investigation of the question, whether this imposed tax was for a public or private purpose, and therefore whether legal or illegal.

This brings us to the third question. Is section 269 constitutional? It is urged that it is not, because it is in violation of sections 4 and 15 of article IV. of the State constitution. Now, it is conceded that these sections do give to the Supreme and Circuit Courts of the State respectively full power to issue writs of injunction, and the other writs therein mentioned. It is also conceded that the constitution is higher than any act of the general assembly, and therefore when they conflict the act must give way. But the question here is, does the act under consideration conflict with either of these sections when properly understood? Has the legislature attempted by this act to curtail or limit the constitutional power of the courts in this

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respect? This must depend upon the purpose which the framers of the constitution had in view when they thus conferred the power upon the courts to issue these writs. Was it their purpose simply to perpetuate these writs, and to fix them as unalterable remedies in certain cases for all times? Were these writs of such importance as to demand this, and was there a fear that the citizen might be deprived of this mode of relief, if the hands of the legislature were not tied? Or was it done simply to confer jurisdiction on the courts in cases where the

law, as it stood, when an application might be made for relief, authorized them to be issued? If the former purpose had been in view, how much easier and freer from doubt could such an idea have been expressed by simply declaring that said writs as heretofore existing should be held inviolate, and that the judges and courts should not only have power to issue them, but should never be prevented from the exercise of that power. If, however, the latter was the intent, no other language more appropriate to that end than that used could have been used.

Section 4 says, the Supreme Court * * * shall always have power to issue writs of injunction, mandamus, &c. Section 15 provides that the Court of Common Pleas * * * shall have power to issue writs of mandamus, prohibition, &c. Not that these writs shall remain inviolate, as is said of the right of trial by jury—not that they shall never be suspended except in certain contingencies as is provided in reference to habeas corpus—but simply that the courts should have the power to issue them when, of course, it is proper and legal that they should be issued. The framers of the constitution knew full well how to perpetuate and fix a right beyond the reach of all attack, either from the legislature or any other power, when they so desired, as is shown by the provisions above referred to in reference to the right of trial by jury and the writ of habeas corpus, and also by many other provisions found in the bill of rights securing rights to the people.

Besides, what reason could there have been why these special writs should have been placed under the guardianship and protection of the constitution more than any other modes of relief? They were certainly not

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more important, more effective, nor in any greater danger of being usurped, lost, or destroyed, than other remedies, and there was no special reason why they should have been declared perpetual and irrevocable. On the other hand, there might have been a question whether the conferring of general jurisdiction on the courts in civil and criminal cases, without more, would have embraced these writs, because of their special and limited character, and on this account there was a reason why it was proper to mention them specially, and to confer jurisdiction in terms in reference to them on the courts. When we find, therefore, a sufficient reason for their prominence in the constitution in the fact of jurisdiction conferred, would it not be a strained construction to conclude that underlying this was a purpose to limit the legislative powers of the general assembly as to these writs in the exercise of that discretion which it is admitted that body possesses in general legislation, and which is so necessary not only in such legislation, but especially so in shaping and moulding remedies and proceedings, to be administered by the courts for

the proper protection of the citizen in his various rights?

Independent of all this, however, we have two cases decided by our own court, which, while they remain of force, are direct and conclusive on the question. *State v. Treasurer*, 4 S. C., 520, and *State v. Gaillard*, 11 Id., 309. It is true, the first case was decided by a divided court, Chief Justice Moses dissenting, and in the second Mr. Justice McIVER concurred only because he felt himself bound by the first as authority, at the same time declaring that if the question was *res integra*, he could not concur. The dissenting views of two such eminent jurists, when the question has come up again, are well calculated to make us pause to review the ground upon which these cases stand, but in such review we must remember how important is the doctrine of *stare decisis* in the administration of justice, and how ruinous also is uncertainty and vacillation. And unless in such review the error is apparent, manifest, and dangerous in its tendencies, it is better to yield than to overrule.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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*Mr. Justice McIVER. I concur, because the constitutionality of the provisions contained in section 269 of the General Statutes has been determined by authority to which I am bound to yield.

Mr. Justice McGOWAN, dissenting. As I cannot concur in this judgment, its importance makes it proper that I should state briefly the reasons for that dissent.

The lands of a number of the citizens of Anderson County, residing in the townships of Varennes, Hall, Dark Corner, and Centreville, of that county, were levied and advertised for sale under some process in the nature of a tax execution issued by the treasurer of the county, to enforce the collection of certain assessments upon a subscription voted by a majority of the electors of the said townships respectively, to aid in the construction of the Savannah Valley Railroad. The plaintiff in this action, being one of those whose lands were advertised, instituted this action in behalf of himself and a number of others in the same condition against the treasurer and auditor of the county and "The Savannah Valley Railroad Company" to restrain and enjoin the sale of their lands under the process aforesaid, alleging that they never authorized the said subscriptions; that there was no law, or tax levied pursuant to law, to authorize the said levy and sale; that the charter of the company and the whole proceedings were irregular and void, and the acts under which they were instituted unconstitutional. The defendants answered substantially that all the proceedings were regular and authorized, but insisted that the court could not, under any circumstances, grant

the relief prayed for, but was prohibited from doing so by the act of December 24, 1878, entitled "an act to facilitate the collection of taxes," reenacted as sections 268 and 269 of the General Statutes.

The case was heard by Judge Witherspoon, who dismissed the complaint, saying: "I am constrained to conclude and decide that the assessment and levy upon plaintiffs' property was made by defendants to collect taxes as contemplated in section 269 of the General Statutes, and that the collection of said taxes by levy and sale of plaintiffs' property cannot be enjoined by this court under said section. This court having no jurisdiction in the premises, neither the constitutionality of

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the acts of the legislature referred to, nor the liability of the conduct of defendants, can be considered or determined in this action," &c.

From this judgment the plaintiffs appealed on various grounds, but for our present purpose it will not be necessary to set out any but the following:

"Because his honor erred in holding that the township assessments or subscriptions levied or assessed on plaintiffs' property in aid of the Savannah Valley Railroad were taxes.

"Because his honor erred in holding that the assessment and levy upon plaintiffs' property were made by defendants to collect taxes.

"Because his honor erred in holding that the sale of plaintiffs' property could not be enjoined under section 269 of the General Statutes."

It is obvious that the merits of the case were never reached. Whether or not there were good grounds for the relief prayed for by the plaintiffs, we do not know, for that inquiry was cut off upon the view that the property was advertised for sale under an execution for the collection of taxes, and the enforcement of such an execution, no matter whether irregular, illegal, or unauthorized, could not be enjoined by the court under section 269 of the General Statutes, which, among other things, provides as follows: "There shall be no other remedy in any case of the illegal and unlawful collection of taxes or attempt to collect taxes * * * other than that herein provided. * * * And no writ or process of any kind whatever, staying or preventing any officer of the State charged with a duty in the collection of any tax, whether such tax is legal or not, shall in any case be granted by any court or the judge of any court; but in all cases whatever the person against whom any tax shall stand charged upon the books of the county treasurer, shall be required to pay * * * and thereupon shall have his remedy under the provisions of the next preceding section," &c. (which will be adverted to hereafter).

As this provision of the statutes apparently

lay in the way of the plaintiffs, before the merits of their case could be considered, and the Circuit Judge had placed entirely upon it his decree dismissing the complaint, after the first argument this court ordered the question of the constitutionality of the aforesaid

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provision to be reargued, saying in the order: "Inasmuch as, in our judgment, the question of the constitutionality of section 269 of the General Statutes (1882) is necessarily involved, though not formally made in this appeal: and inasmuch as such question has heretofore been decided by a divided court, we think it desirable that a question of such importance should be maturely considered before it is re-affirmed," &c. The question was accordingly reargued at the bar. But it seems that my brethren, notwithstanding its admitted importance and the fact that it was originally decided by a "divided court," have come to the conclusion that it is better to stand on the principle of stare decisis and reaffirm the former decision, holding that the provision of the law prohibiting the judges from granting injunctions in certain cases, is constitutional, and applies to this case. In that I cannot concur. I thoroughly agree that consistency and stability in the administration of the law is becoming and proper, as tending to promote the peace and good order and prosperity of the State; but it seems to me that it is possible to go to the opposite extreme, and by mere acquiescence to permit the erroneous decision of to-day to ripen into the precedent of to-morrow, and thus allow error to assume the form and force of law, and every instance of such acquiescence only adds to the force of that error.

Section 15, article IV., of the constitution declares that "the Courts of Common Pleas shall have power to issue writs of mandamus, prohibition, scire facias, and all other writs (including injunction) which may be necessary for carrying their powers fully into effect." And yet it is maintained that this positive declaration of the constitution may be absolutely nullified by an act of the legislature which provides that "no writ, order, or process of any kind whatever, staying and preventing any officer of the State, charged with a duty in the collection of taxes from taking any step or proceeding in the collection of any tax, whether such tax is legally due or not, shall in any case be granted by any court or the judge of any court," &c. It seems that the view, sustaining this act in prohibiting judges from granting writs of injunction, sometimes called "the great preventative remedy of equity," is, that the legislature has the right to determine in what cases the jurisdictional power conferred by

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*this section shall be exercised, especially where an adequate alternative remedy is given in the place of that taken away. I had thought that was the very matter which the

judges were appointed to determine, there being no good reason why, even as to the collection of taxes, they should not be safely entrusted with the power expressly given to them by the constitution. As was said by this court in *Hendon v. Moore*, 18 S. C., 351: "The constitution has divided the functions of government into the legislative, executive, and judicial, and it is the fundamental theory of our system that the departments shall be kept separate and each in its own sphere, independent of the others." The question whether a proper case has been made for an injunction, is peculiarly judicial in its character, and all judicial power has been taken away from the legislature and deposited in the courts of the State created or to be created.

It is true that there are two cases in our books which have been cited as sustaining the constitutionality of the law. But although there are nominally two cases, there is in fact but one, that of *State v. Treasurer* (4 S. C., 529); for the other, *State v. Gaillard* (11 S. C., 309), was avowedly and entirely placed on the authority of the first. "When cases follow in line for no better reason than because they have a case to follow, the authority is to be found in the first decision and not by counting up the number in the line." I must say that I cannot consider the law settled as announced in the case of *State v. Treasurer*, *supra*. It seems to me that the decision is not only unsupported by authority, but is of dangerous tendency. It was made in 1871, a time not favorable for intelligent, dispassionate judicial inquiry. As before stated, it was made by a divided court, Mr. Justice Willard delivering the judgment with the concurrence of Judge Wright, and Chief Justice Moses dissenting. It would now, however, accomplish no good purpose to again open the argument, which is well stated in the dissenting opinion of Chief Justice Moses in the case of *The Treasurer* as also in that of Mr. Justice McIver in the case of *State v. Gaillard*, *supra*. I hope the case will be formally overruled.

But assuming that the prohibition upon the action of the courts, in regard to restraining

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the collection of State and county taxes proper, must be regarded as constitutional for the reason that it has been so decided, does it follow that it is constitutional and applicable to the collection of local township subscriptions to railroads, whether called subscriptions, assessments, or taxes? It is quite certain that neither of the cases referred to as affirming the constitutionality of the law, arose in connection with such a case; and upon that precise question we are in no way embarrassed by the principle of stare decisis. But on the contrary, as to such a case the question is still *res integra*, and we are not bound to enforce the act beyond the exact point decided, or to stretch it by con-

struction so as to embrace cases of this kind, unless it necessarily follows from the nature of the thing or from the terms of the act itself.

It strikes me that cases of this kind are not within the purview of the sections which restrain the judges in the matter of collecting ordinary taxes, and to so construe them will be in effect to amend the law, and in doing so to extend it and go beyond the reasons upon which it was based and contrary both to its spirit and intent and the express terms of several of its provisions. It is perfectly manifest that the act was not passed with any special reference to the collection of railroad assessments, considered as taxes, for the first act upon the subject, that which was considered in the case of *State v. Treasurer*, was passed as far back as 1870, when there was not in the State, nor ever had been, and it could not be foreseen that there ever would be, such an anomalous thing as a township subscription for a railroad voted by a majority of the electors. The same may be said of the act of 1878, to facilitate the collection of taxes (16 Stat., 785). It is very well known that the object of that act was to prevent the payment of taxes in depreciated funds or money, such as the bills of the old bank of the State, or any other except those which the treasurer was by law authorized to receive, and without the remotest reference to closing the mouths of the judges in the matter of collecting railroad assessments in the form of taxes. So that it is perfectly plain, that if the law restrained the judges from interfering with the collection of such assessments, it must be from the terms of the act itself being broad enough necessarily to cover such a case.

Are the terms of the sections aforesaid so

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broad and explicit *as to require us to construe the prohibition upon the courts, as extending to local railroad assessments, under the form and name of taxes? I do not think so. Section 268 of the General Statutes, which undertakes to provide what is called the "alternative remedy" for that of injunction taken away, is as follows: "In all cases in which any county, State, or other taxes are now, or shall be hereafter charged upon the books of any county treasurer of the State against any person, and such treasurer shall claim the payment of the taxes so charged, or shall take any step or proceeding to collect the same, the person against whom such taxes are charged, or against whom such step or proceeding shall be taken, shall, if he conceives the same to be unjust or illegal for any cause, pay the said taxes, notwithstanding under protest, in such funds and moneys as the said county treasurer shall be authorized to receive by the act levying the same: *and upon such payment being made, the said county treasurer shall pay the taxes so collected into the State treasury,*

giving notice at the time to the comptroller general that the payment was made under protest; and the person so paying said taxes may at any time within thirty days after making such payment, but not afterwards, bring an action against the said county treasurer for the recovery thereof in the Court of Common Pleas for the county in which such taxes are payable; and if it be determined in said action that such taxes were wrongfully or illegally collected for any reason going to the merits, then the court before whom the case is tried shall certify of record that the same was wrongfully collected and ought to be refunded, and thereupon the comptroller general shall issue his warrant for the refunding of the taxes so paid, which shall be paid in preference to all other claims against the treasury," &c.

Can any one read this section and affirm with certainty that the remedy therein provided was intended to extend, and by fair construction does extend, to anything other what are strictly State or county taxes, levied for the benefit of the government and payable into the State treasury? These assessments were not made directly by the legislature for the benefit of the State or county government, but by the president and directors of the Savannah Valley Railroad Com-

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pany, who had by the joint resolution of 1880 authority to "direct the collection of the taxes voted to the said Savannah Valley Railroad." They were not upon the regular "books of the county treasurer," in the sense of the act, but on a special book provided for the purpose, and were not payable "into the State treasury," giving notice at the time to the comptroller general that the payment was made under protest, but it is expressly directed by the amended charter that the said assessments "shall be paid by such treasurer to said railroad company."

It seems to me that this direction of the proceeds of the assessments, at once repealed, quoad these plaintiffs, all the latter part of the section quoted, which is italicized, and that they could not pay under protest and avail themselves of the alternative remedy therein provided, to pay and recover back from the State, if the tax should turn out to be illegal. I do not see that in such case where the money has been paid to the company the comptroller general could "issue his warrant for the refunding of the taxes so paid," &c. If not, then there cannot be said to be an adequate alternative remedy for these plaintiffs, and that being (as stated by Judge Haskell in *State v. Gaillard*) the only thing which makes the law constitutional, it would seem to follow that no practical adequate remedy being provided of which these plaintiffs may avail themselves, the act excluding the judges from inquiry, cannot extend to them, or, if so, that it is clearly unconstitutional. The act which stands only

because it affords an alternative remedy, surely cannot stand in the way of these to whom it gives no such remedy. If the parties cannot in any event recover back the money from the State, then they have no adequate alternative remedy, and if the judges are excluded from even hearing their alleged grievances, they would be left absolutely remediless and at the mercy of a company having the assistance of the officers and the use of all the machinery of the State.

But it is said that these assessments are taxes, and the prohibition is general, forbidding inquiry into the legality of any kind of a tax. It is true, that in the acts and joint resolutions of the legislature these exactions are sometimes called "subscriptions," sometimes "assessments," and sometimes "the Savannah Valley Railroad tax," but it is

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quite certain that they are not State *taxes in the usual and ordinary sense of the word. To be taxes in the sense of the act, they must have the characteristics of taxes, and if not they cannot be made such by simply calling them by that name. I have always had the idea, expressed by Webster in one of his definitions, that "a tax is a rate or sum of money assessed on the person or property of the citizen for the use of the nation or State," and doubtless that was the sense in which the framers of this law understood it. But I do not think it necessary here to enter into the discussion. Whether these exactions voted by a majority of the electors in the townships named for the benefit of the railroad company, are called "subscriptions," or "assessments," or "railroad taxes," is a matter outside of the question. In either case it seems to me clear that they are not "taxes" in the sense of the sections under consideration, which require the taxes there in contemplation to be paid "into the treasury of the State," and in reference to which the comptroller general, in a certain event, was required "to issue his warrant refunding the same."

Sections 268 and 269 are manifestly but parts of the same scheme: the first undertaking to provide an alternative remedy by the State refunding, if the tax should turn out to be illegal; and the second forbidding all "other remedy." And the point is, that when the circumstances are such that the "other remedy" is not given by the first, it follows that the second, taking away that by injunction, does not apply. And in this case the exactions, whether they are called "taxes" or not, are ordered to be paid over to the railroad company in such way as to take them out of section 268, making the State liable to refund them, and in doing so deprives the parties of any adequate alternative remedy. If I am right in this, and it seems to me that there cannot be two opinions, then this decision certainly makes a great advance beyond what was decided in

the cases of *The Treasurer* and of *Gaillard*, for in both of them the taxes being public State taxes, there was clearly the right to make the State refund, and for that very reason it was held that the act only "postponed" the question of illegality, leaving that to be determined in the "other remedy." A Tennessee act of 1844 declares a deed made in pursuance of a public "sale for taxes"

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prima facie evidence of *the prerequisites of the law. A party claimed under a town corporation tax sale, and the Supreme Court of that State held that the corporation tax sale was not within the law. Judge Turley says: "Corporation taxes are not public, but private taxes, and are therefore not embraced within the act, but as to the remedy for collection are left as it existed prior to the passage of the act." *Shoalwater v. Armstrong*, 9 *Humph.* [Tenn.] 217; *Black Tax Tit.*, §4.

If it should be the decision of this court that section 269 must apply to this case simply because these exactions for a railroad are called "taxes," without inquiring whether the parties are entitled to the alternative remedy against the State, it will indeed be a speedy realization of the fears of Chief Justice Moses expressed in his dissenting opinion in the case of *The Treasurer*: "This concedes an unlimited control to the legislature of the whole judicial magistracy of the State, which, in the end, might be so exercised as to suppress its entire authority. If it can declare in what case a particular form of action shall be a remedy for an alleged complaint, and ignore its application to other cases, in which, at the adoption of the constitution, it was employed as a medium through which a wrong was to be redressed, may it not step by step disarm the courts of all their authority, and at last leave it but a tribunal to carry out the behests and mandates of the legislative will? The power to tax is the most extensive and unlimited of all the powers which a legislative body can exert. It is without restraint, except by constitutional limitations. To tie up the hand that can alone resist its unlawful encroachments, would not only render uncertain the tenure by which the citizen holds his property, but make it tributary to the unrestrained demands of the legislature," &c.

I think this court should now declare section 269 of the General Statutes to be unconstitutional; or if it is too late to do so, that it should declare that said section was never intended to apply to a case like this, where the provision for an alternative remedy against the State does not exist; and that the decree should be set aside and the cause remanded to the Circuit, to be heard like other cases, only upon the merits involved.

Judgment affirmed.

23 S. C. *89

*CARRIGAN v. BYRD.

(November Term, 1884.)

[1. *Deeds* ⇨56.]

The delivery of a deed of conveyance is composed of two concurrent parts: (1) an intention to deliver, and (2) an act evincing a purpose to part with the control of the instrument. Neither of these parts, by itself, is sufficient to constitute delivery.

[Ed. Note.—Cited in *Johnson v. Johnson*, 44 S. C. 372, 22 S. E. 419; *Merck v. Merck*, 83 S. C. 340, 65 S. E. 347; *Harrison v. Dunlap*, 96 S. C. 392, 80 S. E. 619.

For other cases, see *Deeds*, Cent. Dig. § 118; Dec. Dig. ⇨56.]

[2. *Deeds* ⇨208.]

The Circuit Judge, upon testimony taken before him, found as matter of fact that the grantor had delivered certain deeds in question, and this court concurred in such finding.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 625-632; Dec. Dig. ⇨208.]

[3. *Appeal and Error* ⇨1011.]

This court will not reverse a Circuit Judge's finding of fact, upon conflicting testimony, in cases where he has observed the witnesses, unless the overbearing weight of such testimony is clearly against his finding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3983; Dec. Dig. ⇨1011.]

[4. *Appeal and Error* ⇨1008.]

It is not a safe rule to set aside a finding of fact upon a consideration of the probabilities of human conduct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⇨1008.]

[5. *Vendor and Purchaser* ⇨228.]

The plaintiff, a subsequent mortgagee for value, had in this case sufficient information of certain prior unrecorded voluntary deeds to charge him with notice of their delivery.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 498; Dec. Dig. ⇨228.]

[6. *Fraudulent Conveyances* ⇨211.]

A, being then indebted, made three voluntary conveyances of his land, and afterwards judgments were obtained against him on this antecedent indebtedness. B, with notice of these prior deeds, advanced a sum sufficient to pay off these judgments, which were then assigned to him; and as further security, A gave to B a bond with a higher rate of interest, and a mortgage of the land embraced in the said voluntary conveyances. In action by B against A and these grantees to foreclose such mortgage,—*held*, that the deeds were not a fraud upon any rights which B was here seeking to enforce; and, therefore, whether A owed any other debts at the time he made the conveyances, was irrelevant in this action.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 648; Dec. Dig. ⇨211.]

[7. *Appeal and Error* ⇨843.]

The rights of a party under a supposed, but unproven, state of facts, not considered.

[Ed. Note.—For other cases, see *Appeal and Error*, see Cent. Dig. §§ 3331-3341; Dec. Dig. ⇨843.]

[This case is also cited in *Mitchell v. Allen*, 81 S. C. 344, 61 S. E. 1087, 62 S. E. 399, without specific application.]

Before Pressley, J., Darlington, October, 1883.

At the hearing of this appeal, honorable W. H. Wallace, judge of the seventh Circuit, sat in the stead of Mr. Justice Melver, who had been of counsel in the cause.

This was an action by William A. Carrigan against Evander Byrd, Lewis S. Byrd, Peter J. Byrd, and Sarah E. Coker, commenced in January, 1876. The cause was heard by Judge Pressley upon the pleadings and upon testimony taken before him at the hearing. He subsequently filed a decree, which is sub-

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stantially stated in the opinion of this court, as are also the plaintiff's exceptions thereto.

Messrs. Boyd & Nettles, for appellant.

Messrs. E. K. Dargan and G. W. Dargan, contra.

May 2, 1885. The opinion of the court was delivered by

Mr. Justice WALLACE. This is an action to foreclose a mortgage of real estate. The mortgage was executed to plaintiff by Evander Byrd on July 13, 1871, to secure a bond of the same date. The consideration of the bond was money expended by plaintiff, at the request of Byrd, in purchasing certain judgments that had been obtained against Byrd by his creditors, who were pressing for payment. Upon a composition between the holders of the judgments and plaintiff, the judgments were assigned to the latter. As further security, plaintiff took a chattel mortgage from Byrd, and, as still further security, he took from Byrd a bond and mortgage of real estate—that which he seeks to foreclose in this action. The bond provides for a larger rate of interest than that borne by the judgments.

This action was commenced against Evander Byrd, the debtor, and also against certain children of Evander Byrd, to wit: Sarah Coker, Lewis Byrd, and Peter Byrd. The complaint, besides the usual allegations of a complaint for foreclosure, alleged that the defendants, Sarah, Peter, and Lewis, claimed an interest in the land described in the mortgage adversely to the claims of the plaintiff, and tendered an issue to these upon the validity of their respective claims. Evander Byrd did not answer. Sarah, Peter, and Lewis answered, and alleged that Evander Byrd, their father, had conveyed to each of them by deed, bearing date January 4, 1870, and before the execution of the bond and mortgage upon which the action is brought, different parcels of the land described in the mortgage; that these deeds were not recorded in the registry office at Darlington, but that plaintiff had actual notice of them before he took the bond and mortgage; that Evander Byrd had other property, real and personal, besides that embraced in the mortgage; and that by reason

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of the aforesaid chattel mortgage and of the judgments assigned to him, plaintiff had it in his power to obtain satisfaction of his debt

without resorting to the land conveyed to these defendants. It appears from the case that the debts upon which the judgments against Evander Byrd were obtained, which were assigned to plaintiff, were in existence when the deeds were executed, and the judgments were obtained upon them after the execution of the deeds. There is no controversy about the execution of the bond and mortgage. Nor, on the other hand, any question as to the execution of the deeds.

Plaintiff attacks the sufficiency of the deeds to protect the grantees against his mortgage upon three grounds: First. Because they were never delivered by Evander Byrd. Second. Because, if delivered, he had no notice of the deeds. Third. Because, being voluntary, they are fraudulent and void as to debts existing at the time of their execution. These issues were decided by the Circuit Judge adversely to the plaintiff, and the grounds of appeal make the same questions here.

Plaintiff's first ground of appeal is, in substance, that the preponderating weight of the testimony is against the delivery of the deeds. The delivery, necessary to transfer title to real property under a deed signed and sealed, is composed of two concurrent parts, namely, an intention to deliver and an act evincing a purpose to part with the control of the instrument. Neither of these parts by itself is sufficient to constitute delivery. There may be an intention never consummated, and the instrument may be put in the custody of another, to be held subject to the control of the grantor. This rule is so well settled that it is only necessary to refer to some of our cases which declare it. *Broughton v. Telfer*, 3 Rich. Eq., 435; *Wood v. Ingraham*, 3 Strobb. Eq., 111 [51 Am. Dec. 671]; *Jackson v. Inabnit*, 2 Hill Eq., 412; *Arthur v. Anderson*, 9 S. C., 249; *Fraser v. Davie*, 11 Id., 69.

It is not disputed that the deeds challenged here were put in the possession of Mrs. Coker, one of the grantees, by Evander Byrd. In the case of *Hagood v. Harley* (8 Rich., 328), there is a strong intimation, and authority referred to in support of the intimation, that when a grantor puts a deed into the possession of the grantee, to be his deed upon the performance of a condition, that this is an absolute delivery, and the subsequent words

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are *void and repugnant. This could only relate to the deed to Mrs. Coker, and according to our view of the case it is not necessary to rest the decision of this question upon it.

The deeds having been put in the possession of Mrs. Coker, the question is, with what purpose was it done? The testimony as to what was said and done at the time of the act is conflicting. Mrs. Coker testifies that when the deeds were executed on July 13, 1870, her father gave the deed to her into her hands; that her two brothers, Peter and Lewis, were minors and absent from home

and that her father offered to her the deeds to them, and said: "This is law, you must stand proxy for the boys as they are not here," and that then she took these deeds and gave them to the boys upon their return from school. She also says that the deed to her brother David was at that time delivered to him, and that he requested her to keep it for him, which she did.

It is not our purpose to go, with any degree of detail, into the testimony; but we will mention some of the circumstances testified to in support of the testimony of Mrs. Coker. Among these are the facts that at the time the deeds in controversy here were executed, similar deeds of equivalent parcels of land were made to Mr. Moore, son-in-law, and to David, son of Evander Byrd. Some days subsequently to the execution of the deeds, all of them were carried by Evander Byrd to Darlington and duly probated. Moore went with Evander Byrd that day, and received his deed from him that day. Upon his return home Evander Byrd gave all the deeds, save Moore's, into the possession of his daughter, Mrs. Coker. It does not appear that David was present then, but some time after he took his deed into his possession, with the knowledge of Evander Byrd; Peter and Lewis were still away from home. A short time before the execution of the deeds Evander Byrd had given to his son John one thousand dollars in money, which was considered about the equivalent of the quantity of the land conveyed by each deed. One of the daughters of Evander Byrd was married and living in the West; a parcel of land about equal in value to the separate parcel conveyed was reserved for her, but no deed to her made. In addition to the foregoing facts is the striking fact that Byrd upon the recurrence of the next time, after the execution of the deeds,

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for listing *property for taxation, returned to the auditor for taxation all the land conveyed to these defendants as their property respectively. If the testimony of Mrs. Coker is true, then certainly the intention of Evander Byrd to deliver the deeds at the time they were put in her possession is clearly proved. Else, why stand proxy for the boys except to receive what was intended to be delivered to them?

On the other hand, Evander Byrd testifies in substance that when he put the deeds in possession of his daughter, Mrs. Coker, he had no intention to deliver the deeds, but meant to retain control of them and keep them in lieu of a will, and that they were delivered to Lewis and Peter, and the one to herself retained by Mrs. Coker, in violation of his intention and her trust. This testimony is corroborated by the statements of Moore, that when the deeds were brought back after they had been probated, Evander Byrd handed them to Mrs. Coker, saying: "Take care of them for me." Isaac Gainey says that Lewis

told him since the commencement of this action that "he had heard that his father was not going to give them these deeds, and he got his sister to get them out for him." W. E. Coker testifies that Peter told him since the commencement of this action "that his father had not put him in possession of the land." If the testimony of Evander Byrd is true, then beyond question there was no delivery. No useful purpose will be subserved by extending this opinion with a fuller discussion of the testimony relating to this issue.

The Circuit Judge, a magistrate of great experience in the trial of causes at the bar and on the bench, after hearing and seeing the witnesses and listening to the argument of counsel, declares himself satisfied that the preponderance of the evidence is in favor of the defendants, and adds that the manner and testimony of Mrs. Coker were more satisfactory to him than that of Evander Byrd. These are the two leading witnesses, and in effect their testimony is conflicting. It goes without the saying that a man of intelligence and long experience in the trial of cases acquires a degree of art in forming correct beliefs as to the credibility of witnesses almost unerring. This fact renders this court, which has not the advantage of observing witnesses under examination, slow in reversing a finding of

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fact by a Circuit *Judge, in cases where the testimony is conflicting, and opinions therefore of the credibility of witnesses must be formed, unless the overbearing weight of the testimony is clearly against the finding. Neither is it a safe rule to set aside such a finding upon a consideration of the probabilities of human conduct. Every one conversant with human affairs knows that not unfrequently it is the improbable that happens, and whether the happening seems probable or improbable depends largely upon the point of view and a knowledge of obscure motives and reasons of conduct which are concealed, and ignorance of which may lead to erroneous conclusions and injustice.

This court agrees with the Circuit Judge, that upon the whole case the weight of the testimony is in favor of the allegations of the defendants Sarah, Peter, and Lewis, and that the deeds in dispute were duly delivered.

The second ground of appeal makes the question that plaintiff had no notice of the delivery of the deeds. The deeds were executed on January 4, 1870, but were not recorded on the day of the execution of the bond and mortgage, to wit, July 13, 1871. Evander Byrd informed the plaintiff at and before the execution of the bond and mortgage that the deeds had been made; but added that only the deeds to Moore and David had been recorded and delivered. Upon an examination of the registry office at Darlington, plaintiff found the deeds to Moore and David recorded and

the others not. These facts were calculated to induce him to believe that Evander Byrd had correctly informed him as to the status of the deeds, yet he knew the deeds had been made. Evander Byrd did not produce them or inform him where they were. They might have been delivered and not recorded. He had paid taxes on the land described in the deeds in the names of the grantees respectively at the request of Evander Byrd. He had asked John Byrd why it was that Mrs. Coker's tax was the largest, and had been informed that her father had given her the home place which was most valuable.

These facts show that plaintiff had express and explicit notice of the existence of the deeds. If they had been duly recorded and inspected by plaintiff, he would have had no more information, for the recording would

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not have established the delivery. He *in point of fact had more information than he could have derived from an inspection of the record, if they had been recorded, for Evander Byrd had admitted to him the existence of the deeds and recognized their efficacy by asking him to pay taxes upon the land listed in the name of the grantees. The plain dictates of common prudence required the plaintiff under these circumstances to ascertain the actual state of the facts, or be bound by them as they were. *City Council v. Page*, 1 Speers Eq., 212; *Wallace v. Craps*, 3 Strobb., 268; *Farr v. Sims*, Rich. Eq. Cas., 122 [24 Am. Dec. 396]; *Black v. Childs*, 14 S. C., 321.

Plaintiff's counsel proposed to ask Evander Byrd, when he was being examined as a witness: "Did you owe other debts, discovered after, and not known at that time?" This question was objected to, and the objection sustained by the Circuit Judge. The fourth ground of appeal alleges the rejection of this question as error. The time referred to in the question was the time when the deeds were executed. The object of the question was to show that these deeds, being voluntary, were as to existing debts fraudulent and void. Actual fraud was not alleged, nor offer made to prove it. It will be borne in mind that there were outstanding debts against Evander Byrd at the time of the execution of the deeds, and upon these debts judgments were obtained after the deeds were executed. The judgments were, and could only be, assigned to plaintiff after the deeds were made, for they were not in existence before. For the money expended in their purchase, he took from Evander Byrd the bond and mortgage he seeks to enforce in this action. The rate of interest stipulated for in the bond was larger than that borne by the judgments. The money which the bond and mortgage was given to secure was paid by plaintiff after the deeds were made. It is obvious, therefore, that any rights plaintiff

acquired under the bond accrued subsequent to the execution of the deeds, and they are not, therefore, though voluntary, a fraud upon the rights he seeks to enforce in this action. The question ruled out by the Circuit Judge was irrelevant in this action.

The fourth ground of appeal is, because his honor erred in holding as follows: "If plaintiff did not have notice of said deeds, or the same as voluntary were fraudulent as to

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creditors then exist*ing, still I could not give him here the remedy he seeks, because I find that he has in his hands money of the mortgagor not applied to the mortgage, with intent to keep it open and enable mortgagor in this case to set aside his voluntary deeds; and because plaintiff has a chattel mortgage for same debt and judgments at law assigned to him which he has not attempted to enforce, and that purposely and by favor to the mortgagor, to enable him to invalidate said deeds in this action." It has been decided above, that plaintiff had notice of the deeds, and that they were not fraudulent as to any rights which plaintiff seeks to enforce in this action. It is, therefore, manifestly unprofitable to discuss in this opinion what would be his rights upon a supposition that he had no notice of the deeds, and that as to him they were fraudulent.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 96

BONHAM v. BISHOP.

SAME v. KING.

SAME v. BALLARD.

(November Term, 1884.)

[1. *Ejectment* ⇨86.]

Where the defendants, in action for the recovery of real property, admit that the plaintiffs are the heirs at law, of a person who once had title, but claim that title now to be in themselves, the onus is upon the defendants to prove their title.

[Ed. Note.—Cited in *Johnson v. Cobb*, 29 S. C. 377, 7 S. E. 601.

For other cases, see *Ejectment*, Cent. Dig. § 244; Dec. Dig. ⇨86.]

[2. *Execution* ⇨271, 272.]

Judgment, execution, levy, and sale are all links in the chain of title to property purchased at sheriff's sale; and while generally a purchaser is not required to look into the regularity of the process under which the sale is made, this is not so where the process is absolutely void, or where the purchaser is the plaintiff in the execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 782; Dec. Dig. ⇨271, 272.]

[3. *Estoppel* ⇨68.]

Parties cannot claim the ownership of a tract of land under a judgment in their favor in a former action of trespass to try titles, and at the same time claim it as purchasers at sheriff's sale, under their own execution issued for the damages and costs only, in the same

case; the two claims are absolutely inconsistent.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. ☞68; Ejectment, Cent. Dig. § 84.]

[4. *Taxation* ☞730.]

A purchaser of land at a tax sale in 1867 was not entitled to recover the land for a longer term than seven years, under the act of 1791. 7 Stat., 277.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1463; Dec. Dig. ☞730.]

[5. *Execution* ☞32, 33.]

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*A vested remainder or reversionary interest in land is, before it vests in possession, the subject of levy and sale under execution, and it is not necessary to state in the levy or in the deed the nature of the interest so levied and sold. Mr. Justice McGowan not concurring, under the facts of this case.

[Ed. Note.—Cited in *Ex parte Crawford & Sons*, 27 S. C. 162, 3 S. E. 75.

For other cases, see Execution, Cent. Dig. § 79; Dec. Dig. ☞32, 33.]

[6. *Appeal and Error* ☞854, 856, 1031.]

The judgment in a case tried by a jury cannot be affirmed upon grounds not submitted to the jury. If the instructions were erroneous, and yet not immaterial, there must be a new trial.

[Ed. Note.—Cited in *National Bank v. Anderson*, 32 S. C. 547, 11 S. E. 379; *Amaker v. New*, 33 S. C. 37, 11 S. E. 386, 8 L. R. A. 687; *Fleming v. Fleming*, 33 S. C. 510, 12 S. E. 257, 26 Am. St. Rep. 694; *Park v. Brooks*, 38 S. C. 305, 17 S. E. 22; *Rapley v. Klugh*, 40 S. C. 153, 18 S. E. 680; *Parr v. Lindler*, 40 S. C. 201, 18 S. E. 636; *Jones & Williams v. Fitzpatrick*, 47 S. C. 61, 24 S. E. 1030; *Rice v. Bamberg*, 50 S. C. 508, 38 S. E. 209; *Lewis v. Hinson*, 64 S. C. 579, 43 S. E. 15; *Cole v. Blue Ridge Railway*, 75 S. C. 150, 55 S. E. 126.

For other cases, see Appeal and Error, Cent. Dig. §§ 3429, 4043; Dec. Dig. ☞854, 856, 1931.]

Before Hudson, J., Spartanburg, November, 1883.

The facts of this case appear in the opinion of the court. The judge's charge was as follows:

By the pleadings the title to the land is put in issue, and this casts upon the plaintiffs the burden of showing a perfect title in themselves. They must recover upon the strength of their own title, and not upon the weakness of that of their adversaries. A perfect title must be traced to a grant from the State. In the absence of a grant, a title may rest upon the presumption of a grant. A grant will be presumed when it is in proof that for twenty years or more, citizens of the State, one or more, have been in the actual occupancy of the land, openly and notoriously claiming the same adversely to all persons. Connection with such a title by possession will dispense with the necessity of proving a grant. In the present case the plaintiffs have shown a grant from the State to their ancestor, Ephraim Bonham, in 1852, and his possession of the land thereunder until his death intestate in 1869, and, besides this, they have shown that for forty years or more their

said ancestor actually used and occupied the premises as his own.

This is sufficient proof of title in their ancestor, and through him in themselves, and will entitle them to recover, unless the defendants show a superior title. This they claim to have done by proof of the recovery of this land from Ephraim Bonham by R. E. Cleveland and J. L. & A. Hill, and by connecting themselves by a chain of conveyances with the title of these persons. If it be true that by the judgment of a court of competent jurisdiction these persons did recover of Bonham the land now in dispute by showing a

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better title in fee, and the defendants derive title from these successful litigants, then the verdict must be for the defendants. To succeed in this proposition, the defendants must show a final judgment upon the question of title and recovery. The record produced shows a verdict in favor of Cleveland and the Hills against Ephraim Bonham, but the judgment entered up thereon is only for damages and costs.

[The judge at first instructed the jury that such a judgment is not conclusive of the question of title, but upon reflection recalled the instruction and charged that the record of the verdict and judgment is such as is conclusive of the question of title then in issue. He then stated to the jury that if the effect of that recovery was to fix the fee of the land in Cleveland and the Hills, it was a singular proceeding that they should enter up judgment for damages and costs, issue execution thereon, and sell the newly recovered land as the property of Ephraim Bonham. If they recovered the fee, such an anomalous proceeding was nugatory and void, because they could not sell their own land to satisfy an execution against Ephraim Bonham.]

Then was their recovery under a tax title? A witness has said something of a tax title, but no one has testified that they were bought originally at a tax sale. In that suit, however, their writ and declaration speak of the land as having been sold for taxes. Such is the allegation of Cleveland and the Hills in their suit against Bonham. Now, if in 1867 they bought this land at a tax sale, they bought for a term of years not exceeding seven. That period having elapsed, the title reverted to Ephraim Bonham or his heirs at law. If under the judgment against Bonham for \$35 and costs it was attempted to sell this reversion, the record must so show, or there must be proof of the fact. It was competent so to sell; but the question is, was it done? If so, the levy should show it. It devolves upon the defendants to show by satisfactory proof the fact of the recovery of this land of Ephraim Bonham by those under whom they claim, and the extent of that recovery, both as to the quantity of the land, its metes and bounds, and the quality of the estate therein. They must be able to identify

the land recovered to a reasonable certainty, otherwise the plaintiffs here must prevail. If the statements in the record of that suit, and

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the relative circumstances, satisfy *the jury that Cleveland and the Hills only became the owners of a tax title, the plaintiffs here must recover; but if, on the other hand, the evidence from the record and witnesses satisfies the jury that they bought the fee in the land now in dispute, taking all the proceedings in review, then the verdicts here must be for the defendants.

During the progress of the charge the judge was requested by the defendant's counsel to instruct the jury that there was no evidence that the land was bought by Cleveland and the Hills at a tax sale. This he declined to do, leaving it to the jury to say whether or not the statements in their writ and declaration, and the circumstance of resale, &c., amounted to proof on this subject. He was then requested to instruct the jury that the reversion after the termination of the tax title may have been sold under the execution for \$35 and costs. He held that it was competent to have made such a sale, but whether it was so made was a question for the jury, and stated that the levy should show it.

The jury rendered in each case a verdict for the plaintiffs for the land in dispute, and thereafter the plaintiffs entered up their judgment against the defendants. From this judgment the defendants appeal to this court on the grounds stated in the opinion.

Messrs. Duncan & Sanders, Bobo & Carlisle, for appellants.

Mr. J. S. R. Thomson, contra.

May 9, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. These actions, for the recovery of real property, involving the same facts and principles of law, were heard together on the Circuit, and will be so considered here. Ephraim Bonham, of Spartanburg County, was seized of a tract of land containing, according to his grant, 418 acres, more or less, of which he was in possession until he died in 1869 intestate. The plaintiffs are his heirs at law, and finding that parts of this land of their ancestor were in the possession of strangers, in 1881 brought three separate actions, one against each of them for the portion claimed by them respectively.

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The defendants conceded *that Ephraim Bonham once had title to the lands, and that the plaintiffs were his heirs; but they claimed that each of them had title to the parcel in his possession from Robert E. Cleveland and J. L. & A. Hill, as purchasers at a sheriff's sale under some verdict or judgment obtained against the said Ephraim Bonham in his lifetime. The real question was, whether that proceeding and the alleged purchase under it divested Ephraim Bonham and his heirs of

the title, and transferred it to the said Cleveland and Hills.

It appeared that in October, 1867, Robert E. Cleveland and J. L. & A. Hill commenced an action of trespass to try titles against Ephraim Bonham for a tract of land "containing 286 acres, more or less, being the same as was sold by the sheriff of the district and State aforesaid, by virtue of tax execution against the said defendant, Ephraim Bonham, for State and district taxes." It seems that there was no appearance or defence made, but the declaration has endorsed on it what would seem to be a verdict, in these words: "We find for the plaintiffs the land in dispute and thirty-five dollars damages." When this verdict was rendered does not clearly appear, but at the spring term of 1869 a judgment, in form upon execution of a writ of inquiry, was entered alone for the damages, \$35, without making the least reference to the verdict for the land. On this judgment was issued an execution, which was levied on the identical lands which were embraced in the verdict "as the property of Ephraim Bonham at the suit of R. E. Cleveland and J. L. & A. Hill." Under this levy the land was sold by the sheriff on June 7, 1869 (probably after the death of Bonham), and bid off for \$5 by the plaintiffs in execution, R. E. Cleveland and J. L. & A. Hill, who took sheriff's title, and the defendants held under them.

The defendants made several requests to charge, which will appear in the exceptions. The jury rendered a verdict for the plaintiffs in each of the cases, and the defendants appeal to this court upon the following exceptions, complaining that the judge erred:

1. "In charging that there was evidence that R. E. Cleveland and the Hills had bought the land in dispute at a tax sale.

2. "In charging that if the suit of R. E.

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Cleveland and the *Hills against Ephraim Bonham, in the action of trespass to try title for the land now in dispute, was based on a tax title, then they could only have recovered the land for seven years, and defendants' title in this case cannot stand.

3. "In charging that if the jury find that in the action of trespass to try title, the plaintiffs, Cleveland and the Hills, recovered their verdict on a tax title, they, or those claiming under them, could only hold said land for seven years from the date of the recovery, and if the seven years have already expired, their verdict must be for the plaintiffs.

4. "In charging, if the jury believe that the land in dispute was covered by the verdict in the suit of Cleveland and the Hills against Ephraim Bonham in the action of trespass to try titles, their verdict must be for the plaintiffs, if Cleveland and the Hills based their claim to the land on a tax title.

5. "In charging that if Cleveland and the Hills recovered the land in dispute on a tax

title and for seven years, the reversion in the land could not be sold to satisfy the judgment for damages and costs unless the levy specified that such reversion had been levied.

7. "In not charging that there was no evidence going to show that, in the suit of Cleveland and the Hills to recover the land now in dispute, the title of the said Cleveland and Hills rested upon a tax title."

In settling the case, the presiding judge stated that exceptions 6, 8, 9, 10, and 11 were founded on a misapprehension of his charge, and, therefore, it is unnecessary to set them out here.

The defendants claimed title in themselves, and the onus was upon them to show it. They, however, offered no proof of title outside of the record in the trespass case against Ephraim Bonham, and the deed of the sheriff under the levy and sale in that case; so that the single question was whether those proceedings were sufficient to transfer the title. That record was certainly a very remarkable one, and, as the Circuit Judge said, in some respects embarrassing. There was no sworn proof that the defendant was ever made a party by service of process; no evidence that he appeared or defended; no judgment was entered for the lands, but only for the damages assessed, and the execution

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issued *thereon was levied upon the identical land embraced in the verdict of the plaintiffs, who became the purchasers at the sheriff's sale for \$5.

There is a rule that, generally, purchasers at sheriff's sales are not required to look into the regularity of the process under which the sale is made; but that does not apply when the process is absolutely void, or the purchaser is the plaintiff in execution, and fairly chargeable with notice of the terms of his own process. *Small v. Small*, 16 S. C., 72. The judgment, execution, levy, and sale are all links in the chain of title to property purchased at sheriff's sale. All are necessary, and if either is void, the title of the purchaser fails. Cleveland and the Hills, the plaintiffs in the trespass suit, were also purchasers at the sheriff's sale under their own process, and, being chargeable with notice, could not set up inconsistent rights. They could not claim to have title to the land under the verdict, and at the same time as purchasers at the sheriff's sale, for the obvious reason that the two things were absolutely inconsistent. If the verdict gave them title, then there was no interest left in Bonham, which they could levy and sell. They were not invested with title by the naked verdict, which was never put into a formal judgment or enforced by writ of habere facias possessionem, and the real question was whether they had title under the sheriff's deed. Then as to the judgment and levy and sale by the sheriff. It is not quite clear that the judgment entered for the damages alone, omitting all reference to the land

embraced in the same verdict, was regular and valid, for the reason that it was not in conformity with the verdict. It is very important that there should be consistency in records, and if that rule had been observed in this case, all the subsequent confusion would probably have been avoided; but as the point was not made in the Circuit Court, we will make no ruling upon it.

Exceptions 1, 2, 3, 4, and 7, complain that the judge committed error, in charging that there was some evidence that Cleveland and the Hills purchased the land at a tax sale against Bonham; and that if the jury so found, their recovery was only for seven years, which had expired. Upon that subject the judge charged as follows: "Now, it is very clear that it is the final judgment that concludes all mat-

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ters in issue between parties *and their privies. It is clear also that the judgment in the former suit speaks only of damages and costs. Hence, I at first instructed the jury, that such a judgment was not conclusive as to the title to the land and the right to possession thereof. But on reflection, considering the verdict of the jury on which it was rendered, I recalled my instruction and charged them that the record in that action was conclusive of matters in issue between the parties. The question was then submitted as to what title was in issue. What right, title, and estate did the plaintiffs in that action seek to enforce against Ephraim Bonham? No evidence of their previous title was introduced in the present action, and the record of former suit and proceedings thereunder alone could be examined to ascertain this fact. Nothing is spoken of in the writ and declaration as causing a loss of the land by Bonham, except that it was sold to pay taxes. This statement and the fact that under the execution issued on the judgment, the same land was again sold as the property of Bonham, the jury were allowed to consider, in determining the extent of the recovery of Cleveland and the Hills. I instructed them that if they found that they recovered only a tax title, it terminated in seven years. 7 Stat., 277."

From the foregoing it will be seen that the judge did not charge as alleged, that there was some evidence that Cleveland and the Hills bought at a tax sale. Nothing was said as to who bought at the tax sale, but that "nothing is spoken of in the writ and declaration as causing a loss of the land by Bonham, except that it was sold to pay taxes." That was literally true according to the record itself. Besides, that was the only view consistent with the acts of the parties, and particularly the omission of the plaintiffs to enter judgment for the land, and allowing the defendant, Bonham, to remain in possession during his life.

Nor do we think it was error to charge the jury that if they found that the land was originally sold under a tax title, as stated in

the declaration, and the plaintiffs proved no other title, that their recovery was limited to the term of seven years, under the act of 1791, which provided that "Whenever any collector shall levy on any property of any defaulter, for any tax or duties as aforesaid, he shall not put up for sale in any one lot, more than he believes will be sufficient to pay

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the sum due by such defaulter, *together with the charges of legal process, * * * and if the sale be made of land, he shall not sell the same for any longer term than seven years." 7 Stat., 277.

Exception 5 complains that the judge committed error in charging "that if Cleveland and the Hills recovered the land in dispute on a tax title and for seven years, the remainder of Ephraim Bonham in said land could not be sold to satisfy the judgment for damages unless the levy specified that such remainder had been levied on." Upon that subject the judge charged as follows: "I also charged the jury that the reversion to Bonham could be levied on and sold under execution, but if such were claimed by the defendants to have been done, they must show it either from the record of the levy and sale or otherwise, and that the levy should show it." A majority of the court think this was error. There is no doubt that a vested remainder or a reversionary interest in land, is the subject of levy and sale under execution before it vests in possession. *Harrison v. Maxwell*, 2 Nott & McC., 347 [10 Am. Dec. 611]. It is also true that ordinarily a levy and sale of the land itself, will carry to the purchaser such interest of the defendant without expressly stating in the levy that the remainder as such is levied. This opinion of a majority of the court makes it necessary to set aside the judgment below, with a view to a new trial.

But I cannot refrain from saying that it seems to me, that this is a peculiar case, and the above rule should not be applied to it. The rule of course should not apply unless the whole proceeding is fair and bona fide. I have a strong impression that the circumstances of this case were well calculated to mislead and did actually mislead the public. Suppose the plaintiffs, who directed the whole land levied under their execution, had announced at the sale that they had already recovered the land from Bonham, and notwithstanding this, still ordered it to be sold under the execution, and purchased it for five dollars—that is to say, as it turned out, the reversion therein, can there be a doubt that the sale would have been void? "If a bidder make representations to deter other bidders and is successful in deterring them, his purchase is fraudulent and void and will be set aside." *Rorer Exec. Sales*, § 750, and

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authorities. It seems to me that the *circumstances here substantially make such a case. The plaintiffs in the trespass case had a verdict on file, in its terms unlimited and absolute, for the very land levied. They were the only persons who knew that that verdict actually gave them the land only for seven years, and that after that time there was a reversion in the defendant, Bonham. The levy gave no hint of the existence of such an interest, which was in fact contradicted by the record. The sheriff's deed is not in the "Brief," but it is there stated that it was in the usual form and conveyed "the land covered by the grant," &c. Under these circumstances I cannot say that it was error in the Circuit Judge to tell the jury that those claiming that the reversion was sold and well conveyed under that levy and sale "should show it either from the record of the levy and sale or otherwise."

The additional grounds upon which the respondent seeks to sustain the judgment below, notwithstanding there may have been error in the charge, cannot be considered. While it is true that a judgment below in a case tried by the court may be affirmed upon other grounds than those upon which the Circuit Judge placed it, the same is not true of a case tried by a jury. If erroneous instructions have been given to the jury, we cannot know that the conclusion reached by the jury was not the result of such instructions, and therefore this court is bound to grant a new trial, even though there may be other correct legal propositions applicable to the case, which, if they had been laid before the jury, might have induced them to find the same verdict: because if such additional instructions are not given and not asked for, we cannot conjecture what effect they would have had upon the minds of the jury. A verdict is the compound result of the legal instructions given to the jury by the court and of their findings of fact applied to the legal principles laid down for their guidance, and if there is error in the instructions, then there is necessarily error in the judgment, and it must be reversed. It is true that there may be a case in which, in any view of the facts, the plaintiff could not recover; and if in such a case there should be some erroneous instructions given to the jury, the judgment below might be sustained, notwithstanding such erroneous instructions. But the present is not such a case.

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*In accordance with the view of a majority of the court, the judgment of this court is, that the judgment of the Circuit Court be set aside, and the cause remanded for a new trial.

Mr. Chief Justice SIMPSON and Mr. Justice McIVER concurred in the result.

23 S. C. 106

LECONTE v. IRWIN.

(November Term, 1884.)

1. The decision of this court in *LeConte v. Irwin* (19 S. C., 554), stated.

2. Under the ruling of this court on the former appeal, the purchaser was entitled to an order confirming the master's report on sales, no additional facts being shown in opposition to the motion.

[3. *Mortgages* ⇨526.]

On a motion to put the purchaser into possession of premises sold under a decree of foreclosure, the defendant cannot resist the motion upon grounds known to him at the time the report on sales was confirmed; he is concluded by the order of confirmation.

[Ed. Note.—Cited in *Murchison, Executrix, v. Miller*, 64 S. C. 430, 42 S. E. 177; *Bank of Columbia v. Havird Co.*, 99 S. C. 114, 82 S. E. 1007.

For other cases, see *Mortgages*, Cent. Dig. § 1534; Dec. Dig. ⇨526.]

[4. *Mortgages* ⇨575.]

The judgment of foreclosure having provided that the purchaser be let into possession on the production of the master's deed, the Circuit Judge erred in granting an order directing the sheriff to put the purchaser into possession, an appeal having been noticed by the defendant from a previous order, at the same term, confirming the report on sales.

Mr. Justice McGowan, dissenting.

[Ed. Note.—Cited in *Elliott v. Pollitzer*, 24 S. C. 86; *Kaminsky v. Trantham*, 45 S. C. 10, 22 S. E. 746; *Rhodes v. Southern Ry.*, 68 S. C. 502, 47 S. E. 689.

For other cases, see *Mortgages*, Cent. Dig. § 1652; Dec. Dig. ⇨575.]

[This case is also cited in *Ex parte Winkler*, 31 S. C. 180, 181, 9 S. E. 792; *Murchison v. Miller*, 64 S. C. 428, 42 S. E. 177, without specific application.]

Before Fraser, J., Richland, April, 1884.

The opinion of this court sufficiently states the case.

Mr. R. A. Lynch, for appellant.

Messrs. Lyles & Haynsworth, contra.

May 19, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. In this case two distinct appeals were taken from two distinct orders, made on different days, and it is due, not only to the Circuit Judge whose orders are appealed from, but also to the parties, that this should be constantly kept in mind while considering the questions raised. The

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first is an *appeal from an order granted on April 14, 1884, confirming the report on the sale heretofore ordered in this case, and the second is an appeal from an order granted on April 24, 1884, requiring the sheriff to put the purchaser at such sale into possession of the premises sold under the order of the court and bought by him.

In considering the first appeal, this court is bound to confine its attention to what was before the Circuit Judge when he granted

the order appealed from, uninfluenced by anything that may have been presented to the Circuit Judge when the order was granted ten days afterwards, from which the second appeal was taken. This is manifest from the very nature and functions of this tribunal, which, except in certain cases not applicable here, has no original jurisdiction, but is confined simply to the exercise of a reviewing or appellate power. All that this court can do is to examine into the case as presented in the court below with a view to ascertain whether any error has been committed. It cannot hear any new or additional facts, but must confine its consideration to such facts as the court below acted upon in rendering the judgment or passing the order appealed from. It follows, therefore, that in considering the first appeal in this case we cannot go outside the showing which was made to Judge Fraser when he granted the order confirming the report of sales, and of course cannot consider any facts which were presented to him ten days afterwards when he granted the order from which the second appeal has been taken.

Looking, then, at the first appeal in this light, I do not see how there can be a doubt as to the correctness of Judge Fraser's order. He had before him no facts other than those which were before this court at the hearing of the former appeal in this case (19 S. C., 554), and upon those facts this court had reversed the order of Judge Hudson setting aside the sale, not simply on the ground that a proceeding by mere motion was not a proper proceeding for that purpose (although that was mentioned as an additional reason), but, as I understand it, upon the ground that a bona fide purchaser at a sale under a judgment, not void, but voidable merely, who has paid the purchase money and received titles cannot be divested

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of such title by the subsequent reversal *or vacation of such judgment. For in that case the court said: "We believe it settled by the great preponderance of authority that property acquired by a bona fide purchaser at a judicial sale under orders regular in form and voidable only, shall not be affected by a future reversal or vacation of the judgment." And the court then went on to adjudge that Monckton was a bona fide purchaser, and as such entitled to the benefit of the rule above stated, and therefore reversed so much of Judge Hudson's order as set aside the sale.

These points being thus adjudged, it seems to me that it necessarily followed that Monckton was entitled to an order confirming the sale whenever he applied to the Circuit Court for the same. It is true, that one of the grounds of appeal from Judge Hudson's order was that he had erred in refusing the motion to confirm the sale, and that this matter was not specially mentioned in

the opinion of the Supreme Court, as it was not necessary that it should be, for the reason just mentioned, especially as Judge Hudson's order was allowed to stand so far as it vacated the judgment, only upon the ground of excusable neglect on the part of the defendant to put in her answer, and allowed her to do so. It was not for this court to grant the order confirming the sale, but only to determine the rights of the parties, and this determination, as I have said, necessarily involved the right of the purchaser to such an order whenever he applied for it to the proper tribunal, the Circuit Court. It seems to me, therefore, that the order confirming the sale should be affirmed.

The question raised by the second appeal is whether the Circuit Judge erred in granting the order making the rule absolute against the appellant, and requiring the sheriff to put Monckton, the purchaser, into possession of the premises sold. Appellant contends, first, that the showing made in the return to the rule was sufficient to prevent the granting of the order appealed from; and second, that in any event the notice of appeal from the order confirming the sale operated as a stay of any further proceedings, and that, pending such appeal, the Circuit Judge erred in granting the order to eject the appellant and put the purchaser into possession.

A brief review of the facts of the case

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will be necessary for a *proper understanding of the first contention on the part of the appellant. On October 13, 1881, the plaintiff instituted this action against the defendant to foreclose a mortgage of the real estate in question, given to secure the payment of a bond bearing date October 7, 1880, payable in four equal annual instalments, with interest from that date, only one of said instalments being then due. To this action the defendant was regularly made a party, but she put in no answer and made no defence. The case was referred to the master, who, on July 25, 1882, made his report, stating that there was then due the first instalment and interest, and that the remaining instalments were not then due. On hearing this report the court granted an order on July 28, 1882, requiring the defendant to pay the whole amount of the bond, as well the instalment then due, as those which had not then become payable, on or before the first day of September, 1882, and in default thereof that the mortgaged premises be sold. Under this order the premises were offered for sale by the master on salesday in November, 1882, and bid off by J. Q. Marshall, the attorney for the plaintiff in the action, who subsequently transferred his bid to W. H. Monckton.

On February 7, 1883, Monckton complied with the terms of the sale, and title was made to him by the master. On the very next day the defendant gave notice of a mo-

tion to set aside the judgment and all proceedings thereunder upon two grounds: "First, that if certain money paid by the defendant to the plaintiff or her agents had been properly credited upon said bond, no right of action would have accrued to the plaintiff; and, second, for surprise, in this, that the defendant was not aware, until judgment had been obtained against her, that the payments referred to had not been credited upon the bond." Upon hearing this motion, Judge Hudson granted an order setting aside said judgment and the sale made thereunder, and granting the defendant leave to file her answer. From this order the plaintiff and Monckton appealed, when this court allowed so much of Judge Hudson's order to stand as vacated the judgment and allowed the defendant to come in and answer, but reversed so much of it as set aside the sale. See *Le Conte v. Irwin*, 19 S. C., 554. Subsequently to the filing of the decision of this

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court, the defendant put in her *answer, alleging, amongst other things, that the first instalment of the bond had been paid before the action was commenced, but making no allegation of fraud in the obtaining of the judgment of foreclosure. The issue thus raised was pending at the time the orders appealed from were granted.

The defendant in her return to the rule states, amongst other things, that on the morning of the same day, to wit, April 14, 1884, that the order confirming the sales was made, but that at an earlier hour than that at which such order was signed, the defendant herein had commenced an action, by the service of a summons and complaint, against the plaintiff herein and the said Monckton, and "that it is therein alleged under oath that the judgment obtained against this respondent was so obtained by fraud, and the sale a fraud against her; that the plaintiff therein be allowed to pay whatever may be found to be due upon her bond, and that she be allowed to redeem the premises upon payment of the bond, and that W. H. Monckton be ordered to deliver up the title to him to be cancelled, upon her so doing; that the purpose of the suit is to establish the fraud and set aside the sale, and that a speedy trial is expected." There is nothing in the return which alleges that Monckton was a party to the alleged fraud in obtaining the judgment, or even that he had any knowledge thereof. Four days afterwards she made a further return, in which she stated that before the sale by the master, Monckton asked her if her property was for sale, to which she replied "that she had heard so, but that whoever bought it would never get it; that she had paid Mrs. Le Conte more money than was due, and that she owed her nothing. * * * That the said W. H. Monckton was fully apprised of the intention of this respondent to resist the enforce-

ment of the decree of foreclosure taken against her, and bought the property at his peril."

So far as we can discover, this is the only statement or allegation in any way connecting Monckton with any implication in, or knowledge of, any fraud in obtaining the judgment under which the sale was made, even if this could be regarded as importing any allegation of fraud against any one. It is simply an assertion that there was nothing due on the bond at the time the action was commenced, a fact which the defendant

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had had an *opportunity of asserting and proving, which she had neglected to avail herself of, and that, therefore, she intended to resist the enforcement of the judgment. It cannot be distorted into a charge of any fraud in obtaining the judgment. These facts certainly did not furnish any sufficient reason for discharging the rule, for the Circuit Judge had also before him the fact that an order confirming the sale had been granted, and this precluded any inquiry into such facts. When the application for the order to confirm the sale was made, these facts were not brought to the attention of the Circuit Judge, as they should have been, for that order was granted on April 14, 1884, and the returns stating these facts were not sworn to until the 19th and 23d of April.

In *Pope v. Frazee* (5 S. C., 269), it was held that an order confirming a sheriff's report of sales under a judgment of foreclosure is a bar to an action against the sheriff and the purchaser to set aside the sale on the ground that it was null and void, as being in violation of the statute forbidding a sheriff from purchasing at his own sale. In that case the following language, applicable to this case, was used by the court: "If there was fraud or illegality, it should have been shown when the motion to confirm the report was made. The confirmation stopped the mouths of all who were interested in the matter, and who had the privilege of then speaking." It is true that there may be cases in which a subsequently discovered fraud might be sufficient ground for opening the order of confirmation, but in this case there is no allegation, and certainly no proof, that the facts relied upon as vitiating the sale were discovered after the order confirming the sale was made; and, on the contrary, it appears from appellant's own return that she not only knew the facts now relied upon, but that she had actually commenced an action to set aside the sale before the order was granted, though for some inexplicable reason she failed to bring these matters to the attention of the Circuit Judge when the order confirming the sale was applied for.

Indeed, this case presents a series of delays or neglects on the part of the defendant, which it is very difficult, if not impossible, to account for. 1st. When the action was

originally commenced on a bond, upon which only one of the instalments was then due, it seems unaccountable that the defendant, who

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now *claims to have paid that instalment in full, should have neglected to appear and make a showing to that effect, which, if done, would have defeated the action. 2nd. That after the sale was made, although the title was not executed until several months afterwards, we have never yet been able to understand why the defendant should have delayed and neglected until the very day after the purchase money was paid and the title executed, to take any step whatever towards opening the judgment. 3d. That when the application for the order confirming the sale was made, it is difficult to conceive why she neglected then to make the showing to the Circuit Judge, which only a few days afterwards she did make on the return to the rule requiring her to show cause why the sheriff should not put the purchaser into possession, all the facts contained in such showing being manifestly known to her at the time the order of confirmation was applied for. While, therefore, it may be a matter of regret that these delays, which may possibly have worked injury to the appellant, have occurred, we cannot allow such a feeling to influence our judgment in determining the legal rights of parties litigant. If a party fails to make his defence or present his claim at the proper time and in the proper mode prescribed by law, he must take the consequences.

We think, however, that the Circuit Judge erred in making the rule absolute, while an appeal from the order confirming the sale was pending. By the express terms of the original judgment of foreclosure, the purchaser was only entitled to be let into possession upon the production of a certified copy of the order of sale, and until the appeal from that order was disposed of, the purchaser was not entitled to a certified copy of such order. The defendant certainly had a right to appeal from such order and obtain the judgment of the tribunal of last resort as to its correctness before any proceedings could be had under it, for until such final judgment was obtained, it could not be known whether there was any valid order of confirmation. The notice of appeal from that order operated as a stay of further proceedings under the provisions of section 356 of the code.

The judgment of this court is that the order of the Circuit Court confirming the sale

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be affirmed, and that the order making *the rule absolute, and requiring the sheriff to put the purchaser into possession, be reversed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice MCGOWAN, dissenting. The decree of foreclosure was set aside and the defendant, Margaret Irwin, allowed to an-

swer the complaint as if no judgment had been rendered. It appears that she not only answered, alleging that nothing was due when the decree was rendered, but also filed an original proceeding making Monckton a party, to set aside as absolutely void the judgment and the sale made thereunder. I cannot think that the former judgment of this court involved the confirmation of the sale, and that the matter is in effect *res adjudicata*. In the former appeal the court reversed the order setting aside the conveyance to Monckton, but, although they moved to do so, did not confirm the sale, and I do not see that anything has occurred since to make it proper to do so now.

It is true it does not appear that the action of the defendant to set aside the sale was brought to the attention of the Circuit Judge when he granted the order confirming the sale, but the proceeding was at that time filed, and it was brought to his attention before he granted the second order ousting the defendant from the premises. It has also been brought to our attention that such proceedings are now pending, and under these circumstances it seems to me that it will only add to the confusion of the case, and possibly do injustice, now to affirm the order confirming the sale, the effect of which must be to deprive the defendant of an opportunity to be heard on the new issues raised, and so far as the sale of the land is concerned, to anticipate the result by deciding the case against her in advance. *Pope v. Frazee*, 5 S. C., 272. It seems to me that at the present it would be better simply to withhold confirmation and allow the parties to stand upon their rights until the new issues as to the sale now made and pending are decided.

Order confirming the sale, affirmed; order to put the purchaser in possession, reversed.

23 S. C. *114

*BAXTER v. BAXTER.

(November Term, 1884.)

[1. *Executors and Administrators* ⚭261.]

A debt due by a surety at the time of his death on a county treasurer's bond, for a default of his principal, is a "debt due to the public," and as such is entitled to priority of payment out of the assets of one deceased, under the act of 1789 (Gen. Stat. (1872), 457); but it has not a preference over antecedent liens, either general or special, in the distribution of the proceeds of sale of the property covered by such liens. Cases reviewed.

[Ed. Note.—Cited in *Lockwood v. Lockwood*, 68 S. C. 331, 47 S. E. 441.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 948; Dec. Dig. ⚭261.]

[2. *Executors and Administrators* ⚭274.]

Under action to marshal the assets of one deceased, costs, disbursements, and counsel fees are primarily chargeable on the unencumbered assets, but the expenses incident to the enforce-

ment of liens should be paid out of the proceeds of the encumbered estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1061-1073; Dec. Dig. ⚭274.]

Before Fraser, J., Newberry, February, 1884.

This was an action by Fannie N. Baxter in her own right and as administratrix of her deceased husband, against the children and creditors of the deceased. The decree of the Circuit Judge was as follows:

This case came before me on the report of the master, dated November 14, 1883, and exceptions filed by W. J. Puffie and the State of South Carolina, defendant creditors. I shall announce my conclusions as briefly as I can, it to be obscure:

1. The order in which the debts of a decedent testate or intestate are to be paid out of his estate does not form any part of the contract by which the debt is incurred in his life-time. It pertains only to the remedy. The act of 1878, which was of force at the death of the intestate in this case, controlled the order of payment, and it is the debt, and not the mortgage, which is a mere security for the debt, which is to give the rank in the administration of the assets.

2. I see no reason why a treasurer's bond should hold any higher rank in the administration than the bond of every other public officer, or even recognizance in the sessions. They are all debts due on contracts. If such debts are to be ranked as "debts due the public," and payable as such in the administration, there would be absolutely nothing in this State on which to base a credit. I do not see

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how even a judicial ascertainment of the amount due on the treasurer's bond would alter the situation, except to make the claim rank as a judgment, which in this case has not been obtained.

3. It has never been the practice, so far as I know, to order the general costs, fees, and disbursements in a case like the one now before me paid out of any other than the unencumbered estate. The master seems to have followed this rule.

It is therefore ordered and adjudged, that the exceptions be overruled, and the report of the master be confirmed.

The State of South Carolina duly served notice of appeal from said decree upon the following exceptions:

1. Because his honor erred in overruling appellant's exceptions to the master's report, that the master erred in recommending that the demand against the estate of James M. Baxter, deceased, arising out of his suretyship on the bond of Jesse C. Smith, late county treasurer of Newberry County, should only be paid pro rata with the specialty debts of the said intestate; whereas it is submitted that he should have found that the same ranked as a debt due to the public in the ad-

ministration of the assets of the intestate.

2. Because his honor erred in overruling appellant's exceptions to the master's report, that the master erred in not finding that said demand on account of the suretyship of the intestate on said official bond, takes precedence under the act of 1789 of all other claims against the intestate's estate.

3. Because his honor erred in overruling appellant's exceptions to the master's report, that the master erred in not finding the costs and disbursements of this action, including counsel fees of the estate, should be paid out of the unencumbered personal estate of the intestate; whereas it is submitted that the same should at least be apportioned among the whole personal and real estate of the intestate.

Messrs. George Johnstone and Geo. S. Mower, for appellant.

Messrs. Suber & Caldwell and J. Y. Culbreath, contra.

May 19, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On February 5,

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1881, James M. Baxter departed this life intestate, leaving real estate, various articles of tangible personal property, together with sundry choses in action, which being insufficient for the payment of his debts, this proceeding was commenced to marshal the assets of his estate, call in creditors, and sell the lands. The claims consisted of bonds secured by mortgages of real estate, judgments upon which executions were issued in 1869, bonds unsecured, sealed notes, and open accounts. Amongst the unsecured bonds was one in favor of the State, given by Jesse C. Smith, with the intestate as surety, to secure the faithful performance of his duties as county treasurer. Upon this bond it is conceded, for the purposes of this case, that default has been made, though no judgment has yet been recovered thereon; and one of the main questions in the case is whether this bond constitutes a debt due to the public, and if so whether this will give it priority over the debts secured by liens, either special or general. The only other question is whether the costs and disbursements of this action, including the counsel fees of those representing the estate, should be a charge, primarily, on the unencumbered estate, or whether they should be a charge upon the whole estate.

What constitutes "debts due to the public" in the sense of those terms as used in the act of 1789 (Gen. Stat. (1872), 457), the law in force at the time of the death of the intestate, does not seem ever to have been judicially ascertained in this State. In the case of *The Commissioners of Public Accounts v. Greenwood* (1 Desaus. 150, 600), it seemed to be assumed that a liability for a default on the bond of one of the commissioners of the

treasury was such a debt, though the question was not discussed or decided in that case, inasmuch as the decision was rested upon another ground. In *State v. Harris* (2 Bail., 598), O'Neill, J., in delivering the opinion of the court, expressed the opinion that the meaning of the term "debts due to the public," as used in the act of 1789, was "debts which are due to the State as a sovereign, and for the protection of both the citizen and property," but that debts "which arise ex contractu, and which are therefore due to her in her corporate capacity, or debts which arise ex delicto, and which are the punishment of the law for misdemeanors, cannot be entitled to any preference over the debts due to citi-

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zens." But *this is conceded to be, as it manifestly was, a mere dictum. For in that case the question did not arise under the act of 1789, but there the question was as to the distribution of the assigned estate of a living insolvent debtor, and not as to the distribution of the assets of a person deceased, to which alone the act of 1789 applied. All that was really decided in the case was, that the State was not entitled, at common law or on the ground of prerogative, to any preference over other creditors.

In the case of *Klinek v. Keckley* (2 Hill Eq. 250), the same judge announced the same opinion, basing it upon what he had said in *State v. Harris*, and seemed to think that the words in question were only intended to embrace taxes. He, however, adds: "But perhaps the words used in the act of 1789 ought to have a little more extended meaning, and to be construed by the common law." This too, was a mere dictum, for all that the case really decides is that the act of 1789 only gives the State preference where the debts due to the State and the citizen were of equal degree; and hence that a junior judgment in favor of the commissioners of the poor, for certain taxes received by the intestate as chairman of the board of commissioners, and not paid over, could not take precedence of a senior judgment in favor of a citizen. It seems, therefore, that the question as to what debts are embraced within the terms, "debts due to the public," as used in the act of 1789, has never been decided. It is true that even the dicta of so eminent a Judge, whose language has been quoted, is always entitled to the highest consideration, but at the same time they are not authoritative, and if found to be in conflict with what we regard as the proper construction of the terms used in the act, they will not be allowed to control our decision. Our duty is simply to ascertain, by the settled rules of construction, the legislative will, as declared by their language, and announce the same.

Now, the language used in the act is very general and comprehensive, "debts due to the public." No limitation is either expressed or implied by the terms used in the act, and

we are aware of no rule of construction which would justify us in fixing any limit to general terms, when the legislature has not seen fit to do so. Hence, where we find

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that there is a debt and that it *is due to the public, we are bound to place it in the class which the legislature has declared shall be entitled to preference. We are less reluctant to reach this conclusion when we see that the court, both in the case of *The Commissioners v. Greenwood* and *Klinck v. Keckley*, seemed to assume, without, however, deciding the question, that debts arising from default in accounting for public money did belong to the class protected by the act, and were not disposed to coincide in the limitation placed upon those terms by Judge O'Neill.

Again, if the preference given to the State rested upon the ground of prerogative, then there might be good reason for confining the preference to such debts as were due to the State as a sovereign, as, for instance, taxes; but the above cases show that such is not the ground upon which the preference is based, but that it rests solely upon the terms of the act, and the only question, therefore, is as to the proper construction of the language thereused.

We think, therefore, that the debt due by the intestate as surety on the bond of the county treasurer is entitled to be classed as a debt due to the public.

The next question is, whether such debt is entitled to preference over antecedent liens, either general or special. This question has been so repeatedly decided that it is not now open to argument. That a debt due to the public cannot take precedence of a debt secured by the lien of a mortgage, judgment, or execution, seems to be well settled by the following cases: *Commissioners v. Greenwood*, supra; *Klinck v. Keckley*, supra; *Rutledge v. Hazlehurst*, 1 McCord Eq., 466; *Brown v. Gilliland*, 3 Desaus., 539; *Haynsworth v. Frierson*, 11 Rich., 476.

It is true that the case of *Percival ads. McVoy* (Dudley, 337) appears to be somewhat in conflict with this doctrine. In that case the plaintiff sued for services rendered intestate in his last illness as a nurse, and the administrator pleaded *plene administravit* praeter a particular sum which was applicable to the payment of judgments recovered in the lifetime of the intestate. The jury having found for the plaintiff, defendant appealed, amongst other things, upon the ground that the demand of the plaintiff was not entitled to rank as "expenses of the last illness" and take precedence of judgments, mortgages, and execu-

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tions; and *the appeal was dismissed. It does not seem that the question which we are called upon to decide was considered in that case. The controversy there seemed to be whether such services were rendered gratuitously, and whether they could be regard-

ed as expenses of the last illness, and no attention seems to have been paid to the question whether a debt for such expenses could take precedence of prior liens. It may be that the fund in the hands of the administrator, in that case, arose from assets not bound by the lien of the judgments, and if so then there would not be any apparent conflict even with the cases above cited; but whether this was so or not, that case, in which the question manifestly did not attract or receive the attention of the court, cannot have the effect of shaking the doctrine settled by the cases which we have cited, none of which were referred to in *Percival ads. McVoy*. Indeed, from what is said in the subsequent case of *Haynsworth v. Frierson*, supra, it is apparent that the court did not regard the case from *Dudley* as unsettling the law as established by the cases of *Commissioners v. Greenwood*, and other cases above cited.

While, therefore, the debt due by the intestate as surety on the bond of the county treasurer, is a debt due to the public, and as such entitled to precedence over other bond debts and sealed claims, it cannot take such precedence over the debts secured by liens, so far as the proceeds of the property covered by such liens are concerned.

The only remaining question is as to the fund upon which costs, disbursements, and counsel fees are primarily chargeable. We agree with the Circuit Judge that, as a general proposition, they are primarily chargeable on the unencumbered assets; but so much thereof as arises from the enforcement of these liens, as for example the expenses of surveys, advertisement, and sales of the property encumbered by the liens, should be paid out of the proceeds of the sales of such property; and this we understand to be the view taken by the master and intended to be approved by the Circuit Judge, though the general terms used in the decree might, possibly, leave room for the inference that all the costs, &c., were to be charged on the unencumbered assets.

The judgment of this court is that the

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judgment of the Circuit *Court be modified in accordance with the views herein announced, and that the case be remanded to that court for the purpose of carrying out such views.

23 S. C. 120

SCOTT v. ALEXANDER.

(November Term, 1884.)

[1. *Appeal and Error* ⇨714.]

Statements of fact appearing only in the argument of counsel, and not admitted by the opposing party, cannot be here considered.

[Ed. Note.—Cited in *Welch v. Gleason*, 28 S. C. 250, 5 S. E. 599.]

For other cases, see *Appeal and Error*, Cent. Dig. § 2962; Dec. Dig. ⇨714.]

[2. *Costs* ⇨13.]

Quere: Are costs in chancery cases now within the discretion of the Circuit Judge? Code, § 323.

[Ed. Note.—Cited in *Cooke v. Poole*, 26 S. C. 324, 2 S. E. 609; *Brown v. Brown*, 44 S. C. 383, 22 S. E. 412.

For other cases, see *Costs*, Cent. Dig. §§ 21, 25; Dec. Dig. ⇨13.]

[3. *Appeal and Error* ⇨119.]

An appeal alleging error of law may be taken upon a question of costs in a chancery case, where the Circuit Judge did not hear the cause upon its merits, but decided only the question of costs.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 823-839; Dec. Dig. ⇨119.]

[4. *Costs* ⇨96.]

Where a board of aldermen have increased, and are continuing to increase, the debt of their city beyond the limit fixed by statute, and citizens institute an action to enjoin any further increase, the aldermen may be required personally to pay the costs of the action.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 380; Dec. Dig. ⇨96; *Municipal Corporations*, Cent. Dig. § 385.]

[5. *Costs* ⇨34.]

An action having been commenced against a board of aldermen, in which there was involved but one issue, which is finally determined in the plaintiff's favor, and afterwards this board was succeeded in office by a new board, when, by amendment, other parties were brought in and other issues were raised and litigated, the original defendants are properly chargeable with the costs incurred in the determination of the first issue only.

[Ed. Note.—Cited in *Scott v. Alexander*, 27 S. C. 15, 2 S. E. 706.

For other cases, see *Costs*, Cent. Dig. § 98; Dec. Dig. ⇨34.]

Before Witherspoon, J., Richland, July, 1883.

The opinion fully states the case.

[For subsequent opinion, see 27 S. C. 15, 2 S. E. 706.]

Messrs. L. F. Youmans and W. A. Clark, for appellants.

Mr. F. W. Fickling, contra.

June 2, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On March 13, 1872 (15 Stat., 220), an act of the legislature was passed authorizing the mayor and aldermen of the city of Columbia to borrow money by issuing bonds of said city, which, together with the then outstanding indebtedness of the city, should not exceed the sum of

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\$600,000, *the declared object of the act being to limit the whole amount of the indebtedness of the said city to the amount above mentioned; and for this purpose it was provided that before any bonds were issued under said act, the city council should recall and cancel certain bonds to the amount of \$250,000, issued on August 21, 1871, for the erection of a city hall and market. By the fourth section of said act it was provided

that the mayor and aldermen should, at any time upon the written demand of the holder or holders of \$50,000 of said bonds, or of corporators to the number of twenty, publish a detailed statement of the city indebtedness and the character of the same. The seventh section of the act prohibited the mayor and aldermen from increasing the debt of said city beyond the said sum of \$600,000, and provided that "upon any attempt being made so to do, any bondholder or corporate taxpayer shall have his action to enjoin the said mayor and aldermen from so doing."

The plaintiff, as a corporator and taxpayer of said city, having made the demand upon the mayor and aldermen of the city as provided for in the fourth section of the act, and having failed to obtain the desired information, on August 14, 1875, instituted this action against John Alexander as mayor, and Henry W. Purvis, Augustus Cooper, C. J. Carroll, B. F. Griffin, Sancho P. Davis, John A. Pugh, S. D. Swygert, Adam Thomas, William A. Carr, L. L. Brown, William Simons, and D. Wells, aldermen of said city of Columbia. In the complaint it was alleged that the said mayor and aldermen had contracted debts of the city largely in excess of the amount limited by the above cited act, and were then, from time to time, increasing said debt beyond said limit, and prayed that all debts in excess of said limit be declared invalid, and that said mayor and aldermen be enjoined from further increasing said debt. The mayor and aldermen answered, denying that they had increased the debt of the city beyond the limit fixed by the act, alleging that the debt of the city at the time of the passage of said act far exceeded the limit fixed therein.

On September 7, 1875, the said defendants "were enjoined, by order of the court, from contracting or increasing said city debt, except to a limited amount, ascertained to be

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necessary for *the current expenses of the city government." On January 6, 1876, the Columbia Waterpower Company and others, as representing various classes of creditors of the city, were made parties, and the complaint was further amended by inserting allegations impeaching certain demands against the city, and by calling in creditors to establish their demands. The only answers to the amended complaint were those put in by John Agnew, mayor, and his board of aldermen, who seem to have succeeded John Alexander and his board on the first Tuesday in April, 1876, and the Carolina National Bank representing one of the classes of creditors.

On January 6, 1876, James P. Lowe was appointed referee "to inquire and report as to the matters embraced in the complaint." He made four reports, dated January 11, July 25, and November 9, 1876, and February 5, 1877, in which is embraced a complete exhibit of the financial affairs of the city, together with

a large amount of testimony impeaching or sustaining various disputed claims.

On March 1, 1877, the case, with the testimony taken by referee Lowe, was referred to Louis LeConte, Esq., "to hear and determine all the issues," and on April 28, 1877, he made his report, recommending that the complaint be dismissed as to all the defendants without costs, except as to John Alexander and the persons composing his board of aldermen, and the mayor and aldermen of the city of Columbia, and recommending that John Alexander and the other defendants named in the original complaint be required to pay the costs and disbursements of the plaintiff herein. To this report the plaintiff and John Agnew, as mayor, with his board of aldermen, excepted so far as it related to the validity of certain claims against the city, and B. F. Griffin, S. D. Swygert, Augustus Cooper, C. J. Carroll, Adam Thomas, and William Thomas, six of the defendants named as aldermen in the original complaint, also excepted, amongst other things, because they were required to pay the costs of the plaintiff.

On August 31, 1877, the cause was recommended to Mr. Barnwell, as master, to take further testimony, and, by consent, the city of Columbia, as a corporation, was made a

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party. The *master made two reports, furnishing a complete history of the cause and the issues involved. From these reports it appears that John Alexander was mayor, and the persons named as the other defendants in the original complaint were aldermen of the city from the first Tuesday in April, 1874, to the first Tuesday in April, 1876, when, as we infer, John Agnew and his board of aldermen succeeded to those offices. It also appears that John Alexander was mayor, and the following persons named as defendants in the original complaint, viz.: B. F. Griffin, Augustus Cooper, C. J. Carroll, and William A. Carr, were aldermen from the first Tuesday in April, 1872, to the first Tuesday in April, 1874, and that two of the defendants in the original complaint are dead, viz., Adam Thomas and William Simons. Whether there were any exceptions to these reports of the master, or whether any recommendation was made therein as to costs, as was done in the report of referee LeConte, which was recommitted to the master, does not appear: but when the case was called for hearing in the Circuit Court, counsel for plaintiff announced that since the passage of the act of February 19, 1880 (17 Stat., 233), authorizing the city of Columbia to fund its debt, and repealing all acts and parts of acts inconsistent with its provisions, the case could not proceed to final judgment, and all that was asked for was an order providing for the payment of plaintiff's costs and disbursements.

The Circuit Judge proceeded to consider that question alone, and in his decree, after setting forth the facts substantially as above stated, used this language: "I am satisfied

from the evidence as to the correctness of the conclusions of referee LeConte and master Barnwell, that the aggregate debt of the city of Columbia, on October 31, 1873, was \$600,000, the amount limited under the act of March 13, 1872; that on April 30, 1874, said debt was increased to \$650,000; on December 31, 1874, to \$679,000; and on December 31, 1875, to \$744,000. I am also satisfied from the evidence that the defendants in the original complaint, John Alexander, as mayor, and Henry W. Purvis and others, aldermen of the city of Columbia, did increase the debt of said city, and, at the commencement of

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this action, were continuing to increase said debt, largely in excess of the amount limited and prohibited under the act of March 13, 1872."

He therefore adjudged that inasmuch as the action could not proceed to final judgment, since the passage of the act of February 19, 1880, the complaint be dismissed without costs to the defendants; that all pending injunctions be dissolved, and that the defendants, John Alexander and others, named as defendants in the original complaint, having rendered the action necessary by their violation of the provisions of the act of 1872, be required to pay the plaintiff his costs and disbursements incurred prior to February 19, 1880, and that for this purpose plaintiff have judgment, with leave to issue execution, against John Alexander, Henry W. Purvis, Augustus Cooper, C. J. Carroll, B. F. Griffin, Sancho P. Davis, John A. Pugh, S. D. Swygert, William A. Carr, L. L. Brown, and D. Wells, with leave to said plaintiff to make the legal representatives of Adam Thomas and William Simons, deceased, parties defendants by proper proceedings.

From this judgment the defendants, B. F. Griffin, S. D. Swygert, W. A. Carr, and Augustus Cooper, appealed upon the ground of error "in ordering and adjudging that the plaintiff have leave to enter execution against John Alexander, mayor, Henry W. Purvis and others, aldermen, including these appellants, personally, for his costs and disbursements in this action accrued up to February 19, 1880, and the antecedent portions of the decree on which this was based." Pending the appeal, the plaintiff died, and the action has, by the order of this court, been continued in the name of F. W. Fickling as his administrator.

This appeal cannot be regarded as presenting any question except whether there was error in requiring the appellants, personally, to pay plaintiff's costs, for that portion of the exception which imputes error in "the antecedent portions of the decree" is too general to require any notice at our hands. No specific error is pointed out, except as to the costs. Indeed, as the only papers furnished us are the decree of the judge, with a very brief statement appended (in which none of the facts stated in the decree are contra-

vened), and the argument, or points and authorities, of appellants' counsel, we are necessarily confined to the facts stated in the decree as supplemented by the appended state-

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*ment. It is true that the fundamental fact, as to whether the debt of the city was increased by the board of aldermen to which appellants belonged, is not only questioned but absolutely denied in appellants' points and authorities, but, as we have often had occasion to say, we can only consider such facts as appear in the "Case" or are admitted at the hearing, and cannot consider any additional or contradictory statement made in the argument of counsel.

We are, therefore, bound, in considering the question presented by this appeal, to assume as a fact that, at the time this action was originally commenced, the defendants, Alexander and his board of aldermen, amongst whom were these appellants, had increased, and were continuing to increase, the debt of the city beyond the amount limited, fixed by the act of March 13, 1872, and, therefore, that there was good ground for plaintiff's action, and that *prima facie*, at least, he would be entitled to costs as against them. But granting this to be so, two other questions are presented: first, whether these defendants, being sued in their official capacity, can be made personally liable for costs; and, second, up to what stage in the case would they be liable, inasmuch as it appears that very soon after the action was commenced they went out of office, and they were succeeded by John Agnew and his board of aldermen, when the case by amendment had assumed a totally different aspect.

But before proceeding to the consideration of these questions, it will be necessary to notice a preliminary objection raised by the counsel for the respondent, which it is urged effectually cuts off this appeal. It is contended by him that this is an equity cause, and that in such cases costs are in the discretion of the court, and any order in reference thereto is not appealable. This, as a general proposition, is doubtless true. Under the former equity practice, that court would not entertain an appeal upon a question of costs alone, but the cases in which this was decided were cases in which the chancellor who made the decree as to costs had heard the case on its merits, and his discretion in awarding costs was supposed to have been exercised upon full view of the conduct of the parties. Even in that court, when the appeal was upon other points, as well as upon the question of

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costs, and *the decree below was reversed upon some point affecting the merits, the order for costs would likewise be reversed (*Singleton v. Allen*, 2 Strobb. Eq., 166); and in *Hext v. Walker* (5 Rich. Eq., 5), the Court of Appeals went so far as to modify a decree in respect to the costs, although there was no appeal upon that point, upon the ground that

the Circuit Chancellor had inadvertently awarded costs against a party who clearly was not liable for them. So that it appears that even in the old Court of Equity the question of costs was not entirely beyond the reach of the Court of Appeals.

Under the code, as it was originally adopted, costs in equity causes were expressly declared to be in the discretion of the court. See section 332, of the Code of 1870, as construed in *Mars v. Conner*, 9 S. C., 79. This section was, however, repealed by the act of February 20, 1880 (17 Stat., 303), and now, by section 323 of the Code of 1882, costs follow the result of the action in cases of chancery "unless otherwise ordered by the court." Since these changes of the law, it may, perhaps, be doubted whether costs in cases of chancery are in the discretion of the court; but be that as it may, and assuming that where costs are awarded to one or the other party as a matter of discretion, determined by the relative merits of the several parties upon a review of the whole case, we do not think we are precluded from hearing an appeal from the decision of a judge who only heard the question of costs, in which it is alleged that he had awarded costs against parties who are not, in law, liable to pay them.

We proceed, then, to inquire whether the fact that these appellants were sued in their official capacity as aldermen, protects them from personal liability for costs. The authorities cited by the Circuit Judge (2 Story Eq. Jur., § 955a, and 3 Dan. Ch. Pl. & Pr., 1548, 1557) show that where public functionaries, who are exercising special public trusts or functions or trustees of private individuals, by their malfeasance or other misconduct render a suit against them necessary, they may be required personally to pay costs. The authorities cited by the counsel for appellants on this point, only go to show that a public officer acting judicially cannot be made liable for any mere mistake or error of judgment, but that malice or corruption must be shown.

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In this case the *mayor and aldermen were, by an act of the legislature, positively prohibited from increasing the debt of the city beyond the amount therein fixed, and as the Circuit Judge found that these appellants, together with their associates, had increased, and were continuing to increase, the debt of the city beyond said limit, they were guilty of personal misconduct in a matter not of a judicial nature, but in open violation of the plain terms of the statute, and, therefore, might properly be held liable, personally, for costs.

The only remaining inquiry is as to whether these appellants, whose rights alone are under consideration, should have been made liable for the costs of the whole case, in the new aspect which it had assumed; or, if not, what portion of the costs should they have been required to pay. It will be observed that the proper object of the action, as orig-

inally commenced, was simply to obtain an injunction restraining the mayor and aldermen from increasing the debt beyond the prescribed limit, for that was all that the act provided for; for although the complaint did also demand that all debts in excess of the limit fixed by the act should be declared invalid, yet that was beyond what the act provided for, and certainly could not have been determined in the absence of the parties claiming such debts to be due. If, therefore, the then mayor and aldermen, who were the only original defendants, had raised no issue as to the allegation that they had increased, and were continuing to increase, the debt of the city, the action then, having served its purpose, must necessarily have terminated with a simple order for injunction. But they did raise such issue, and, of course, it was necessary to try and determine the same. The injunction granted on September 7, 1875, so soon after the commencement of the action, must have been a temporary injunction, until the issue raised by the answer of the defendants could be heard and determined. It seems to us, therefore, that the action could not be regarded as terminated by that order of injunction, but that it must have gone on until the issue raised had been determined. And as that issue has been determined against these appellants, we see no error in charging them with all the costs and disbursements of the plaintiff in the trial and determination of that issue.

It seems, however, that after the action

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had been commenced *for the single purpose above indicated, it was, by amendment and by the introduction of new parties, converted into a wholly different action, in which new issues were raised, with which, so far as we can see, these appellants and their associates had no concern; for having gone out of office on the first Tuesday in April, 1876, and their successors brought in by amendment, it was no longer their right or duty to contest such new issues, and they could not, therefore, be properly charged with any of the costs and disbursements incurred by the plaintiff in litigating such new issues.

It seems to us, therefore, that the Circuit Judge erred in charging these appellants and their associates in the board of aldermen with all the costs and disbursements incurred by the plaintiff in litigating and determining the various issues which arose in the action by reason of the change in the object, or, rather, in the addition to the objects originally sought to be obtained; and that they are only chargeable with such costs and disbursements as the plaintiff may have sustained in determining the issue originally raised, viz., whether these appellants with their associates in the board of aldermen had increased, or were continuing to increase, the

city debt beyond the prescribed limit, at the time of the commencement of this action; whether such costs and disbursements were incurred before or after the granting the order of injunction of September 7, 1875, taking care that in charging them with costs or disbursements incurred after that date, that they shall be only such costs and disbursements as would be incurred in hearing and determining such issue, and not costs or disbursements incurred in hearing or determining any of the new issues raised by the complaint as amended.

The judgment of this court is that the judgment of the Circuit Court be modified according to the views herein announced, and that the case be remanded to the Circuit Court for the purpose of carrying out such views.

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*THE BATH SOUTH CAROLINA PAPER CO. v. LANGLEY.

SAME v. SAME.

(November Term, 1884.)

[1. *Appeal and Error* ⇨1008.]

Findings of fact by the Circuit Judge in a law case (a jury being waived) cannot be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3356; Dec. Dig. ⇨1008.]

[2. *Execution* ⇨288.]

Where parties take possession of property, purchased by them at a sheriff's sale, under circumstances that induced a Court of Equity from considerations of public policy, to set the sale aside (as in *Barrett v. Bath Paper Company*, 13 S. C., 128), the sale cannot be said to have been void, and the purchasers tortfeasors, nor can they be regarded like to trespassers taking possession *vi et armis*, but their relation to the execution debtor is like to that of trustee to *cestui que trust*.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 825; Dec. Dig. ⇨288.]

3. Whether questions of rents and profits, and of damages for detention and waste, which might have been, but were not, raised between codefendants, in the case of *Barrett v. Bath Paper Co.*, *supra*, are *res judicata*—discussed, but not decided.

[Ed. Note.—Cited in *Bouland v. Carpin*, 27 S. C. 239, 3 S. E. 219; *Earle v. Earle*, 33 S. C. 504, 12 S. E. 164.]

[4. *Execution* ⇨288.]

A trustee is bound to the exercise of only ordinary care over the property of the *cestui que trust* in his possession, and cannot be charged with rents and profits which he did not, and could not, receive.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 825; Dec. Dig. ⇨288.]

[5. *Execution* ⇨288.]

Where a quasi trustee has insured property of his *cestui que trust*, for which, being burned, he receives the insurance money, he is accountable for the amount so received, less his payments in effecting and collecting the insurance.

[Ed. Note.—Cited in *Clyburn v. Reynolds*, 31 S. C. 119, 9 S. E. 973; *Green v. Green*, 50 S. C. 534, 27 S. E. 952, 62 Am. St. Rep. 846;

Steinmeyer v. Steinmeyer, 64 S. C. 419, 42 S. E. 184, 59 L. R. A. 319, 92 Am. St. Rep. 809.

For other cases, see Execution, Cent. Dig. § 825½; Dec. Dig. ☞288.]

Before Hudson, J., Aiken, October, 1884.

These were two actions by the plaintiff corporation against W. C. Langley, W. C. Sibley, J. G. Bailie, E. R. Schneider, D. B. Hack, and M. F. Foster, commenced in the spring of 1880. They are a sequel to the case of Barrett v. Bath Paper Company, 13 S. C., 128. A jury trial was waived and all the issues of law and fact were referred to John T. Rhett, Esq., "for trial and determination." After taking the testimony and hearing arguments, the referee made a very carefully prepared report, in which, after full discussion, he announced the following conclusions:

Matters of Fact. 1. I find that the rental value of the property is twelve thousand dollars annually. That the time for which the defendants are liable, if liable at all, is from

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August 6 *to March 31, 1880, and the whole amount \$19,800 (nineteen thousand eight hundred dollars).

2. I find that the plaintiffs did not pay the \$10,000 (ten thousand dollars) counsel fees.

3. I find that the defendants were not guilty of negligence in the matter of the breaking of the dam and the injury to the wood-work connected with the pond, canal, and factory, and to the machinery.

4. I find that the injury mentioned in the foregoing finding is eleven thousand five hundred dollars expressed in money.

5. I find that the defendants were not guilty of negligence in the matter of the burning of the house, and that the value of said house is \$1,500 (fifteen hundred dollars).

Matters of Law. 1. I find that the plaintiffs are barred from recovering for the use of the property by the matter being within the principles of res adjudicata.

2. I find that the plaintiffs cannot recover the counsel fees for the reason given in the foregoing finding.

3. I find that the defendants are not to be held to extraordinary care in the use of the property, or in the guarding of it, but that the degree of care required of them is that which a prudent man should show in the conduct of his own business in doing or omitting.

4. I find that the defendants cannot be called upon to pay the insurance money received by them to the plaintiffs.

And I find, generally, that judgment should be for the defendants.

Upon exceptions to this report by both parties, the cause came on for trial in the Circuit Court, where the following decree was rendered:

These two actions are sequels to the action of William H. Barrett and Robert A. Fleming, mortgage trustees, against the Bath South

Carolina Paper Mill Company and others, including the above named defendants, reported in 13 S. C., 128 to 160. From the report of that case can be gathered the nature of the controversy, its aim, purpose, and final determination, so fully and clearly that it is needless for me to indulge in repetition here. To

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*that report I refer for all facts therein which have any bearing on the issues arising in the two causes now under consideration. Suffice it to say that the judgment in that case was duly and fully enforced; the sheriff's title to the present defendants was cancelled, the property returned, a resale made, the proceeds distributed in accordance with said judgment, and the new purchasers let into possession.

Thereupon the Bath Paper Mill Company began these actions to recover damages for injuries done to the property by these defendants while they were in the use and occupation thereof, by negligence and remissness, and for the rents and profits thereof in the first action; and, in the second, to recover the value of a dwelling house negligently destroyed by fire. In the first action it is questionable whether the claim for rents and profits arises from the pleadings; but of this I will speak hereafter.

The issues of fact and of law were referred by this court by consent to John T. Rhett, Esq., for determination, and upon exceptions to his report the cases came on for hearing at this term of the court. The questions raised, discussed, and decided, or which must be decided, are in the first of the cases: 1. Is the plaintiff in this action estopped by the judgment in the former action? 2. Has it so framed the present complaint as to include the claim for rents and profits, or is it an action solely in tort? 3. To what rents and profits, if any, is the plaintiff entitled in money? 4. Did the defendants damage the property by negligence or otherwise, and if so, in what amount?

The first of these questions the referee has answered in the affirmative, holding that on the principle of res adjudicata the plaintiff is estopped; not that the question of rents and profits and injury to the property was actually raised, either in the pleadings or in the evidence, but that these matters of controversy were appropriate to the issue then raised, pertained to the cause of action, and should have been there raised by the present plaintiff, and that by failing to claim such relief in that action the plaintiff has waived all right to redress.

Much learning and research on the law of res adjudicata characterize the report of the referee and arguments of counsel on both sides. A want of time prevents me from re-

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marking at *length upon their arguments, and from entering into a full discussion of

the subject. Perhaps a conclusion can be more readily reached by applying to the pleading, evidence, and judgment in that case a few plain and common-sense principles of law.

It is conceded that the relief now asked was not demanded by the Bath South Carolina Paper Mill Company in that action in the pleadings, nor was it referred to in the evidence. That action was principally and mainly a foreclosure suit. It was only as a second cause of action that the sale to the defendants now before the court was assailed for fraud, and therefore sought to be set aside. To the action of the mortgage trustees to foreclose their mortgages the Bath Paper Mill Company was a necessary party defendant, and the second cause of action, to wit, the fraudulent sale, could not have changed the company's relative position in the pleadings.

It is true that the company was friendly towards the mortgage trustees throughout the whole scope of the action and extended aid freely on all their issues, but it was a proper and necessary defendant. Nevertheless the law allowed it full privilege to demand affirmative relief against its co-defendants, the purchasers at sheriff's sale, and it might very well either in the pleadings or proof, or in both, have set up the claim to rents and profits of the land in case the sale should be declared void, and could have, furthermore, demanded compensation for property wrongfully injured or destroyed. By so doing a complete determination could have been had of every matter growing out of said alleged illegal sale betwixt all the parties to the action. Under the practice of our former Court of Equity co-defendants were frequently granted relief as against each other as matter of justice, and to avoid multiplicity of suits. See *Motte v. Schult & Motte*, 1 Hill Eq., 146 [26 Am. Dec. 191]. This was, anciently, and is now, the law in England, and was invariably followed by our Courts of Equity in proper cases. Under our code of procedure the rule has not been contracted, but if anything made more liberal.

Clearly, then, the Bath South Carolina Paper Mill Company could have obtained in that suit all the relief it demands in these two actions, as readily as can be had here. But was it necessary to make claim there, and by failing so to do has the company

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*waived its rights? I think not. Such a claim was not necessary to the determination of the issues of that cause. It was not a necessary incident to that suit. In England the claim for mesne profits succeeded a recovery in ejectment. So it does now in some of the United States, and so it was in our State until the action of ejectment was abolished and the action of trespass to try titles substituted, which, in the very form prescribed by statute, was an action "to try the title as well as for damage." So, too,

our Courts of Equity, in every case in which by decree the possession of land was restored to its rightful owner, also ordered an accounting for rents and profits, if asked so to do. But the former action which we are considering was, as we have said, to foreclose mortgages and annul a sale in which the Bath Company was a co-defendant with the purchasers at said sale, and was not bound to set up an independent cross claim against the said co-defendant purchasers, although the right to do so existed.

The present defendants in support of the alleged estoppel rely greatly upon the case of *Martin and Walter v. Evans et al.*, 1 Stroh. Eq., 350. The case is very much like the one under consideration. The sale to Evans was set aside on the same ground on which the sale to the present defendants was declared void. The deed was cancelled, the land restored, a resale had, and the purchase money ordered to be returned to Evans. Now, in that decree leave was granted to parties to apply at the foot of the decree for any further orders which might be deemed necessary. Two years thereafter an order was applied for to compel Evans to account for the mesne profits, and was granted. The decree pronounced had been in every respect carried into effect, and the purchase money had been refunded to Evans. Now, the only difference between that case and this is, that the plaintiffs in that suit availed themselves two years after of the right to apply for an account for rents and profits, whilst in the present instance one co-defendant, as against another, prefers to bring an independent suit. In my opinion the doctrine of *res adjudicata*, waiver, or estoppel does not bar these actions, and it is so adjudged.

The next inquiry is as to the scope of the action. Is this an action to recover rents and profits as well as damage for property

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*negligently injured or destroyed, or is it solely an action in tort for negligence? It is well settled with us, that the demand for relief, the prayer of the complaint, is no part of the cause of action: but that plaintiff can and will recover such relief as the allegations of the complaint supported by proof entitle him to. The allegations of the complaint of this plaintiff are not as full and explicit as should be, but they do aver that by the wrongful possession of the defendants the Bath Company was deprived of the use and occupation of the premises, and the claim for damages can be as well referred to this injury as to the subsequent statement of loss from the destruction of and damage to the premises. As a general rule an action in tort cannot be joined with one arising in contract express or implied; but I see no reason why a plaintiff, in suing a trespasser of this kind for the use of property, cannot incorporate a claim also for its abuse and injury, or vice versa, in suing for the trespass why he cannot lay a count for its

use. The two, the use and abuse, arise in the same wrongful possession, are inseparably connected, and may properly be embraced in one action. We hold, therefore, that the present actions are maintainable, and are not obnoxious to the foregoing legal objections, and so holding, we will proceed to consider the plaintiff's claims upon their full merits under the evidence adduced and the law applicable thereto.

Let us now examine the question of damage to the property resulting from the alleged negligence of the defendants. The breaking of the dam, the rotting of the wood-work, the rusting of the machinery, and, finally, the burning of the dwelling house, are all attributed to the negligence of the defendants. The first question in this connection to be decided is, what degree of care were the defendants liable for whilst in the possession of the property? In my opinion only for such care as a prudent man should exercise in the management of property of that description, if owned by him. It is a mistake in counsel to say that the sale to defendant was absolutely void, and hence that they were high-handed trespassers from the beginning of their possession, and stood as absolute insurers of the property, or, at least, were bound to exercise extraordinary care, and were liable for slight neglect. The

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sale was not void, but only voidable, *and by decree of the court was, at the suit of creditors, set aside and declared void. Technically, in consequence of this decree, the defendants' possession was tortious *ab initio*, but they were not tortfeasors in the sense and to the extent they would have been had they *vi et armis* ejected the rightful owners and taken violent possession.

In the Circuit decree of Judge Kershaw they are not convicted of positive moral wrong or fraud, but only of having effected the purchase of property at public auction by a combination which is contrary to established rules of public policy. So did the Supreme Court in the case of *Dudley v. Odom* [5 S. C. 131, 22 Am. Rep. 6], disclaim all intention of imputing to Col. C. W. Dudley moral fraud or wrong in making the contract with Odom. Therefore, I hold that these defendants whilst in possession of the property of the Bath South Carolina Paper Mill Company were liable only for ordinary care and prudence in its custody, use, and management.

Did they exercise such? I have listened to the reading of the testimony and the very full discussion by counsel of the facts, and have since perused the evidence. To discuss it in detail in this opinion would give to it greater length than is proper, and I will content myself with giving only my findings. I am satisfied that the dam broke in a few days after the defendants took possession of the mill, from the defects existing at the time of and before the sale, which were un-

known to the defendants, and against which they could not with ordinary care and diligence have guarded. This care and diligence they did exercise, and yet, in open day, the dam went out. For this loss they cannot be made to pay without violating the rules of justice and equity. The loss is a misfortune that should not fall on them, as they were in no way to blame.

But the plaintiff company's counsel say that the defendants should have repaired it. The reply to this is, that it was an immense break, to repair which required a large outlay of money, larger, perhaps, than the defendants had in hand, and moreover, the mortgage trustees about that time began suit to foreclose and set aside the sale, in which suit the company heartily coöperated, though co-defendants with their titles thus assailed. It is perfectly natural that the most prudent

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would have refrained *from expending so large a sum in repairing the dam. But suppose they had repaired the dam and gone on in spite of the cloud on their title, is it not clear that on a resale the court would have directed the outlay to be refunded to them out of the proceeds of the sale, if, as now, the proof had satisfied the court that the dam broke because of a defect existing at the time of the sale unknown to defendants, and against which their prudence and care could not and did not protect them? The loss most assuredly would have been made to fall upon the company in that event, and there we place it now without hesitation. In *Martin and Walter v. Evans*, the defendant Evans was without hesitation accorded the right of a bona fide purchaser, and in addition to the purchase money there was refunded to him compensation for improvements put upon property to which he thought he had titles.

In consequence of the breaking of the dam, the mill could not be run, and more or less decay in the wood-work occurred, and some rusting of the machinery from want of use. The evidence satisfies me that they did all in their power to prevent this, and cared for the machinery as well as any prudent owner would or could have done under like circumstances. The plaintiff has failed in so much of this action as claims damages resulting from alleged negligence of defendants whilst in the possession thereof.

Then, as to rents and profits. It is very clear that the remaining property, including the pulp mill and machinery, was useless without the water power to run it: without the pulp mill, the other machinery was useless. This pulp mill was sold subject to a heavy incumbrance. It could only be used by payment of a royalty of several thousand dollars per annum. The company suffered large arrears of this to accumulate prior to the sale, and, as I understand it from statements of counsel on both sides, the accrued, and annually accruing, royalty constituted

a lien on the pulp mill and the machinery attached to it. This encumbrance on the pulp mill and machinery was very heavy, so much so that to remove it and to pay up one annual royalty would have required, perhaps, \$10,000 or \$15,000. To have repaired the dam would have cost as much or more, and for neither of these obstacles and embarrassments were the defendants responsible.

In addition to these adversities, and before

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they could possibly *have overcome them and begun the operation of the mills, action was brought against them, involving the title to the entire property. Under these circumstances it could not be expected that they would expend so large an amount of money to repair the works and pay the royalty when in a very short time the title might be annulled. Now, the most intelligent witnesses agree in saying, and none deny the truth of it, that without the use of the pulp mill and machinery, and without the dam, or with a dam so badly broken, the mills, as paper mills, were worthless, and the rental value was nothing. Nor is it pretended that with that property in such condition, they could have made shift and embarked in any other enterprise—certainly not one requiring water power.

The referee's estimate of the rental value of the property is based entirely upon its value in good working order. But we cannot take that basis, even if we were so authorized by the evidence to thus consider it. I could not agree with the referee, when it appears that the present plaintiff, who places so high an estimate on the annual value of the use of the property, so signally failed when using it to realize any profit therefrom. The company had not only encumbered the property with very heavy mortgage debts, but their creditors generally had been forced to put their numerous and large claims in judgment, and even their operatives remained unpaid and were forced to sue their small claims for wages and put them in judgment. All this, when, according to the evidence for the company, the machinery and property generally were in first class order. It was clearing no money, but annually getting deeper involved in debt under the company's management, with dam, machinery, and all in good condition, and yet we are asked to give judgment against the defendants for \$15,000 to \$20,000 for the rents and profits whilst the dam was broke, the pulp mill overburdened with accrued royalty, and all things necessarily at a stand-still; whilst a law suit, besides, was pending, involving the title. I have no hesitation in saying that the claim is not tenable, and that nothing should be recovered for rents and profits when none were made, nor could have been made and realized.

So much for the first action, except that

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it should be remarked *that the claim for

reimbursements for counsel fees was abandoned.

As to the second action, much of what I have already remarked will apply. As well as I can find, there is nothing in the evidence sufficient to justify the conclusion that the house was burned through the negligence of the defendants. Their employee, Mr. Tyler, and his family were living in it at the time whilst he was engaged in taking care of the property for them. The account of the origin of the fire is just such as is usual in all cases of accidental burnings. No one of the inmates can tell how it occurred, nor does any one outside so testify as to fix negligence upon them. Without such evidence, the loss should not fall on the defendants.

So far as the insurance money is concerned, as hard as it may seem, the plaintiff cannot recover. With that contract the company had no connection. It was in no way privy to it. The defendants purchased and paid for the contract of insurance. The house was accidentally burned, and the insurance money was paid to them, and from them the plaintiff cannot in law recover it.

The findings of facts and conclusions of law by the referee, and the exceptions thereto not sustained herein, are overruled. It is therefore ordered and adjudged and decreed that the complaint in each of the aforesaid actions be dismissed with costs.

From this decree the plaintiffs appealed upon the following exceptions, omitting those which alleged errors in the findings of fact:

1. That his honor erred in holding as a conclusion of law, that the defendants were only bound to exercise such care as a prudent man should exercise in the management of property of that description, if owned by him; whereas, it is submitted that the law is, and his honor should have held, that the defendants were bound to exercise extraordinary care in the use of the property, and in the guarding thereof.

2. That his honor erred in holding that the sale was not void, but only voidable; whereas, it is submitted that the law is, and his honor should have held, that the sale was void ab initio.

3. That his honor erred in holding that the defendants were not tortfeasors in the sense and to the extent they would have been had they vi et armis ejected the rightful owners

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and taken *violent possession; whereas, it is submitted that the law is, and his honor should have held, that the defendants were tortfeasors, and were liable to the plaintiffs to the same extent as if they had ejected the plaintiff vi et armis and taken violent possession.

4. That his honor erred in holding, as a construction of Judge Kershaw's decree, that the defendants "were not convicted of positive moral wrong or fraud, but only of having effected the purchase of property at public auction by a combination, which is

contrary to established rules of public policy:" whereas, it is submitted that his honor should have held, in the language of Judge Kershaw's decree as confirmed by the Supreme Court, that the sale was set aside expressly "upon the grounds of fraud and public policy." (13 S. C., 149.)

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9. That his honor erred in holding that the rental value of the property should be estimated upon it while in its damaged condition, accruing after the defendants had taken possession, and as though the defendants had no right to use the pulp mill; whereas, it is submitted that the rule for estimating the damage is the rental value of the property at the time defendants took possession of the same.

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11. That his honor erred in holding that the pendency of the action, brought to set aside the sale, exonerated or in any way relieved the defendants of any responsibility; whereas, it is submitted that such action was an express notice to them of their fraudulent title, and any holding of the property thereafter was in utter disregard of plaintiffs' rights, in defiance of law, and was calculated to aggravate the unlawful acts of defendants.

12. That his honor erred in holding that the defendants were not liable for the value of the house destroyed by fire; whereas, he should have found that the defendants did not exercise extraordinary or even ordinary care in the use and protection of said house, and that the same was destroyed through negligence of the defendants and their agents, and, therefore, liable to plaintiffs for the value thereof.

13. It is submitted that the defendants

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held the house that was *burnt as trespassers, and, therefore, in order to excuse themselves from liability on account of the destruction, it was not enough for them to show that they did not know how the fire originated, but it was incumbent upon them to go further, and show that the fire was unavoidable, and without the least possible blame to themselves; and having failed to do so, they are liable to plaintiffs for the value of said house, and his honor erred in not so deciding.

14. It is submitted that the defendants had no insurable interest in the house destroyed by fire; that the plaintiff was the true owner thereof, and the money received by defendants on account of its destruction was held by them as trustees for the plaintiffs, and they should be made to account to the plaintiffs therefor; and that his honor erred in not so deciding.

The defendants filed the following exceptions:

1. Because, it is submitted, that in reaching the correct conclusion declared by his honor, that the complaint in the first action

for \$50,000 should be dismissed, he should have given, in addition to the reasons given, the reason and ground that the plaintiffs could not recover "rents and profits" or "rental value" in said action, because the complaint was simply for negligence; and it is submitted that his honor erred in not so finding.

2. Because, it is submitted, that his honor erred in not giving as another reason for the conclusion that he reached, to wit, that the plaintiffs were estopped from recovering any amount for "rents and profits" or "rental value" in this action by the proceedings in the former action of W. H. Barrett et al. v. Bath South Carolina Paper Company et al., upon the principles of res adjudicata.

Messrs. J. Ganahl, James Aldrich, and G. W. Croft, for appellant.

Messrs. Henderson Bros., C. R. Miles, Simon-ton & Barker, and D. C. Jordan, contra.

June 19, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On August 5, 1878, a tract of land, with the improvements there-

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on, consisting of a paper factory and *its appurtenances, belonging to the plaintiffs, was offered for sale under various judgments against said company and bid off by the defendants through their agent, Mr. Henderson, and on the next day, titles having been made to them by the sheriff, they took possession of the property. A very short time after they went into possession of the property, to wit, August 20, 1878, the dam of the pond which furnished the water power necessary for running said factory was broken, and in consequence thereof, the property could not be and was not used by the defendants for the purposes for which it was intended.

On August 21, 1878, an action was commenced by Barrett and others against the plaintiffs herein and the defendants herein and the judgment creditors of the company with a double aspect. 1st. To obtain foreclosure of certain alleged mortgages which had been executed by the Bath Company on said property to the said Barrett and others, the validity of which was questioned; and, 2d. In the event that the court should determine that said mortgages were not valid liens as against the judgments, then for the purpose of setting aside the sale of the property to the defendants of August 5, 1878, upon the ground of fraud therein. The case was heard by Judge Kershaw, who rendered a decree that the mortgages were not valid liens, and that said sale be set aside upon the ground of constructive, not actual, fraud, and upon appeal his decree was affirmed. Thereupon the defendants, on March 30, 1880, surrendered the possession of the said property and the same was subsequently resold under the decree of Judge Kershaw.

For a more full account of the proceedings in the case thus briefly referred to, reference may be had to *Barrett v. Bath Paper Company*, 13 S. C., 128.

On April 21, 1880, and on May 4, 1880, the plaintiffs commenced the two actions, in which this appeal is taken, against the defendants, which were heard and will be considered together. By the first they seek to recover damages for the illegal seizure and detention of the said property, for the loss of the dam and injury to the wood-work and machinery; and by the second they seek to recover damages for the destruction by fire of a building on the premises, and also the sum of \$1,000 received by the defendants from an insurance company for the building

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so *destroyed by fire during the time the defendants were in possession of the property, which insurance, it appears, was effected by the defendants.

By consent of all parties the issues in these two actions were referred to a referee "for trial and determination." The referee made his report, in which he found that the claim of the plaintiffs in the first action for the use of the property was barred by "the plea of *res adjudicata*, or rather the principles of it as used in equity," and the claim for damages by the breaking of the dam, and the consequent injury to the wood-work and machinery, could not be sustained, because there was no proof of negligence on the part of the defendants; and in the second action he found that the plaintiffs could not recover the insurance money, as there was "no such privity between them and the defendants, or the insurers, as entitled them to recover from the defendants the insurance received." He therefore found generally for the defendants in both of the cases.

This report, with the exceptions thereto, was heard by Judge Hudson, who held: 1st. That "the doctrine of *res adjudicata*, waiver, or estoppel, does not bar these actions." 2d. That as to the claim for the use of the property, or the rents and profits thereof, it could not be sustained, as no rents and profits were, or could have been, realized by the defendants in the condition in which the property was, within a very few days after they took possession, which condition was not due to the fault of the defendants. 3d. That no damages could be claimed for the loss of the dam and the consequent injury to the wood-work and machinery, inasmuch as this was not a consequence of the negligence of the defendants, but resulted from causes for which they were not responsible. In the other action he held that the plaintiffs, not being in any way privy to the contract of insurance, could not recover the insurance money received by the defendants. He therefore rendered judgment dismissing the complaints in both of the actions.

From these judgments plaintiffs appeal

upon numerous grounds, which need not be set out in detail here. Inasmuch as these are law cases, and not cases in chancery, it is quite clear that we have no jurisdiction to

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review any findings of fact, but are confined solely to the correction of errors at law, assuming the facts to be as found below. Hence it will not be necessary, or even proper, for us to consider any of the questions of fact raised by the grounds of appeal. The defendants also, by the form of exceptions, seek to sustain the judgment below in the first action upon other grounds than those upon which it is placed by the Circuit Judge, and for this purpose contend that the plaintiffs could not recover anything for rents and profits, or for rental value, because the complaint was simply for negligence; and, 2d. That the plaintiffs were estopped from recovering any rents and profits, or rental value, by the proceedings in the former case of *Barrett v. Bath Paper Company* upon the principles of *res adjudicata*.

We do not propose to consider the various exceptions in detail, but simply to determine what we understand to be the fundamental and controlling questions in the case. The fundamental idea upon which the argument for the plaintiffs rests is that the sheriff's sale on August 5, 1878, was absolutely void, and that the defendants, in taking and holding possession of the property under that sale, were tortfeasors, or trespassers in the same sense and to the same extent as if they had taken such possession *vi et armis*. This, we think, is not a proper view of the relations of the parties. The sale certainly was not absolutely void; for, if so, it would not have been binding on any of the parties, and might have been so treated whenever and wherever it was encountered. Now, it is quite clear that if the defendants had refused to comply with their bid, they could have been compelled to do so, and it is equally clear that the sale could not have been treated as a nullity in any collateral proceeding, but that it was necessary that it should be assailed and set aside in a direct proceeding, as was done. Nor do we think that the defendants could be regarded as trespassers, taking possession *vi et armis*. They went in peaceably, and with the acquiescence of plaintiffs, under a clear legal title; and it seems to us an entire misuse of terms to characterize them as trespassers. If the position taken by appellants be correct, then it would follow that the sale by the sheriff and his title might have been disregarded and the defendants might have been sued for

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trespass the *moment they went into possession, and this surely would not be contended for.

It seems to us that the relations of the parties were more like that of trustees and *cestui que trust*. They had the legal title,

and therefore the right to possession, but inasmuch as they had acquired such title under circumstances that a Court of Equity, from considerations of public policy, would not allow them to retain it, they could, by proper proceedings in that court, and only in that court, be required to surrender their title and account for the rents and profits while in possession. Upon the same principle, if one buys trust property with a knowledge of the trust, he will be declared in equity a trustee, and will be required to surrender the property, notwithstanding he may have the legal title, and account for the rents and profits. But certainly such a person could not be regarded as a trespasser, and as such liable for damages.

In this case it does not appear that the defendants personally did or said anything which vitiated the sale; in fact, it does not even appear that any of them were present at the sale. What was done was the act of their agent, Mr. Henderson, and Judge Kershaw in his decree very properly exempted him from any charge of moral wrong, and it is manifest that the Supreme Court took the same view, for their opinion rests solely upon the ground that the arrangement made by Mr. Henderson necessarily tended to chill the biddings, inasmuch as by reason of such arrangement some of the judgment creditors lost that motive to bid at the sale which otherwise would naturally prompt them to do so in order to save their debts, and thus that competition, which is the life of such sales, was prevented. The mere fact that the defendants desired to obtain, and did obtain, the property at a price less than its real value (and this is all that the defendants can be charged with having done personally), would not have vitiated the sale; the real vice was that their agent made such an arrangement as would necessarily tend to diminish the number of bidders and thus prevent that competition which might otherwise have been naturally expected, and this from considerations of public policy the law will not permit.

It not unfrequently happens that acts in-

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volving no moral wrong are set aside by a Court of Equity upon the ground of legal fraud, as contradistinguished from moral fraud, because they violate some settled principle of public policy. Thus a person who makes a voluntary conveyance with the most innocent, or even laudable, motives, may find such a conveyance declared fraudulent in law and set aside; or, as in *Dudley v. Odum* (5 S. C., 131 [22 Am. Rep. 6]), a contract, which it was conceded violated no moral rule, was declared fraudulent, because made in contravention of a well settled principle of public policy. In such cases it would be clearly a misuse, if not an abuse, of terms, to characterize the persons who made such conveyances or contracts as tortfeasors in the sense of those terms as used by the coun-

sel for appellants. So here we think it is a mistake to suppose that the act of these defendants, through their agent, Mr. Henderson, was of such a character as would justify such a charge.

It seems to us, therefore, that the relation of the defendants to the plaintiffs was more like that of a trustee than a trespasser, and hence it has been argued with much force that the claim now made in the first action was a necessary incident to the former suit, and should have been there adjusted and not made the subject of a second action. It is undoubtedly true that the plaintiffs could, in the former action of *Barrett v. Bath Paper Company* and others, have required these defendants to account for the rents and profits, and such has been the usual practice in this State. *Martin & Walter v. Evans*, 2 Rich. Eq. 368, and again in 1 Strob. Eq., 350; *Brown v. McDonald*, 1 Hill Eq. 297; *McDonald v. May*, 1 Rich. Eq., 91, and other cases cited in the argument for respondents. And we see no reason why, in the same case, the defendants, by proper pleadings and proofs, might not also have been made to account for any damages done to the property by their fault or misconduct while the same was in their possession; for while it is true that a claim for damages is not ordinarily within the jurisdiction of the Court of Equity, yet where they are incidental to the other relief sought of which the court does have jurisdiction, then a Court of Equity may also proceed to award damages as ancillary to such relief, either by a reference to the master or by ordering an issue of quantum damnificatus to be tried by a jury.

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Bird v. Railroad Company, 8 Rich. Eq., 46 [64 Am. Dec. 739], and the authorities therein cited; *Lamar v. Railroad Company*, 10 S. C., 476.

Courts do not try cases by piecemeal, and a Court of Equity especially delights to do full and complete justice. Thus a claim which is necessarily incident to one that has already been adjudicated cannot be made the ground of a second action, even though it may not have been considered or passed upon in the former action. A party cannot, after having obtained judgment for the principal of a note or other interest-bearing demand, bring a second action to recover the interest, even though he may have wholly omitted to claim interest in the first action, because the interest, being a necessary incident to the principal, should have been demanded in the first action, and therefore cannot be made the ground of another action. So, too, in the old action of trespass to try titles, which by the act of 1791 was substituted for the former action of ejectment, in which the party could only recover the land, and was put to his second action for the recovery of rents and profits, a party having recovered the land could not maintain a second action for rents and profits, although the act simply

permitted, but did not require, such a claim to be embraced in the first action. *Lehie v. Sumter*, 1 Tread, Con. R., 102; *Coleman v. Parish*, 1 McCord, 264; *Lowrance v. Robertson*, 10 S. C., 33.

It is contended, however, that in the former case the parties were different, and that the claim now sought to be set up was not a claim of the plaintiffs in that case against the defendants, but that it was a claim by one co-defendant against co-defendants. A Court of Equity takes but little note of how the parties are arrayed upon the record, whether as plaintiffs or defendants, but proceeds to determine the issues, whether they arise between plaintiff and defendant, or between co-defendants, and nothing is better settled than that a Court of Equity may render a decree in favor of one defendant against his co-defendant upon an issue growing out of the pleadings and proofs between the plaintiff and such defendants. Such a decree was rendered in *Motte v. Schult* (1 Hill Eq., 146 [26 Am. Dec. 194]), where the following language of Lord Redesdale, in *Chamley v. Lord Dunsany* (2 Sch. & Lef., 710), is quoted with approval: "But it seems

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strange to object to a decree *because it is between co-defendants, when it is grounded on evidence between the plaintiffs and the defendants. It is a jurisdiction long settled and acted on, and the constant practice of a Court of Equity; so much so that it is quite unnecessary to state any case in its support"—as well as the following words of Lord Eldon, in the same case: "When a case is made out between defendants by evidence, arising from pleadings and proofs between plaintiffs and defendants, a Court of Equity is entitled to make a decree between the defendants—further, my lords, a Court of Equity is bound to do so. The defendant chargeable has a right to insist that he shall not be made a defendant in another suit for the same matter that may then be decided between him and his co-defendant, and the co-defendant may insist that he shall not be obliged to institute another suit for a matter which may be then adjudicated between the defendants. And if a Court of Equity refused so to decree, it would be good cause of appeal by either defendant."

This strong and decisive language of Lord Eldon might have been applicable to the present case, if the issue now presented had been raised by the pleadings and proofs in the former case. The real object of the former case, and the one which was effected, was to set aside the sale and restore the property to its original owner, and it may be that the claim for damages now made might have been asserted by proper pleadings and proofs in that case, but this does not seem to have been done, and, therefore, the court was not called upon to decide, and did not decide, anything in reference to the present controversy. It is true that the Bath Company

were, in the former suit, nominally arrayed on the side of defendants, yet they were really plaintiffs, desiring the same relief as the plaintiffs. In their answer they plainly allied themselves with the plaintiffs, and expressly asked for such relief "as the nature of the case may demand, as fully and completely as if this defendant had instituted the said proceeding."

But the "nature of the case," as made by the plaintiffs in the former suit, did not embrace the demand now made, and whether the Bath Company, by joining in the demand for the relief there asked as fully and completely as if they had instituted said proceeding, were bound so to shape their pleadings

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and proofs as to *embrace the demand now made, is a question about which there may well be difference of opinion; and, therefore, we prefer to rest our decision in this case upon the ground upon which the judgment below was placed by the Circuit Judge, sustained, as it is, by the reasons which he has given, which need not be repeated here. The relations of the parties being such as we have indicated above, it is clear that the Circuit Judge was right as to the degree of care which the defendants were bound to exercise; and as the findings below established the fact that such care was used, there is no ground upon which the defendants could be made liable for the injury, which the property sustained without fault on their part. So, too, as to the rents and profits; the Circuit Judge having found that none were received, or could have been received, by reason of causes for which the defendants were in no wise responsible, there is no ground upon which plaintiffs can claim anything on that account.

As to the second action, we agree with the Circuit Judge in the views which he has presented, so far as the claim for damages for the destruction of the building by fire is concerned. Assuming, as we are bound to do, under the findings of fact below, that the destruction of the house by fire was not due to any negligence on the part of the defendants, they cannot be made liable for any damages occasioned thereby.

It seems to us, however, that the claim for the insurance money received by the defendants stands upon a different footing. If, as we have seen, the defendants stood in the relation of quasi trustees towards the plaintiffs, then the money received by them for the insurance on the house of the plaintiffs belonged, *ex aequo et bono*, to the plaintiffs. This money may be regarded as a compensation, in part, at least, for the loss of property which has been adjudged to be the property of the plaintiffs, and, therefore, in equity and good conscience, it belongs to the plaintiffs. Any other view would, contrary to well established principle, enable the defendants to make profit for themselves out of the quasi trust property. It is, in effect, money had

and received by the defendants to the use of the plaintiffs, and, as such, recoverable by the plaintiffs, subject, however, to a deduc-

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tion of all amounts *actually paid by the defendants, either by way of premiums or otherwise, in effecting or collecting such insurance.

The judgment of this court is that the judgment of the Circuit Court in the first action above considered be affirmed; and that the judgment of the Circuit Court in the second action be reversed, and that said second action be remanded to the Circuit Court for a new trial.

23 S. C. 149

LANGSTON v. SHANDS.

(November Term, 1884.)

[1. *Payment* ⚭66.]

A joint and several bond, which matured January 1, 1860, and was credited with a payment January 5, 1860, was presented in September, 1883, under a call for the creditors of P deceased, one of the obligors. *Held*, that it must be presumed to have been paid, notwithstanding judgment against the other obligors and payments thereon after P's death; and notwithstanding an action commenced against P's estate in 1870, but dropped from the calendar by the Circuit Judge in 1877, and never restored.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 176-188; Dec. Dig. ⚭66; *Bonds*, Cent. Dig. § 226.]

[2. *Limitation of Actions* ⚭103.]

A guardian's bond stands as security to the ward for the payment of whatever may be found due on a proper accounting, for full twenty years from the day that the ward may demand a settlement; but the right to an accounting may be barred in a shorter time, under the statute, where there has been a disavowal of the trust.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⚭103.]

[3. *Limitation of Actions* ⚭103.]

The acts of the guardian in this case did not amount to a disavowal of trust, and yet were not admissions binding upon the surety on his bond.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 500, 506-510; Dec. Dig. ⚭103.]

[4. *Payment* ⚭66.]

An infant ward having married a husband in March, 1863, the presumption of a payment by her guardian to her husband for her, then commenced to run, and was complete before September, 1883, when the claim was presented in this case for payment.

[Ed. Note.—Cited in *Hall v. Woodward*, 26 S. C. 560, 2 S. E. 401; *Burnside v. Donnon*, 34 S. C. 291, 13 S. E. 465.

For other cases, see *Payment*, Cent. Dig. §§ 176-188; Dec. Dig. ⚭66; *Guardian and Ward*, Cent. Dig. §§ 511-513.]

Before Hudson, J., Laurens, September, 1883.

In this case the Hon. T. B. Fraser, of the third Circuit, and the Hon. I. D. Witherspoon, of the sixth Circuit, sat in the places

of the Chief Justice and Mr. Justice McGowan, who had been of counsel in the court below. It was an action by P. B. Langston, as administrator de bonis non of Robert Pitts, deceased, against the executor of one of the

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devisees, and against the other *devisees and legatees of the plaintiff's testator. Creditors were subsequently called in, and the only questions brought to this court involved the rights of two of these creditors. The report of the master, and the brief decree of the Circuit Judge, together with other facts, are sufficiently stated in the opinion of this court.

Mr. Richard C. Watts, for appellants.
Messrs. Holmes & Simpson, contra.

July 1, 1885. The opinion of the court was delivered by

Mr. Justice FRASER. Some time in 1879 this action was commenced by the plaintiff in his own right and as administrator against the devisees, heirs, and representatives of Robert Pitts, deceased, having for "its object the marshalling of the assets and the full and final settlement" of his estate. It does not appear in the "Case" that at the commencement of the action any creditors were made parties to the action. Some time in 1881, an order was made referring the case to the master. On October 17, 1882, an order was made, by whom it does not appear, to call in creditors. The "Case" does not show that there was any publication of the usual notice to creditors, or that there was any order enjoining creditors from prosecuting their claims otherwise than under these proceedings. Amongst the claims presented for payment are two, which are the subjects of this appeal:

1. A bond of Isabella A. Henry, B. C. Beasley, and Robert Pitts, to B. R. Campbell, commissioner in equity, in the penal sum of \$3,400, dated March 29, 1859, conditioned to pay \$1,701 on January 1, 1860. On this bond there was paid January 5, 1860, \$750. On this bond Robert Pitts was a surety.

At the May term, 1875, judgment was obtained on this bond against Beasley for the full amount of the debt, interest, and costs, and nothing has been recovered on it. At the February term, 1878, judgment was obtained against Isabella A. Henry for the full amount of debt, interest, and costs, and there was collected thereon the sum of \$125, an amount insufficient to pay the costs which had accrued in that action. Robert Pitts had died in the spring of 1862. An action was com-

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menced against his *executors, and the case stood on calendar No. 1 at the June term, 1870. The case remained on this calendar, No. 1, until the May term, 1877, when, as stated in the "Case," it was marked "struck off," or, as stated by the counsel for the appellants, "adjourned off." The executors of

Robert Pitts died about this time, and no further proceedings were had in reference to this bond against the estate of Robert Pitts until the same was presented under the call for creditors in this case.

This claim was allowed by the master, and on exception his judgment was overruled by the Circuit Judge on the ground that the claim was barred by the presumption of payment arising from lapse of time. It does not appear that there was any order enjoining creditors made in this case at any time, and it is not necessary, therefore, to consider what would have been the effect of such an order in arresting the currency of the statute of limitations, or of the presumption of payment from lapse of time. The first order to call in creditors was made October 17, 1882. While there was, on April 16, 1883, an adjournment to communicate with a party in the west and for claims represented by Mr. Watts, one of the counsel for the appellants, there was no presentation of the claim, or any evidence in reference to it until September 4, 1883. It is to be regretted that the "Case" does not furnish more definite information as to the time and mode in which these claims were presented. We must, from such statements as have been made, conclude that this claim and the one to be hereafter considered, were first presented under the call in this case on September 4, 1883. This, therefore, is as to this claim the commencement of the action, which would arrest the presumption if not too late. See *Warren v. Raymond*, 17 S. C., 202, 205.

The presumption of payment running from the payment of \$750, January 5, 1860, even if we allow nine months, during which action cannot be brought against personal representatives, was complete on October 5, 1880, unless it has been in some way arrested. A payment made by Isabella A. Henry, or B. C. Beasley, if made during the life of Robert Pitts, might have given a new starting point for the presumption of payment. A several judgment against them, or either of them,

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after his death, *can have no such effect, even if a part of the money is collected under the execution issued under the judgment. The judgment was as to each of them several and conclusive only as to the party sued. In any other action against other parties to the bond there must be proof de novo as to every issue involved. See *Shubrick v. Adams*, 20 S. C., 49.

It is earnestly urged, however, that the presumption of payment was arrested by the commencement of an action against the executors of Robert Pitts in 1870 on this bond, and (as we understand the argument) which was still pending when the claim was presented here, notwithstanding the entry of "struck off" or "adjourned off" in 1877 at the May term of the court. This latter expres-

sion, which was a very common one used in such cases by the Circuit Judge alluded to, really has no precedent for its use, and, as far as we are informed, never had any other effect than to induce the clerks to drop the case from the calendar, to be restored, without asking leave, whenever requested by any party to the action. The words had no meaning, and were so regarded by the profession. If the entry of "struck off" had been made, and this is the strongest way in which it can be put as against the claim, the case could have been restored to the calendar on motion made within a reasonable time. Nearly seven years had elapsed since this entry was made on calendar No. 1, before any further steps were taken to submit this claim to the court. The case thus stricken from the calendar, or "adjourned off," cannot certainly have such dormant life as to justify a revival of it now. In *Kennedy v. Smith*, 2 Bay, 414, it is said: "That all the cases quoted from 3 Blackstone's Commentaries are strong in point, and prove that leaving a chasm in the proceeding, without regular continuance from time to time, will amount to a discontinuance. But the lapse of seven years is so great laches on the part of the plaintiff in this action that nothing on her part can cure it."

In this case we see nothing to excuse the laches, and there was nothing in the way in which suit was brought on this bond and allowed to drop to arrest the presumption of payment. This court therefore holds that there has been as to this bond a presumption of payment arising from lapse of time having

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a force *equal to the bar of the statute of limitations. *Boyce v. Lake*, 17 S. C., 481 [43 Am. Rep. 618]; *Shubrick v. Adams*, 20 S. C., 49.

2. The other claim is on a bond signed by Robert Pitts as surety for John Langston as guardian of Mary E. Langston, now Mary E. Donnon, wife of James M. Donnon. The bond bears date June 26, 1846. Mary E. was married March 3, 1863, and attained her majority June 30, 1863. As the law then stood, the marital rights attached to the fund in the hands of the guardian, and the change as to the rights of married women by the constitution of 1868 did not divest them. In the absence of any evidence on the subject, we must assume that James M. Donnon was then of age, and he could have received the money from the guardian and given a valid receipt for the same without joining his wife in the receipt. The statute of limitations would then have commenced to run, and the presumption of payment from lapse of time, for the same reason, from the marriage. *Glover v. Lott*, 1 Strob. Eq., 79; *Coleman v. Davis*, 2 Strob. Eq., 341.

The bond of a guardian is conditioned that the guardian shall faithfully account for and pay over whatever may come into his hands as guardian. To secure the performance of

this duty the bond runs for full twenty years from the time at which the ward attains majority, or, as in this case, from the time when by her marriage there was a person sui juris and competent as her husband to receive and receipt for the fund. When, however, after this period the guardian does an act which purports to be a termination of his trust, he thereby claims to have discharged this duty. From such an act, therefore, the statute of limitations commences to run and becomes a bar to any further accounting. The statute, however, does not bar any claim to the amount admitted to be due on such accounting. It only shuts out any claim to a further accounting, but the bond continues to run for the security of the ward that the sum so admitted to be due shall be paid for the full period of twenty years from the date of such admission.

In the case now under consideration there is a fund in the hands either of the personal representatives of the guardian, John Langston, or of the Probate Court, as a part of his

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estate *admitted to be applicable to this claim. Neither is the death of the guardian, John Langston, in 1862, nor the recovery of a judgment against his personal representatives in 1875, nor the accounting in the Probate Court in 1879, such a throwing off of the trust as will give currency to the statute of limitations. Neither can any of these things amount to such an admission of the claim as to give as against the surety a new starting-point for the commencement of the presumption of payment from lapse of time, as might have been the effect of an admission by the guardian in his life-time of an amount due and unpaid. *Shubrick v. Adams*, supra. The presumption of payment commenced to run on the marriage of Mary E., March 3, 1863, and this as well as the claim above considered was first presented September 4, 1883, twenty years and six months after the presumption commenced to run.

It is not necessary here to consider the effect of an injunction against creditors, for in this, as well as in the above considered case, there seems to have been none. Neither is it necessary to inquire whether nine months are to be added to the twenty years in cases of presumption as in cases of the statute of limitations, for which *Gray v. Givens* (2 Hill Eq. 511) seems to be an authority; for Robert Pitts had died in the spring of 1862, and the nine months had more than expired before the presumption commenced to run, or the marriage March 3, 1863. This claim therefore, of Mary E. Donnion, or rather of James M. Donnion and Mary E., his wife, has also been barred by lapse of time.

It is therefore ordered and adjudged that the judgment of the Circuit Court be affirmed and the appeal dismissed.

23 S. C. 154

GENOBLES v. WEST.

(November Term, 1884.)

[1. Judgment ⇨403.]

The validity of a former judgment may be attacked in subsequent action brought for that purpose, although other relief be also demanded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. ⇨403.]

[2. Process ⇨149.]

A sheriff's return of personal service, while presumptively correct, is *155 rebutted when disproved by the entry in his writ book, and by the testimony of the deputy to whom the paper was delivered for service, and of the person upon whom the alleged service was made.

[Ed. Note.—Cited in *Sanders v. D. Landreth Seed Co.*, 91 S. C. 28, 74 S. E. 120.

For other cases, see Process, Cent. Dig. § 204; Dec. Dig. ⇨149.]

[3. Infants ⇨89.]

The Court of Common Pleas can acquire jurisdiction of a minor by personal service only.

[Ed. Note.—Cited in *Whitesides v. Barber*, 24 S. C. 376.

For other cases, see Infants, Cent. Dig. § 258; Dec. Dig. ⇨89.]

[4. Judgment ⇨426.]

Irregularities arising subsequent to the service of a summons cannot properly, it seems, enter into the question of jurisdiction, nor render the judgment void.

[Ed. Note.—Cited in *Robertson v. Blair & Co.*, 56 S. C. 106, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see Judgment, Cent. Dig. § 804; Dec. Dig. ⇨426.]

[5. Process ⇨31.]

Where the proper party is served, and makes default, he is bound by the judgment, although incorrectly named in the summons.

[Ed. Note.—Cited in *Benson v. Carrier*, 28 S. C. 122, 5 S. E. 272; *Simmons Bros. v. Cochran*, 29 S. C. 34, 6 S. E. 859; *Prince v. Dickson*, 39 S. C. 483, 18 S. E. 33.

For other cases, see Process, Cent. Dig. § 25; Dec. Dig. ⇨31.]

[6. Estoppel ⇨94.]

Parties who take no steps to avoid proceedings relating to land in which they have a future interest, or to prevent strangers from dealing for it with another as his own (they having no positive knowledge of such dealings until after purchase completed), are not estopped from afterwards claiming this land from such purchasers.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 277; Dec. Dig. ⇨94.]

[7. Judgment ⇨123.]

The statute directing that the order for a judgment by default be endorsed upon the complaint, and that "no execution shall be signed on judgments obtained by default in any other manner," is directory, and a failure to observe this law does not invalidate a judgment otherwise regular.

[Ed. Note.—Cited in *Henlein v. Graham*, 32 S. C. 306, 10 S. E. 1012.

For other cases, see Judgment, Cent. Dig. § 221; Dec. Dig. ⇨123.]

[8. Judgment ⇨423.]

It cannot be assumed that in action for cancellation of deed on the ground of fraud, a judgment was rendered for the plaintiffs without

any evidence; but were the fact so, the judgment can not be corrected in a subsequent action.

[Ed. Note.—Cited in *Crocker v. Allen*, 34 S. C. 462, 13 S. E. 650, 27 Am. St. Rep. 831; *Archer v. Long*, 46 S. C. 295, 24 S. E. 83.

For other cases, see *Judgment*, Cent. Dig. §§ 797-801; Dec. Dig. ⚭423.]

[9. *Process* ⚭39, 41.]

It is not necessary that a summons should be signed and sealed by the clerk of the court.

[Ed. Note.—Cited in *Carolina Savings Bank v. McMahon*, 37 S. C. 316, 16 S. E. 31.

For other cases, see *Process*, Cent. Dig. §§ 34, 35; Dec. Dig. ⚭39, 41.]

[10. *Dower* ⚭46.]

Where dower is renounced upon a mortgage, in which power is given to the mortgagee on default to sell the land, satisfy the mortgage, pay subsequent encumbrances, and turn the surplus over to the mortgagor, all of which is done in the life-time of the mortgagor, his widow cannot claim dower out of this land, or any part thereof.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 147; Dec. Dig. ⚭46.]

[11. *Appeal and Error* ⚭1201.]

A claim not embraced in the pleadings, nor considered in the court below, disallowed on appeal, without prejudice to appellants' right to raise such issue by amendment in the further progress of the cause on Circuit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4673, 4677-4683; Dec. Dig. ⚭1201.]

[12. *Dower* ⚭49.]

A renunciation of dower certified to by the person taking it under his hand and seal, but without stating his office, *held* sufficient under the proof that such person was at that time a trial justice.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 154-174; Dec. Dig. ⚭49.]

[13. *Action* ⚭44, 45.]

[Where no objection is urged as to the mitting of several causes of action, the objection is waived.]

[Ed. Note.—For other cases, see *Action*, Cent. Dig. § 378; Dec. Dig. ⚭44, 45.]

[14. *Escheat* ⚭6.]

[Cited in *Eason v. Witcofskey*, 29 S. C. 245, 7 S. E. 291, to the point that notice required in proceedings of escheat is not in the proper sense process.]

[Ed. Note.—For other cases, see *Escheat*, Cent. Dig. §§ 7-17, 24; Dec. Dig. ⚭6.]

Before Fraser, J., Spartanburg, May, 1884.

In this case the Hon. I. D. Witherspoon, of the sixth Circuit, sat in the place of the Chief Justice, who had been of counsel in the cause.

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*To the full statement of the case, as made by the Circuit Judge, it will be necessary to add only that the renunciation of dower on the mortgage to Fowler was as follows: "State of South Carolina, Spartanburg County. I, J. W. Stribling, do hereby certify unto all whom it may concern, that Mrs. Susan B. Genobles, the wife of the above named John A. Genobles, did this day appear before me, and upon being privately," &c. (following the usual form). Its conclusion was as follows: "Given under my hand and seal this

22d day of November, A. D. 1878. (Signed) John W. Stribling, [L. S.] (Signed) Susan B. Genobles, [L. S.]"

The Circuit decree was as follows:

The cause came up on a report of a special referee and exceptions thereto. On October 26, 1874, John Genobles executed a deed by which he conveyed to the plaintiffs, Edwin Belton Genobles and others, his children by a former marriage, a tract of land described in the complaint, and the subject of litigation in this case. He reserved in this deed a life estate in himself, and at his death the said land was to be sold and the proceeds divided equally amongst his said children, the children of any one of them then dead to take the share of their parents. In this deed no provision was made for his wife Susan B. Genobles, one of the defendants in this case. To Franklin G. Genobles, another son, and one of the defendants, he gave in said deed one dollar.

On May 31, 1877, the said John Genobles filed a complaint against all of his said children, except Franklin G. Genobles, the purpose of which was to set aside said deed on account of undue influence exercised over him by his said children while he was under incapacity from age, infirmity, and distress of mind, from some great family affliction. To this complaint no answers were filed by any of the defendants, except by Henry C. Genobles, then a minor, near eighteen years of age, by his guardian ad litem, as will be hereinafter more fully stated. There is nothing to show that the adult children made any opposition to the wishes of their father, John Genobles, while the testimony taken in the case shows that several of them were willing that their father should have the relief demanded in the complaint; and all of them knew that the

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complaint had been filed. The cause *was placed on calendar 6, and when it came up for a hearing Judge Mackey, who was then holding the regular term of the court, made a decretal order, in which it was held that said deed "is void as against the plaintiff (John Genobles), and has no legal force and effect," and "that the said deed be delivered up for cancellation by the clerk of this court, and that the same be cancelled and discharged of record, and that the defendants be perpetually enjoined and restrained from exercising any rights and privileges under said conveyance." This decretal order bears date October 20, 1877, and was marked on the back of it, "Filed October 20, 1877," by the clerk of the court.

After these proceedings were had John Genobles executed a mortgage of this land to one Fowler to secure the payment of \$300, money borrowed. On this mortgage Susan B. Genobles, then the wife of John Genobles, duly renounced her dower. John Genobles having failed to pay this debt, Fowler, under

a power reserved in the mortgage, and after due notice, sold the land to Dr. Cleveland for \$801. This sale was made in the lifetime of John Genobles, and after paying the mortgage debt and some small judgments against him, the surplus was turned over to him. The title was made to Dr. Cleveland, and he conveyed the land to the defendant, J. Walter West.

W. L. Genobles, one of the children, purchased six acres of this land from his father, John Genobles, which, by several intermediate conveyances, was also transferred to the defendant, West. His title to this six acres, I understand, is not disputed in this case. John Genobles died January 8, 1883.

Now, the purpose of the present action is to have this decretal order of Judge Mackey "reversed and adjudged null and void," and the parties "enjoined from enrolling the same," and to have the possession of the said land or partition thereof and general relief. Susan B. Genobles, the widow, is a defendant, and claims dower in the land. Franklin G. Genobles though claiming more in his answer, put in by a guardian ad litem, insists in the argument only on the payment of one dollar and interest and costs. The referee has dismissed the complaint as to Rena Genobles, another minor, who is not in any way mentioned in the deed of John Genobles.

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John Robert Genobles having died *since the commencement of the suit, by an order of the referee his widow and children have been substituted in his place in the action, guardians ad litem having been duly appointed by the judge of probate for such of them as are minors.

The case of the plaintiffs in this action is based on the theory that the proceeding above referred to, which terminated in the decretal order of Judge Mackey of October 20, 1877, is absolutely void, or that it is voidable, and should be set aside by the court in this action, and the plaintiffs remanded to their rights under the deed of John Genobles of October 26, 1874. The objections on which plaintiffs rely, as I understand them, are as follows:

1. That the summons in that case was not signed and sealed by the clerk of the court.

2. That the summons was not served personally on the defendants in that action, or by delivery to such other person as was then required by law.

3. That the decretal order of Judge Mackey was never enrolled or recorded.

4. That the minor, Henry C. Genobles, was not served personally with the summons; that there was no personal service on him of the notice of application for the appointment of guardian ad litem; and that the notice which was left at his residence was for an application to Judge Northrop, and not to Judge Mackey, by whom the order appointing the guardian ad litem was made.

5. That neither the petition for nor order appointing the guardian ad litem were filed, nor was his answer filed or served on plaintiffs' counsel in that cause.

6. That the order of Judge Mackey was not endorsed on the complaint.

7. George T. Genobles also claims that he was never made a party to that action, one J. T. Genobles having been named in the complaint, and not George T. or G. T. Genobles.

8. None of the defendants in that action answered, except the minor, Henry C. Genobles, in the manner above stated, and it does not appear that the decretal order of Judge Mackey was founded on any report of a referee as to facts, or any testimony taken in open court.

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*I will state my conclusion on these questions as fully as the time at my disposal will allow:

1. Under the old practice a writ in the common pleas or a subpoena ad respondendum in equity, by which an action was commenced, was a process of the court to compel the attendance of the defendant in order that his person as well as his property might be held to answer the judgment in the common pleas or to secure his answer under oath to the allegations of the bill. It was important, therefore, to have the authority conferred by signature of the clerk under seal of the court to such process. The summons now, under the code, is merely a notice that an action has been commenced, to apprise the defendant of the nature and amount of the claims against him, and to compel his attendance on pain of losing all right to dispute the claims or prevent their enforcement.

1 Wait Pr., 468, § 1. I have found nowhere in the acts, or in the books of practice or of forms, any reference to a seal or the signature of the clerk of the court. While these forms in Abbott indicate even the revenue stamp as necessary, the seal and signature of the clerk are conspicuously absent, and I see no use for them.

2. On examining the record in that case I find that the affidavit of service shows, prima facie at least, personal service of the summons on all the defendants, and Judge Mackey states in his order that the summons had been personally served on all the defendants. If it be true, as alleged by some of the plaintiffs here, that in fact they were not personally served with the summons in that case, it seems to me that this is not the proper way to make the question. It seems to me that under the old practice a bill in equity, to which this action is similar, to set aside a judgment at law, or a decree in equity, would not have been a proper proceeding, if the ground of relief was mere irregularities in the service of process or in the course of proceeding in the cause. The proper mode to correct errors of this kind is, to make a motion in the cause itself, supported by affidavits, and made with due promptness. In

Wagner v. Pegues (10 S. C., 261), it is said "that the powers of equity cannot be invoked to restrain an execution on the ground of irregularity." I am under the impression that there is another case in which it is held

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by the *present Supreme Court that any errors or irregularities in a cause must have their remedy in the cause itself, and on motion, and not in another action. I have not been able to find the case, but the principle seems to be a good one as it is the best and only way to end litigation. It is true that great wrong may be done sometimes, but this is incident to all human tribunals.

3. A judgment is the final determination of the rights of the parties in an action. While the written instrument purporting to be the judgment in a cause remains in the possession of the judge who is to pronounce it, it is of no effect, and like a deed not delivered. The moment, however, it is filed by the clerk of the court it becomes the judgment of the court and fixes the rights of the parties. The recording of the judgment or order is only to give notice and secure the safety of the record of the solemn acts of the courts. This seems to be the principle on which the case of *Clark v. Melton* (19 S. C., 498) is founded. The failure of the clerk to cancel this deed cannot restore it to validity.

4 and 5. On examining the record in that cause, I think that the minor, Henry C. Genobles, was personally and properly served with the summons. The notice of the application for the appointment of a guardian ad litem was not, as appears on the paper itself, served personally as the law required. The order for the appointment of the guardian ad litem was not filed; the answer was not put in or served on the attorneys for the plaintiff; and the consent of the minor amounted to nothing, as he could not bind himself to anything. The record itself shows that as to this minor, the court never had any jurisdiction, and as to him the judgment is void. *Finley v. Robertson*, 17 S. C., 439.

6. When courts of limited jurisdiction are created by and derive their power entirely from the legislature, it may be that they are confined in the exercise of this jurisdiction to the precise mode prescribed. In reference, however, to courts of general jurisdiction, I think that the rule is properly laid down in a note on p. 226 of *Potter's Dwarrris on Statutes and Constitution*, as follows: "When a statute directs certain proceedings, to be done in a certain way, or at a certain time, and the form or period does not appear essen-

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tial to the judicial mind, the law *will be regarded as directory." When provision of the statute relates to the essence, it is mandatory; when to the form or manner, it is directory. *Ib.*, note a, p. 224. I hold, therefore, that the requirement to endorse the judgment on the complaint in cases on calendar 6, now calendar 3, is directory, and a failure

to do so does not invalidate the judgment when otherwise regular.

7. In that complaint one of the children was called J. T. Genobles. There was no J. T. Genobles, but one George T. Genobles, sometimes called G. T. Genobles. It seems that the summons was served on this George T. Genobles, who is a party plaintiff in the action now before the court. If George T. Genobles had appeared and answered and taken no exception to the misnomer, it would now be too late to object to it. He did not appear in the case at all, and I do not see how he can in any way be held bound by a proceeding in which he was not named, or called by a name by which it does not appear that he is known; they are different names and there is no better reason for holding George T. bound by a judgment against J. T., than for holding Mr. Smith bound by a judgment against Mr. Jones.

8. If on this hearing I can reverse an order of Judge Mackey, because he took no testimony and had no evidence before him on which he based the findings of fact on which the order rests, I do not see where is the limit at which one judge is to stop his inquiry into the evidence on which another rested. If I could reverse his judgment or order for a total failure of evidence, I could do it on the same principle for a total failure on any one material point, and I do not see why it could not be done for mere insufficiency. I think there should have been testimony in the case, and there is no positive statement that there was not, and I do not think that I am at liberty to infer that there was no testimony in the case. If there was, however, a judgment without any testimony, I do not see how I am to correct it.

It appears from the testimony that all the children of John Genobles knew of these proceedings now assailed and took no steps of any kind to have them set aside or to prevent strangers from dealing with their father as to this land, as if it were his property. I do not see anything, however, which

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comes up to *my view of an estoppel in their conduct. A man who has a claim on property is not bound to hunt up persons dealing with it, and give notice of his claim. These claims under this deed, if they had any, did not accrue until after the defendant West had bought and gone into possession of the land. There is nothing to show that they had any positive knowledge of the dealings of Cleveland or West until after they had paid their money for the land, and they certainly gave no consent otherwise than they are bound by the judgment or order of Judge Mackey. The entry made by the clerk during the reference under this complaint cannot affect the rights of the parties. They stand as they were at the commencement of this action.

As to the right of dower in the widow, I do not think it makes any difference whether

the order of Judge Mackey is valid or invalid. She had an inchoate right to dower in the land before the deed of 1874, and she released her dower on the mortgage to Fowler. Under a power in this mortgage, Fowler sold the land to Cleveland, and made him title. This was in the life-time of her husband, John Genobles. I take this to be the true doctrine in such cases: "Where there is a foreclosure and sale of the mortgaged premises upon a mortgage valid against the wife, the result is entirely to divest her of all claim upon the land, and compel her to look to the surplus proceeds of sale, if any remains after satisfying the mortgage debt." 1 Scrib. Dower, 491, § 16. The only cases in this State where there is an allowance out of the surplus, are where the sale has been made after the death of the husband. There are some New York cases where a part of the surplus has been held by the court to meet the wife's claim of dower, if she survives. *Ibid.*, 501-504, §§ 26-30. I do not think the widow is entitled to dower in this land.

It is therefore ordered and adjudged, that the complaint be dismissed as to all the parties plaintiff and defendant, except Henry C. Genobles, George T. Genobles, Franklin G. Genobles, and J. Walter West: and that the parties as to whom the complaint is hereby dismissed do each pay their own costs. It is ordered, that Franklin G. Genobles be paid out of the land one dollar and interest from the death of John Genobles. It is further ordered and adjudged, that a writ of

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partition do issue to five *persons appointed, two by the plaintiffs, H. C. and G. T. Genobles; two by the defendant West, and one by the clerk, commanding them to divide the said land, so as to set off one-ninth to Henry C. Genobles; one-ninth to George T. Genobles, and the remainder to J. Walter West; and if the land cannot be divided fairly, that they then make their return according to the requirements of said writ. It is further ordered, that the costs of all the parties as to whom this complaint is not dismissed be paid out of the land; and in estimating the costs to be paid out of the land, only so much shall be charged thereon in favor of Henry C. and George T. Genobles, of the costs heretofore accrued as they two were to the whole number of shares claimed by plaintiffs in the land, to wit, two-ninths thereof.

Ordered, that any parties as to whom this complaint is not dismissed have leave to apply at the foot of this decree for any necessary or proper orders in the cause, and that the report of the referee be modified as above stated.

From this decree the defendant, J. Walter West, appealed on the following exceptions, to wit:

I. Because his honor, the Circuit Judge, erred in holding that H. C. Genobles did not have notice of the application for appoint-

ment of a guardian ad litem in the case of John Genobles v. John W. Genobles et al.

II. Because his honor, the Circuit Judge, erred in holding that the order for the appointment of the guardian ad litem in said cause was never filed, and the answer of such guardian ad litem was never put in or served on the attorneys of plaintiffs.

III. Because the Circuit Judge erred in holding that the court never had jurisdiction over said H. C. Genobles in said cause, and that the judgment therein as to him was void.

IV. Because the Circuit Judge erred in holding that though the summons and complaint in said cause of John Genobles v. John W. Genobles et al. was personally served on G. T. Genobles, he was not barred by the judgment therein, because in said summons and complaint he was incorrectly called J. T. Genobles.

V. Because the Circuit Judge erred in holding that the plaintiffs, H. C. Genobles and

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G. T. Genobles, were entitled to an *interest in the land in dispute, and in ordering a writ to issue to partition the same.

VI. Because the Circuit Judge erred in not holding that all the plaintiffs are estopped by their conduct, and by the record of the case of John Genobles v. John W. Genobles et al., from asking any part of the relief demanded in the complaint, and in not dismissing the complaint as to all of said plaintiffs.

The plaintiffs, except Henry C. Genobles and George T. Genobles, appealed on the ground that his honor erred:

I. In not holding that the seal of court and the signature of the clerk are necessary in issuing of the summons which the plaintiffs seek to set aside.

II. In holding that relief should be refused to these plaintiffs, because they came in by bill instead of by motion to set aside the decree complained of.

III. In not holding that the decree of Judge Mackey was null and void.

IV. In not at least holding that the decree of Judge Mackey was voidable, and, under the facts herein, should be adjudged null and void.

V. In not distinctly finding and holding that Judge Mackey's decree was made without the taking of any testimony whatever.

VI. In not sustaining the exceptions to the referee's report.

VII. In not finding the facts as alleged in the complaint of plaintiffs.

VIII. In not making a decree granting the relief prayed for in the complaint of the plaintiffs.

IX. In finding that any deed was ever made by John Genobles to William L. Genobles for six acres of the aforesaid real estate.

X. Because at the least, this plaintiff should have had a decree and interest in the six acres of land mentioned in the decree of the Circuit Judge.

XI. In finding that the title of the aforesaid six acres is not disputed in this case.

The defendant, Susan B. Genobles, appealed on the ground that his honor erred:

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*I. In not sustaining this defendant's exceptions to the report of the referee.

II. In not allowing this defendant dower in the whole of the premises in dispute.

III. In not allowing this defendant dower in at least the surplus of said land over and above what was sufficient to pay the mortgage debt due to W. D. Fowler.

IV. In not allowing this defendant dower in at least the six acres of the said land conveyed by John Genobles to F. J. Genobles.

V. In not holding that there was no proof that the alleged renunciation of dower was made before any person authorized by law to take such renunciation.

Mr. J. S. R. Thomson, for plaintiffs.
Messrs. Bomar & Simpson, for J. W. West.
Mr. S. T. McCravy, for the widow.

July 20, 1885. The opinion of the court was delivered by

Mr. Justice WITHERSPOON. A statement of the case is necessary to a proper understanding of the issues involved in this appeal. [The facts are all stated in the Circuit decree.]

We will first consider plaintiffs' second exception, alleging that the Circuit Judge erred in refusing plaintiffs relief "because they came in by bill instead of by motion to set aside the decree complained of." The judgment sought to be set aside by plaintiffs can only be impeached directly and not collaterally. The main purpose of this action is to have the former judgment adjudged null and void, upon the ground that plaintiffs were not personally served, as well as on account of alleged fatal irregularities and omissions in said action. All of the defendants in the former action are represented as plaintiffs in this action. It is true that this action seeks relief beyond the setting aside of the former action, but several causes of action can be united, and no objection has been urged as to improper uniting of causes of action in this

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*case. We think that the former judgment is directly attacked in this action, and plaintiffs should have been permitted to impeach the same. But this view cannot avail plaintiffs who make this exception, as we are satisfied that in the former action the court did acquire jurisdiction over such plaintiffs by personal service of summons.

In this connection we will next consider the third, fourth, and fifth exceptions of the defendant, J. Walter West, which allege that the Circuit Judge erred in holding that the court never acquired jurisdiction over the persons of the plaintiffs, G. T. Genobles and Henry C. Genobles, in the former action. Henry C. Genobles was a minor when the former suit was instituted. The Circuit

Judge concludes from an examination of the record that he was personally served with the summons; but as the application for the appointment of the guardian ad litem does not itself show that it was personally served, and as the order appointing the guardian ad litem does not show that it was filed, and as the guardian's answer does not show that it was served on plaintiffs' attorney, the Circuit Judge concludes that the record shows that as to the minor, Henry C. Genobles, the court never had jurisdiction in the former case—referring to *Finley v. Robertson*, 17 S. C., 439. The sheriff's writ book, introduced without objection, shows that Henry C. Genobles was not personally served. The officer who made the proof of service upon the summons testifies before the referee that he remembers that Henry C. Genobles was not personally served in the former action. Henry C. Genobles also testifies before the referee that he was not personally served in said action. We think this testimony is sufficient to overcome the presumption of service derived from the record. As a minor, Henry C. Genobles could not be bound by his consent, and the court could only acquire jurisdiction over him by personal service of the summons. We conclude that the court never acquired jurisdiction over the person of Henry C. Genobles, and that he is not bound by the judgment in the former case. The exception as to Henry C. Genobles must be overruled.

In this view it will not be necessary to consider the effect of the irregularities referred to by the Circuit Judge. It does not, however, occur to us that such irregularities

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can properly enter into the question of jurisdiction, as they arose subsequent to the service of the summons.

The Circuit Judge held that as the plaintiff, G. T. Genobles, was incorrectly called J. T. Genobles in the summons, and as he never appeared or answered, he is not bound by the former judgment. The referee and Circuit Judge both conclude that the plaintiff, G. T. Genobles, was personally served in the former action, although under the name of J. T. Genobles. The sheriff's writ book, introduced without objection, shows that G. T. Genobles was personally served in the former action. Under the decision of *Waldrop v. Leonard* (22 S. C., 118), the plaintiff, G. T. Genobles, being then under no disability, must be held bound by the former judgment. The fourth and fifth exceptions of the defendant, J. Walter West, must be sustained so far as they relate to the interest of the plaintiff, G. T. Genobles, in the land, and the Circuit decree must be modified to that extent.

We agree with the Circuit Judge that the doctrine of estoppel does not apply in this case, as urged by defendant West. This disposes of the exceptions of the defendant, J. Walter West.

Having concluded that the court acquired jurisdiction over the persons of all of the plaintiffs in the former action, except Henry C. Genobles, we will recur to plaintiffs' other exceptions involving alleged omissions and errors in the former proceeding after the service of the summons. As already observed, after jurisdiction has been acquired by such service, such irregularities do not render a judgment void.

Plaintiffs' fourth exception alleges that the Circuit Judge erred "in not holding that the decree of Judge Mackey was voidable, and under the facts herein should be adjudged null and void." One of the facts referred to in this exception is that the cause was on calendar 6, and that the decree was not endorsed upon the complaint. The act of March 8, 1875, provides that "no execution shall be signed on judgments obtained by default in any other manner." This act does not provide that an order or judgment will be void unless entered upon the complaint. But we concur with the Circuit Judge, that as the statute relates to form or manner, it is directory, and this failure would not invalidate a judgment otherwise regular.

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*Another circumstance referred to by plaintiff under this exception is that it does not appear that the final order was based upon a reference, or upon testimony taken as to the facts set forth in the complaint. It is to be presumed that the final order was based upon testimony as to the facts alleged in the complaint until the contrary appears. There is no sufficient evidence to show that the order was passed without testimony as to the facts. We are not at liberty to infer that such was the case. But even if it appeared that the former judgment was rendered without testimony, we think the Circuit Judge properly held that he could not correct it.

Plaintiffs in their exceptions also allege that the Circuit Judge erred in not holding that the signature of the clerk and seal of the court were necessary in issuing the summons in the former action. The summons, under the code, does not issue from the court, but is merely a notice by the plaintiff to the defendant, that an action has been commenced, in which the defendant can appear or not, as he thinks proper. It is not necessary that the summons should be signed and sealed by the clerk of the court.

The other omissions and irregularities referred to in plaintiffs' other exceptions all occurred after all the plaintiffs, except Henry C. Genobles, had been served with the summons in the former action, and we agree with the Circuit Judge that they cannot affect the validity of the final order or judgment in said action.

Plaintiffs' third, fourth, sixth, seventh, and eighth exceptions raise no specific objection to the Circuit decree, and cannot be considered. Plaintiffs' ninth, tenth, and eleventh exceptions cannot be sustained, as nothing

was adjudicated by the Circuit decree, as to the six acres of land therein referred to.

The second and third exceptions of the defendant, Susan B. Genobles, the widow, are based upon the ground of error in the Circuit Judge in refusing to allow her claim of dower in the whole land, or at least in the surplus after paying the mortgage debt. Susan B. Genobles renounced her dower according to law upon the mortgage executed by her husband, John Genobles, to W. D. Fowler. This renunciation must be controlled by the terms of the mortgage on which it is made, to which it has reference, and of which it is a part. By recurring to the state-

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ment of facts herein it will be observed that the mortgage gave Fowler, the mortgagee, the power to foreclose by a public sale, and to pay from proceeds the mortgage debt and hold surplus subject to rights of other incumbrances, if any, and if none, then to pay same to the mortgagor. It is not contended that Fowler, the mortgagee, abused the trust reposed in him, or in any way failed properly to execute the power conferred upon him. The sale of the mortgaged land was made in the life-time of the mortgagor (the husband), and the surplus, after paying the mortgage debt and two small judgments (incumbrances), was turned over to the mortgagor as provided by the terms of the mortgage. Susan B. Genobles having voluntarily made herself a party to the mortgage by her renunciation, and having thereby disposed of the surplus proceeds of sale, we do not think there was error in refusing her claim of dower.

The fourth exception of Susan B. Genobles alleges that the Circuit Judge erred in refusing to allow her dower in the six acres of land conveyed by John Genobles to J. F. Genobles. The pleadings show that the only issue raised by this defendant was as to her claim of dower in the mortgaged land, upon which dower was renounced. It is true, that a deed for this six acres was introduced before the referee, and that the six acres are in the possession of the defendant West. But the defendant West does not hold or claim the six acres under the Fowler mortgage, but by a title distinct from the mortgage. The pleadings were not amended, nor were they considered as amended by the referee or Circuit Judge so as to extend defendant's claim of dower to embrace the six acres. This exception does not seem to have been taken to the referee's report, or considered by the Circuit Judge. The defendant, Susan B. Genobles', fourth exception must be overruled, but without prejudice to her right to have the pleadings amended in the Circuit Court so as to embrace the six acres, if so advised, before the case is finally disposed of in the Circuit Court.

The fifth exception of the defendant, Susan B. Genobles, must be overruled, as there is

sufficient evidence that her renunciation of dower was taken before a trial justice.

The judgment of this court is that the

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judgment of the Circuit *Court, except as herein modified as to the plaintiff, G. T. Genobles, be affirmed.¹

¹ This is the last of the cases of November Term, 1884.—REPORTER.

23 S. C. 170

STATE v. HAINES.

(April Term, 1885.)

[1. *Criminal Law* ⇨1028.]

A point not ruled upon in the court below is not properly before this court for review.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2619, 2620; Dec. Dig. § 1028.]

[2. *False Pretences* ⇨30.]

An indictment for obtaining goods under false pretences should charge that the defendant made the false pretences, at the time knowing them to be false; except, it may be, in cases where the very nature of the misrepresentation implies that the party who made it must have known it to be false.

[Ed. Note.—For other cases, see *False Pretences*, Cent. Dig. § 37; Dec. Dig. ⇨30.]

[3. *False Pretences* ⇨7.]

A false pretence is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value. A mere promise to do something in the future, as, for example, to pay for goods at a future time, even if false, is not such a pretence as would come within the terms of the statute.

[Ed. Note.—Cited in *State v. Hicks*, 77 S. C. 293, 57 S. E. 842.

For other cases, see *False Pretences*, Cent. Dig. §§ 5-12, 25; Dec. Dig. ⇨7.]

[4. *False Pretences* ⇨7.]

A person obtaining advances from a factor under a statement that he is then planting cotton, and under a promise to ship his cotton, when made, to such factor, cannot be convicted of obtaining goods under false pretences, unless he was not at that time planting cotton.

[Ed. Note.—For other cases, see *False Pretences*, Cent. Dig. § 12; Dec. Dig. ⇨7.]

[5. *Indictment and Information*, ⇨125.]

An indictment that charges defendant with obtaining goods from the prosecutor under the false pretence that he was then engaged in planting cotton, and would ship his cotton when made to the prosecutor, alleges only one false pretence.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. ⇨125.]

[6. *False Pretences* ⇨7.]

[Cited in *Dargan v. West*, 27 S. C. 157, 3 S. E. 68, to the point that if representations are false, and known to be so by persons making them, intent to deceive would be inferred.]

[Ed. Note.—For other cases, see *False Pretences*, Cent. Dig. §§ 5-12, 25; Dec. Dig. ⇨7.]

Before Aldrich, J., Charleston, February, 1885.

The opinion fully states the case.

Messrs. Lee & Bowen, for appellant.

Mr. Solicitor Jervey, contra.

June 24, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The indictment in this case charged the defendant with having

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obtained from the prosecutor certain *goods "by certain false pretences and representations, that is to say, by falsely pretending and representing unto the said Theodore G. Snowden that he, the said R. Willis Haines, was, at that time, engaged in planting cotton, and for such advances would consign his crop to Theodore G. Snowden, and would in the autumn following send and ship to the said Theodore G. Snowden the cotton crop which he falsely pretended to be cultivating; whereas, in truth and in fact, the said R. Willis Haines was not then and there engaged in planting cotton, and had no cotton crop during the said year of our Lord one thousand eight hundred and eighty-two, with intent to cheat and defraud the said Theodore G. Snowden against the form of the statute," &c.

The evidence on the part of the prosecution tended to show that in April, 1882, the defendant bought from the prosecutor corn to the amount of \$54.86, on which he paid \$25 in cash, and obtained credit for the balance until the fall, under the representation that he was planting cotton, and would send to the prosecutor his crop. There was also some evidence adduced on the part of the prosecution for the purpose of showing that the defendant planted no cotton during that year, that none was sent to the prosecutor, and that the balance due on the account had never been paid. The defendant adduced evidence tending to show that he did plant cotton in 1882, that he had paid the balance of the account with the exception of some few cents, and that the reason why he did not send his cotton to the prosecutor as he had promised to do was that he had paid very nearly all the balance due him, and as he had heard that the prosecutor was in a precarious condition, financially, he was afraid to send him his cotton, as he had agreed and intended to do.

The defendant requested the Circuit Judge to charge the jury, "That in order to convict, the jury must be satisfied from the evidence that the defendant did not plant any cotton during the year 1882; and that the State having alleged that the defendant did not plant cotton during the year 1882, should prove the same to the satisfaction of the jury, or the defendant should be acquitted." The solicitor requested that the jury should be instructed as follows: "There may be one

or more false pretences charged in an indictment, and the proof of either is sufficient. In

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"this case it is submitted that two pretences are alleged." The jury were charged as follows: "The solicitor has correctly stated the legal points by which you are to be governed in this case. * * * Either there has been false swearing on the part of Mr. Snowden, or there has been false swearing on the part of the defendant. The defendant swears positively that he paid the \$28, and that he still owes him some cents. Mr. Snowden very positively denies that, and says that the defendant did no such thing. * * * That is the whole case, and as you determine the falsity or truth of the evidence, so will be your verdict. The defendant says that the reason he did not send the cotton to Mr. Snowden was because he had paid him up the \$28. But if he promised to send him the cotton, and has not paid him, as stated by Mr. Snowden, then he has deceived him. I cannot undertake to intimate or decide where the truth lies. That is your province, and as you decide that question, so will be your verdict."

The defendant having been convicted, appeals upon the following grounds: "I. Because the indictment was fatally defective in not alleging that the defendant knew, at the time he obtained the goods, that the statement upon which he obtained them was false. II. Because defendant's alleged agreement to ship and consign his cotton to T. G. Snowden, the prosecuting witness, in the autumn of 1882, was a promise and not a pretence, and, therefore, not indictable, though not kept, or meant to be kept, at the time it was made, and his honor erred in not so holding. III. Because the false pretence, as alleged in the indictment, was the avowal of the defendant, that he was planting cotton near Oakley, in the County of Berkeley, during that year (1882), which avowal the indictment alleged to have been false, and further alleged that in truth and in fact said defendant was not planting, and did not plant any cotton during the year 1882; all of which averments in the indictment were material, and should have been sustained by proof, and his honor erred in not so holding. IV. Because his honor's charge to the jury, that the indictment alleged two false pretences, was incorrect and misleading."

The question raised by the first ground of appeal is not properly before us, inasmuch as there does not appear to have been any ruling by the court below upon that point.

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and there is, *therefore, nothing for us to review. The Circuit Judge was not asked to decide, and did not decide, anything as to the sufficiency of the indictment. We may say, however, for the purpose of avoiding any misconception, that inasmuch as the gist of the offence charged in this indictment is the

obtaining the goods of another by false pretences, with the intent to deceive, it would be better pleading to charge that the defendant made the false pretences, knowing at the time that they were false. For it may well be that a person may, most innocently and with perfect good faith, make representations which prove to be false in fact, in which case there would be an absence of any criminal intent; but if the representations are not only false, but known to be so by the person who makes them, then the intent to deceive would necessarily be inferred. It may be that there are cases, and perhaps this is one, in which the very nature of the representation is such as to imply that if false it must necessarily be known to the party who makes it. If it was not true, in point of fact, that the defendant planted cotton in 1882, it would seem that this must necessarily have been known to the defendant at the time he made such representation, and, therefore, even if the question had been properly made in this case, we are not prepared to say that it would have availed the defendant.

The second and third grounds of appeal may be considered together. The best definition of the offence charged in this indictment is that given by Bishop (2 Crim. Law, § 415) in the following words: "A false pretence is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value." It follows from this that a mere promise to do something in the future, as for example, to pay for goods at a future time, even if false, is not such a pretence as would come within the terms of the statute. 2 Bish. Cr. L., §§ 419, 420. It is true, that the combination of a false promise with the false representation of an existing or past fact will not take the case out of the statute, but it is not the false promise which constitutes the offence, but the false representation with which the promise may be connected. Hence, unless there is a false representation, upon

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which the false promise is based, there *can be no conviction, for the false promise alone involves no criminal consequences. As is said in 2 Bish. Cr. L., § 424, "though there is a promise connected with the pretence of an existing fact, this promise does not take the case out of the statute. It is, as to the criminal consequences, a mere nullity. If there is a sufficient pretence of a false existing or past fact, the consequence attached to it by law is not overthrown by the promise; if there is not a sufficient pretence of this sort, the promise does not supply the defect." It may be that the promise constitutes the principal motive of the prosecutor to part with his goods, but unless such promise is connected with or based upon a false representation of an existing or past fact, the case does not fall within the statute. These principles are,

we think, fully sustained by the cases cited by the distinguished author from whom we have quoted, and are not in conflict with the authorities relied upon by the solicitor.

Looking at this case in the light of these principles, we think it clear that the Circuit Judge erred in refusing to charge the jury that in order to convict the defendant they must be satisfied from the evidence that the defendant did not plant any cotton during the year 1882. That was the only false representation of an existing or past fact alleged in the indictment, and until that was proved the defendant could not be convicted, even though it should have been proved to a demonstration that the defendant had failed to keep his promise to send his cotton to the prosecutor. Indeed, the Circuit Judge, in his charge to the jury, made the case turn entirely upon the question whether the balance due the prosecutor by the defendant had been paid, wholly ignoring the fundamental inquiry whether the goods had been obtained by a false representation of an existing or past fact, coupled with a promise to pay for them by sending the cotton in the fall.

We think, also, that the Circuit Judge, in adopting the suggestion of the solicitor, that there were two false pretences charged in the indictment, may well have misled the jury into the belief that it mattered not whether the allegation that the defendant planted no cotton in the year 1882, was sustained by the evidence, and that if the de-

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fendant failed to pay as he had *promised, he still might be convicted. There was in fact but one false pretence alleged in the indictment, that the defendant was engaged in planting cotton, though such pretence was connected with, and formed the basis of, the promise alleged to ship the cotton to the prosecutor in the fall. While, therefore, it might be true, as a general proposition, that several false pretences may be alleged in one indictment, and the proof of any one of them will be sufficient, yet this does not apply to the present case and its statement to the jury under the testimony in the case was well calculated to mislead them. The testimony as to the material inquiry in the case, viz., whether the defendant's representation that he was planting cotton was true or false, was not only conflicting, but the testimony on the part of the State was only negative, while that from several witnesses on the part of the defence was of the most positive character. The jury might, under the instructions given them, very well have concluded that even if the version given by the witnesses for the defence was true, yet if the defendant had failed to keep his promise, he might be convicted.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

23 S. C. 175

STATE ex rel. STEPHENS v. COMMISSIONERS OF PILOTAGE OF BEAUFORT.

(April Term, 1885.)

[1. *Mandamus* ⇨73.]

Mandamus is an appropriate remedy to compel a board of pilotage commissioners to reverse their action in suspending a pilot from service for alleged misconduct. Mr. Justice McIver, not concurring.

[Ed. Note.—Cited in *State ex rel. McDonald v. Courtenay*, 23 S. C. 184; *State ex rel. Fouché v. Verner*, 30 S. C. 280, 9 S. E. 113.

For other cases, see *Mandamus*, Cent. Dig. §§ 115, 135, 144-149; Dec. Dig. ⇨73.]

[2. *Mandamus* ⇨77, 172.]

Facts found by commissioners of pilotage in the investigation of the conduct of a pilot in service within the territorial limits of their jurisdiction, cannot be reviewed in proceedings by *mandamus*.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 167, 381; Dec. Dig. ⇨77, 172.]

[3. *Pilots* ⇨1.]

Under the pilotage law of this State the board of pilotage commissioners have the right to suspend a pilot for dereliction of any duty attaching to his office, whether specifically mentioned in the statute as a cause for removal or not.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

[4. *Pilots* ⇨5.]

Taking a pilot boat off of her regular station and to another port without the owner's knowledge, and putting a pilot on board an outward *bound vessel without provision made for taking the said pilot off again, are derelictions of duty on the part of the pilot so acting.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. § 6; Dec. Dig. ⇨5.]

This was an original proceeding in this court, and is sufficiently stated in the opinion.

Mr. J. B. Howe, for relator.

Mr. W. J. Verdier, contra.

July 3, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case, like the case of *The State ex rel. George McDonald v. William A. Courtenay* and others, *Pilotage Commissioners of the Port of Charleston* (post, p. 180), is within the original jurisdiction of this court, and, like that case, seeks to reverse the action of the pilotage commissioners herein, by *mandamus*, requiring the said pilotage commissioners to vacate an order made by said board on April 23, 1885, suspending the petitioner as pilot of the port and harbor of Port Royal and St. Helena, &c. This case, however, does not involve, as did the case above referred to, the regularity simply of the proceedings had by the board, but it raises the question whether the charge which was found against the petitioner was of a character which authorized his suspension.

The charge was as follows: "That Charles Stephens violated his duty under the pilotage

law, that while on board of the pilot boat *Bertha*, No. 3, belonging to Captain T. B. Buckley, to wit, on October 25, 1884, he combined with one John Casey, in charge of said pilot boat, contrary to law, to take her off of her regular station without the knowledge or consent of the owner, and assisted in carrying the said boat to Charleston, S. C.; and also in placing a pilot on board an outward bound vessel, making no provision for taking the said pilot off, and the said pilot was compelled to remain on board the said vessel twenty-four hours before he was relieved by another boat, the captain and crew of which had to take him off and bring him to Charleston." In the return to the rule it is stated that the board, after full investigation of this charge, Stephens being allowed

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the fullest liberty of defence, and being represented by counsel, were satisfied of the truth of the charge, and believing the same to be in violation of the law of the State and of the rules and regulations of said board, "did sentence the said pilot Stephens to be suspended for three months from said April 23, 1885," &c.

No question has been made as to the proceeding by mandamus being a legitimate remedy in a case of this kind, where the facts of the case entitle the petitioner to relief. Ordinarily, mandamus is proper against a public officer for the discharge of a ministerial duty, to which the petitioner shows himself of right entitled, and for the breach of which he has no other adequate redress. Or it may go against an inferior court, requiring said court to proceed in any matter over which it has jurisdiction, yet refuses action. It cannot, however, issue either to a public officer, or to an inferior court, as to matters requiring the exercise of official judgment, or resting on judicial investigation and discretion. Without entering into the discussion here of the question to which of these classes the respondents belong, to wit, whether they are public officers, or whether they constitute an inferior court charged with special duties and invested with certain jurisdiction, it is sufficient to say that, so far as their status is concerned under the cases (*Geter v. Commissioners*, 1 Bay, 354 [1 Am. Dec. 621]; *Singleton v. Same*, 2 Bay, 105), they would be subject to this writ in the discharge of their duty where the necessary facts as to the right of the petitioner and the duty of the respondent, upon which, under the law, the writ is usually demandable, appear. In the two cases above cited a tobacco inspector had been removed from office by the tobacco commissioners, a commission of five, authorized by the general assembly to perform certain powers, among them to appoint tobacco inspectors. The removed officer alleging that he had been improperly removed, applied for a mandamus to be restored, and it was granted in each case. In the first (*Geter v. Commissioners*) a question as to the jurisdiction

of the court was raised, which was promptly overruled, Judge Bay saying: "That he would never sit in the Court of Sessions and suffer its authority over any of the inferior officers of any department in the State to be called in question."

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*Conceding, then, that the respondents are amenable to mandamus proceedings, the question to be considered is, do the facts here authorize the writ requiring the petitioner to be restored to his office? This depends upon the fact whether the charge of which he was convicted constitutes a sufficient legal cause for his removal. As to the truth of this charge resting entirely upon the evidence, we can take no cognizance, because that is a matter of judicial investigation, and cannot be reviewed by mandamus proceedings. We must take the facts as found by the commissioners, and confine ourselves to the question whether the charge, assuming it to be true, warranted the sentence.

Under the pilotage law found in General Statutes, page 369, commencing with section 1260, several acts are enumerated and specified as violations of the law, and for which, when committed by a pilot, he may be held responsible—in some by suspension, in others by forfeiture of his license, and in others by pecuniary penalties. For instance, in section 1266 it is provided that a pilot shall not engage in any other business while holding his license or branch, without the permission of the commissioners, on pain of being deprived of his license for twelve months. Nor shall a pilot discontinue to act, nor absent himself at any time from the port or harbor, * * * except by permission of the commissioners, under the same penalty as above. In section 1268, certain acts are forbidden on pain of forfeiting his license and also the payment of a certain sum to the State. So in section 1279 and several other sections; but it can hardly be contended that the pilotage commissioners are confined to these enumerated and specified acts in their supervision of the pilots appointed by them. The position of a pilot is a very important one—important to commerce, to the safety of vessels, and to the lives of their crews and passengers, and vastly important to the cities and towns built upon the harbors where pilots are needed; and the pilotage commissioners are expected not only to be careful in their appointment, so as to secure safe and reliable officers, but to be watchful afterwards over their conduct and the manner in which they discharge their duties, and to this end something must be left to their discretion in the application of general principles.

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*It is nowhere enumerated in terms by the pilotage act that a pilot may be suspended or deprived of his license or dealt with in any way by the commissioners if he should fail, without excuse, to repair to ships coming into port, or if he should wilfully disre-

guard a jack hoisted at the foretop masthead of an outward bound vessel. Nor is there any specific penalty provided for recklessly or ignorantly guiding a vessel outside of the channel and upon breakers; but it could not be urged that in acts of this kind the commissioners were powerless because these acts were not specially forbidden in the act. In fact, section 1267 seems to have been intended to provide a general power in the commissioners where it enacts that a majority of the board shall have power and authority to take away the license of a pilot for a given time, or to declare his license null and void, as the nature of the case may demand, upon charge of any dereliction of duty made and proven against him.

In this case, we are satisfied that the act of which the petitioner was convicted was a dereliction of duty. (See the duties of a pilot as specified and mentioned in the oath which he is required to take when appointed, § 1264.) But, in addition to this, one of the acts specially forbidden in section 1266, as stated above, is absenting himself without the permission of the commissioners. Here this pilot was found not only to have absent-ed himself, but to have conspired with another to take away a pilot boat from its station.

It is ordered that the rule be discharged.

Mr. Justice MCGOWAN concurred.

Mr. Justice McIVER. I concur in the result, but am not prepared to assent to the proposition that mandamus is the proper mode of obtaining the relief sought.

23 S. C. *180

*STATE ex rel. McDONALD v. COURTENAY.

(April Term, 1885.)

[1. *Pilots* ⇨1.]

The board of pilotage commissioners of Charleston have the power to suspend a pilot and reduce his license, under either section 1266 or section 1267 of the General Statutes, as the facts may warrant, without specifying in their charge the precise section under which they are proceeding.

[Ed. Note.—Cited in *State ex rel. Stephens v. Commissioners of Pilotage of Beaufort*, 23 S. C. 176.

For other cases, see *Pilots*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

[2. *Mandamus* ⇨77.]

In proper cases, pilotage boards are subject to mandamus at the suit of pilots of their appointment removed from office. Mr. Justice McIVER not concurring.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 167; Dec. Dig. ⇨77.]

[3. *Pilots* ⇨1.]

The summons in this case to a pilot to appear before the commissioners of pilotage was sufficient, as it apprised the pilot of the charge against him and of the investigation to be had.

And the general finding by the board, of dereliction of duty, was sufficient.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

[4. *Pilots* ⇨1.]

A majority of the commissioners was sufficient to constitute the board, and it was not necessary that those present and acting should sign the finding. Gen. Stat., § 1267.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. §§ 1-3; Dec. Dig. ⇨1.]

[5. *Pilots* ⇨1.]

The board having the power to revoke a pilot's license, they could suspend him for three months, and reduce his license from that of full branch to twelve-foot branch.

[Ed. Note.—For other cases, see *Pilots*, Cent. Dig. §§ 1-3; Dec. Dig. § 1.]

[6. *Mandamus* ⇨77; *Pilots* ⇨5.]

This board has the power to ascertain and determine the fitness of pilots for their office, but not to punish them for crime. In investigating a charge against a pilot for negligence in grounding a steamship, if he is refused the privilege of being represented by counsel in the cross-examination of witnesses, and in argument, he will not, for such refusal, be entitled to a writ of mandamus to restore him to his office from which he has been removed on account of such negligence.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 167; Dec. Dig. ⇨77; *Pilots*, Cent. Dig. § 6; Dec. Dig. ⇨5.]

This was an application to the Supreme Court for a writ of mandamus. The opinion fully states the case.

Mr. J. P. K. Bryan, for relator.

Messrs. Simonton & Barker, contra.

July 3, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is a proceeding within the original jurisdiction of this court in which a mandamus is prayed by the relator against the respondents. The relator had been a full branch pilot of the bar and harbor of Charleston for a period of twenty years up to and before the

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15th day of January last (1885). On that day he was suspended by a letter from the harbor commissioners, of which the following is a copy:

"Office of the Harbor Commissioners,

"Charleston, S. C., January 15, 1885.

"Capt. George McDonald, Charleston:

"Dear Sir: At a special meeting of the board of harbor commissioners held this day the following resolutions were adopted:

"Resolved, That the letter of the master of the British steamship, Harbinger, and the circumstances attending the said steamship getting ashore be considered by this board at an adjourned meeting to be held to-morrow afternoon, 16th, at 5 o'clock, at which meeting the said pilot and witnesses shall be summoned to attend.

"Resolved, That pending the investigation of this case, the pilot, George McDonald, be suspended."

"You will immediately surrender your license to the harbor master and attend the meeting of the board, at their rooms, to-morrow afternoon, at 5 o'clock p. m.

"Respectfully yours,

"(Signed) James Armstrong, Sect."

On the day (the 16th) and at the time mentioned, the commissioners met, with witnesses summoned, the relator and counsel being present, and though no written charges with specifications, other than the letter above, were made and served on the relator, yet an investigation was had as to the circumstances attending the steamship Harbinger getting ashore. In this investigation, witnesses, after being duly sworn, were examined, with the right of cross-examination freely afforded to and exercised by the relator, as it is said in the return to the rule. It appears, however, that the counsel of the relator was not allowed to participate in this examination, nor was he allowed to represent the relator by argument. It appears, further, that before the investigation began, the relator demanded, by his counsel, from the board, "to declare unto him what charges, if any, were preferred against him, and also demanded

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written specifications of such charges, if any. That he further demanded the right that his counsel be present to cross-examine all witnesses produced, and to present and make, by addressing the said board, any proper defence of your petitioner. All of which demands were severally denied by said board, whereupon his counsel, on his behalf, formerly protested." These facts are stated in the petition and not denied in the return. The investigation resulted in an order "suspending the relator for three months, at the expiration of which time he be given a twelve-foot branch." At the next ensuing meeting of the board in February, 1885, the relator demanded, in writing, that said board rescind the action of January 16, and forthwith restore him to his office of full branch pilot, which was refused; whereupon his petition for a mandamus requiring the said board to restore the relator to the office of full branch pilot in and for the harbor of Charleston was filed. The respondents, in their return to the rule requiring them to show cause, claim that they had full jurisdiction of this matter by virtue of section 1266 of the General Statutes, and that being satisfied, especially from the testimony of the relator, offered as a witness for himself, "that he had not sounded the channels of the bar for three months, they saw sufficient cause to order and direct the relator, who was the pilot in charge of the Harbinger at the time of the disaster, to give up his license for a period of three months, and to further order that when the new license should be issued, it should be regulated according to his fitness as was discovered in the investigation then had, and be limited to a twelve-foot branch

or license, permitting him, however, to remain as a pilot of the bar of Charleston, and not depriving him of his license as such."

Section 1266, under which the respondents claim to have acted, is as follows: "Said board shall have power and authority, for any cause or charge to them satisfactorily proven, to order and direct any and all pilots, for the port to which they belong, to deliver his or their licenses, and to take out a new license or licenses; but no pilot, who shall satisfy them of the groundlessness of such cause or the falsity of such charge brought against him, shall be required to pay any additional fee for his new license."

It cannot be seriously contended that if

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the cause for which the *pilotage commissioners herein took action against the relator and suspended him, was founded in fact and properly established, that he would be entitled to the writ which he seeks. Because, under the section supra of the pilotage act (Gen. Stat., p. 369), it seems to us that in such case the pilotage commissioners would be fully warranted in doing what they have done. In fact, under this section the license of a pilot might possibly be withdrawn altogether, subject to the right of said pilot to apply for a renewal without any additional fee, upon proof of the groundlessness or falsity of the charge upon which action had been taken by the commissioners.

But if there could be any doubt as to the application of section 1266, can such doubt exist as to the application of section 1267, where it is provided that upon a charge of dereliction of duty made and proven against a pilot, his license may be taken away for a given time, or it may be declared absolutely null and void, as the nature of the case may demand? And this power, by this section, is lodged with a majority of the board. The relator contends in his argument here, that the commissioners were acting under this latter section. This section is a part of the general law governing pilots and pilotage commissioners, as is section 1266, and in the investigation of a case involving the conduct of pilots by a commission like that of pilotage commissioners, where no special rules of procedure are provided, we do not think that it could be made a ground fatal to the proceeding, that the pilot charged with misconduct was not informed under which precise section of the act the alleged misconduct was forbidden. The proceeding of a commission of the character like the pilotage commission must necessarily be somewhat informal, and in the investigation of a charge against a pilot, when he is informed of the character of the charge, in substance and in fact, he is as well prepared to meet it as if the precise section of the act alleged to be violated is pointed out to him.

Supposing that the relator here was properly summoned and was before the commissioners with a charge of dereliction of duty

made in connection with the steamship Harbinger, of which he had notice, we think the commissioners had the power to act under either section, 1266 or 1267, as the facts war-

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ranted, notwithstanding the precise section under which the commissioners were acting was not mentioned in the charge.

It is not necessary to discuss here the question, whether this board of pilotage commissioners can be made the subject of mandamus proceeding. This has been somewhat considered in the case of *State ex rel. Stephens v. Pilotage Commissioners of Beaufort and St. Helena* (ante, p. 175), filed at the same time with this case. And under the cases in 1 and 2 Bay, referred to in that case [*Geter v. Commissioners, 1 Bay, 354, 1 Am. Dec. 621; Singleton v. Same, 2 Bay, 105*], we have conceded that in a proper case these pilotage boards may be subject to a mandamus, in the removal from office of pilots appointed by them.

The question to be considered, then, in the case now before the court is narrowed down to one of procedure. The relator complains: 1. That there was no charge or specification before trial. 2. That he was denied the right of counsel in the cross-examination of witnesses and in argument. 3. That the finding was the general indefinite opinion that he had been derelict of duty without particularising in what. 4. That eight only of the commissioners were present and acted. 5. That this abstract finding even is not signed by the eight commissioners who were present. 6. That the sentence was twofold: suspension for three months, and then taking away full branch and giving pilot a twelve-foot branch.

As to the first, we think the resolution of the board found above, and in which the relator was informed that the master of the steamship Harbinger having complained to the board that his ship had struck in crossing the bar, this matter would be investigated, with witnesses summoned at a time specified, and that pending such investigation he, the pilot, was suspended, was quite sufficient, as a charge upon him that he was the cause of the disaster, and that his conduct therein would be the subject of inquiry and investigation at the time mentioned. That he so regarded and understood it is evidenced by the fact that at the time mentioned he appeared with his counsel to answer and defend. Remembering, as we have already said, that pilotage commissioners do not constitute a regular court, with rules of procedure deliberately prepared and adopted or required, but that it is a mere commission, charged with limited duties and with special

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functions, *we think their action in the matter of the charge here, and the notice of trial to the relator, was ample.

As to the third ground, that the finding

was a general indefinite opinion of dereliction of duty, without particularising in what—we do not think this can be sustained. The relator was evidently charged with dereliction of duty in connection with the ship Harbinger getting ashore, which as pilot he was guiding across the bar. After full investigation, with several witnesses examined and cross-examined, including the relator himself, upon inquiry by the chairman of the board to each member, asking each to give his views, each and all present answered that Geo. McDonald had been derelict in his duty. Derelict in what? Why, certainly in producing the disaster which had been charged upon him, the investigation of which had just closed.

4th. That eight only of the commissioners were present and acted. This was a majority, and under section 1267 a majority may act.

5th. That the abstract of finding is not signed even by the eight. There is nothing in the act which requires the finding to be signed at all, and there is no allegation that the finding, as announced, was not the finding of the board.

6th. That the sentence was twofold. It was within the power of the board to declare the license of the relator null and void. It did not go that far: it simply suspended upon conditions. The less is within the greater, and if the relator is unwilling to take a twelve-foot branch for the future, that is a matter for him.

This brings us to the second objection, which, in our opinion, having the most substance, has been reserved for the last. It would have been better, probably, for the board to have allowed the relator to be represented by counsel, both in the cross-examination of the witnesses and in argument. This is usual in trials involving the rights of parties; in fact, is guaranteed by the constitution, where a party is charged with a crime or offence. In such cases he is entitled to a speedy and public trial by an impartial jury, and to be fully heard in his defence by himself or by his counsel, or by both, as he may elect. Art. I., § 13. Here the relator, however, was not charged with crime or other offence, in the sense of this section of the constitution. The pilotage

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*board is not a board organized for trying crimes or misdemeanors. Its functions, in reference to the appointment of pilots and their suspension or removal from office, have been granted in the nature of powers by which to ascertain and determine the fitness and capacity of such pilots, and in the interest of commerce to secure at all times perfectly safe and reliable pilots, and not for the purpose of punishing crime in such pilots. We do not think, therefore, that the section of the constitution referred to applies.

But there is another section of the constitution which may apply (Art. II., § 31): "Of-

ficers shall be removed for incapacity, misconduct, or neglect of duty, in such manner as may be provided by law, where no mode of trial or removal is provided in this constitution." Now, section 1267 of the pilotage act provides a mode for removal or suspension of pilots, with the condition that each and every pilot against whom any charge be made shall be entitled to a hearing before the said board of commissioners, and to make any proper defence to such charge, &c. Here the pilot charged appeared before the board at the time to which he was notified. He certainly knew fully the character of the charge against him. He entered upon the trial, and cross-examined the witnesses fully. He offered himself as a witness, and upon the close of the examination he was asked if there was anything not covered by the questions which he wished to state; if so, to say to the board anything that would explain this damage to the steamship Harbinger; and he replied that he had nothing more to add.

Under these circumstances, although the board declined to hear argument on the case from counsel, we do not see that the great prerogative writ of mandamus should be issued as a matter of right to the relator, requiring the pilotage board to restore him to his office, in face of the fact solemnly found by the board, and which, it seems, is sustained by the evidence, that he had been neglectful of his duty to such extent as to have grounded a British steamship in guiding it across the bar, doing such damage as necessitated its return into port.

It is ordered that the rule be discharged.

Mr. Justice McGOWAN concurred.

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*Mr. Justice McIVER. I concur in the result, but am not prepared to assent to the proposition that mandamus is the proper mode of obtaining the relief sought.

23 S. C. 187

RIKER v. VAUGHAN.

(April Term, 1885.)

[1. *Infants* ⇨89.]

Jurisdiction of the person of an infant can only be obtained by pursuing the mode prescribed by statute. The mode of serving a summons upon a non-resident minor, stated.

[Ed. Note.—Cited in *Tedraff v. Bouknight*, 25 S. C. 283; *Carriam v. Drake*, 36 S. C. 364, 15 S. E. 339; *Robertson v. Blair & Co.*, 56 S. C. 106, 34 S. E. 11, 76 Am. St. Rep. 513.

For other cases, see *Infants*, Cent. Dig. §§ 255-272; Dec. Dig. ⇨89.]

[2. *Process* ⇨67.]

Acceptance or acknowledgment of service out of the State by a non-resident is equivalent to personal service, and a sufficient service, only where there has been an order for publication.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 54; Dec. Dig. ⇨67.]

[3. *Infants* ⇨89.]

An infant is incapable of making himself a party to an action by accepting service, so as to be bound by a judgment therein. *Finley v. Robertson*, 17 S. C. 439.

[Ed. Note.—Cited in *Whitesides v. Barber*, 24 S. C. 376.

For other cases, see *Infants*, Cent. Dig. § 266; Dec. Dig. ⇨89.]

[4. *Judgment* ⇨486.]

[Cited in *Ruff v. Elkin*, 40 S. C. 78, 18 S. E. 220, to the point that a judgment can only be impeached in a collateral proceeding, except upon proof of fraud or want of jurisdiction.]

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 919-923; Dec. Dig. ⇨486.]

Before Aldrich, J., Charleston, April, 1885. The opinion fully states the case.

Messrs. Wilmot G. DeSaussure and Henry A. DeSaussure, for appellants.

Messrs. J. Barrett Cohen and H. L. P. Bolger, contra.

July 3, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. Under proceedings for partition certain real estate in the County of Charleston was sold, and two of the purchasers declining to comply, a rule was taken out which, at the hearing below, was discharged, upon the ground that M. A. Riker, a minor, one of the parties interested in said real estate, had not been properly made a party so as to bind his interest, and therefore the purchasers were not bound to accept the title tendered. The only question made by the appeal is whether said minor had been properly made a party.

The facts are conceded, and are as follows: M. A. Riker is a minor, above the age of fourteen years, resident in the State of Tennessee, and was named as one of the defend-

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ants in the action. *There was no order for publication of the summons, but the summons was sent to Tennessee and returned with the following endorsement thereon: "We acknowledge service of the summons and complaint in this action. (Signed) Charles H. Vaughan, Lelia A. Vaughan, and as those with whom the minor defendant, Martin A. Riker, resided. (Signed) M. A. Riker."

Within twenty days thereafter the said M. A. Riker filed his petition, sworn to, setting forth that the case had been begun by service of summons upon the petitioner, &c.; that petitioner was fifteen years of age, and praying the appointment of Wm. A. Hoppoldt as guardian ad litem, who consented to serve, and was appointed.

Conceding that the endorsement on the summons, signed by the minor, though not in form an acknowledgment of service, when taken in connection with the statement in the petition of the minor asking for the appointment of a guardian ad litem, practically amounted to an acknowledgment of service, two objections are made by the respondents:

1. That there was no order for publication of the summons, and that such an order is necessary to give validity, even to actual and formal service of the summons where the party is out of the State. 2. That a minor is incapable of making himself a party to an action by accepting or acknowledging service of the summons.

The mode by which a person may be made a party to an action is prescribed by statute, and in the case of infants jurisdiction of their persons can only be obtained by pursuing the mode prescribed. As is said in *Finley v. Robertson*, 17 S. C., at page 439: "The mode of making infants parties to an action in a court of record is clearly and expressly prescribed by statute, and a due and tender regard for the rights and welfare of infants requires that this statute shall be strictly followed." Section 156 of the code provides the mode by which a non-resident of the State may be served with a summons so as to make him a party to the action, which is by obtaining an order for service by publication; by publication of the summons for the prescribed time, and by depositing a copy of the summons in the post-office, directed to the person to be served, at his place of residence, where, as in this case, it is known. But the

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section goes on to provide: "Where publication is ordered, personal service of the summons out of the State is equivalent to publication and deposit in the post-office." And then expressly declares: "In case of minors in like cases a similar order shall be made, and like proceedings be had, as in the case of adults."

This being the only mode provided by statute by which a non-resident minor can be made a party defendant to an action, the only question is whether this mode has been "strictly followed." It is quite clear that it has not. The statute, as one alternative, prescribes three things to be done: 1. The procuring of an order for service by publication. 2. The actual publication; and, 3. The deposit in the post-office of a copy of the summons, addressed to the person to be served, at his place of residence. And as the other alternative, two things: 1. The procuring of an order for service by publication. 2. Personal service of the summons out of the State. It is conceded in this case that no order for service by publication was ever obtained, and therefore the first requirement under either of the alternatives above presented has not been complied with. It may be that it is difficult to see any practical benefit to be derived from the order permitting service by publication, yet as the statute expressly requires it, we do not see by what authority we can dispense with that, any more than with any other requirement. So that, even if it should be conceded that the endorsement on the summons signed by the minor, taken in connection with the state-

ment in his petition that the "case had been begun by service of summons upon petitioner," amounted to an acceptance or acknowledgment of service, and as such, equivalent to personal service, there would still be a fatal defect in the failure to obtain an order that the service might be made by publication, for the statute only provides that personal service out of the State shall be sufficient "where publication is ordered."

But, in addition to this, it has been expressly held in the case of *Finley v. Robertson*, supra, that "an infant is incapable of making himself or herself a party to an action by accepting service, so as to be bound by a judgment therein." It follows from this that even if the minor had, in the most formal manner, accepted or acknowledged service

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of the summons in this case, he would not thereby have become a party to the action, so as to be bound by any judgment therein.

It is quite clear, therefore, that the non-resident minor, Martin A. Riker, not having been made a party to the action for partition in the mode prescribed by statute, is not bound by any proceedings therein, and that the rule was properly discharged.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN, concurred.

Mr. Chief Justice SIMPSON. I feel constrained, under the authority of *Robertson and Finley*, to concur, otherwise I would hold that M. A. Riker, being over the age of fourteen, having acknowledged personal service, and having appeared and petitioned for the appointment of a guardian ad litem, which appointment was made, was a party before court and bound by the judgment.

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HUME, SMALL & CO. v. THE PROVIDENCE WASHINGTON INSURANCE CO.

(April Term, 1885.)

[1. *Insurance* ⇨115.]

A mere equitable interest in property may be the subject of insurance.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 139-157, 177; Dec. Dig. ⇨115.]

[2. *Appeal and Error* ⇨216.]

An omission to charge, even upon an issue raised by the pleadings, is not error of law, unless the judge was requested to charge thereon and he refused; and, in a law case, only errors of law can be considered by this court.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 627-641, 660, 662-676; *Appeal and Error*, Dec. Dig. ⇨216.]

[3. *Insurance* ⇨640.]

In an action on a policy of insurance on an American vessel, the alienage of the plaintiffs as a defence under the statutes of the United States must be specially pleaded in the answer;

otherwise, evidence upon the subject is irrelevant, and an omission to charge thereon no error of law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. ⚡640.]

[4. Insurance ⚡615.]

The statutes of the United States forbidding an alien to own an American vessel under pain of forfeiture, does not prevent alien owners from recovery, in case of loss, on a policy of insurance, based upon a valuable consideration.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1530, 1532-1534; Dec. Dig. ⚡615.]

[5. Insurance ⚡115.]

Where aliens purchase a vessel and have the title made to a citizen, but really for their benefit, they may lawfully take in their own

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names a policy of insurance upon such vessel, the policy not being designed to aid an illegal purchase.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 139-157, 177; Dec. Dig. ⚡115.]

[6. Insurance ⚡668.]

In action on a policy of insurance, questions of misrepresentation and concealment are pure questions of fact for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. ⚡668.]

[7. Insurance ⚡668.]

It is the duty of the judge to construe a policy of insurance, a written instrument, and to explain what is meant by the term "deviation," and its effect, and then to leave it to the jury to say whether the facts found make out the defence of deviation.

[Ed. Note.—Cited in Pelzer Mfg. Co. v. Sun Fire Office, 36 S. C. 269, 15 S. E. 562.]

For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. ⚡668.]

[8. Insurance ⚡314.]

It seems that deviation is a doctrine that applies to particular voyages only, and is inapplicable where a vessel is insured for a year and does not go beyond the limits specified in the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 722-737; Dec. Dig. ⚡314.]

[9. Trial ⚡295.]

In determining whether the Circuit Judge has committed error of law in his instructions to the jury, the charge must be considered as a whole.

[Ed. Note.—Cited in Evans v. Chamberlain, 40 S. C. 108, 18 S. E. 213.]

For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. ⚡295.]

[10. Insurance ⚡413.]

When the loss of a vessel has happened wholly from one of the perils insured against, the negligence of the master and crew in failing to perform their duties as such is no defence to the insurance company, where the same did not in any way contribute to such loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1124; Dec. Dig. ⚡413.]

Before Kershaw, J., Charleston, March, 1884.

The facts of this case are stated in the opinion. The judge's charge was as follows:

I consider the court and the counsel on both sides fortunate in having a jury so well informed on subjects of this kind as I am

satisfied this jury is. It lessens the burden of responsibility upon both court and counsel.

You are aware, gentlemen, that a policy of insurance is a contract whereby the underwriters undertake to make good any losses which may ensue to the person insured which are provided against in the policy, and, like any other case, the burden is upon the plaintiff claiming to recover under such a contract; first to prove the contract, and next to prove the loss under such circumstances as would entitle them to recover under the contract. If the plaintiffs make out a case of that kind, they are entitled to recover the full amount of the loss which they have suffered by the perils against which they were insured by the policy, unless there be something else in the case shown and established by the evidence which would prevent their recovery. It is chiefly in regard to these objections to the recovery under the peculiar circumstances of this case that your attention has been

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called by the counsel, and the various propositions which have been made by the counsel to the court in their requests to charge the jury involve chiefly those objections to which I have referred.

I will ask your attention now to what I shall charge you as to the law upon which you are to determine this case. After I have laid down these propositions of law, the whole case is in your hands to deal with as you think the evidence requires under the legal propositions as laid down by the court.

An insurance on a ship does mean ordinarily and prima facie the legal interest in the vessel, and if the policy is intended to cover an equitable interest, it should be so specified. But where the equitable owner of the vessel has possession and control of the same as owner, though the ship's papers may be in the name of another person, who holds the naked legal title, a failure to disclose the true nature of the title of the insurance would not vitiate the policy where the insurer had made no inquiry as to the nature of the title. It would be otherwise, however, if under the circumstances just stated the vessel was not in the possession of the insured, holding the equitable title, and subject to their control as their own property, but was under the control and in the possession of another person as owner, because the insurance of a vessel is supposed to be made by the underwriters, with some reference to the character of the insured, and their prudence and care as owners in the management and preservation of the vessel. A failure in such case to disclose the nature of the interest of insured, when it is other than the legal ownership, the insured being out of possession, would be a material concealment, which would vitiate the policy.

An equitable interest is an insurable one, and may exist and be proved conjointly with

the legal title at the custom house in another. If the jury find that the plaintiffs paid the money for the purchase of the tug and for subsequent repairs and the premiums on the insurance, and that the legal title to the said tug was taken and held in the name of W. B. Pringle, Jr., to dispose of the same as the plaintiffs should direct, the said W. B. Pringle, Jr., assenting thereto, then the plaintiffs had an insurable interest in said tug, and, if entitled to recover at all, are entitled to recover to the extent of that interest up to

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\$3,000, provided such *interest be covered by the policy and the policy be in force at the time of the loss.

There is no warranty in the policy as to the legal title, nor any charge in the answer, or evidence on the trial, showing fraudulent concealment or misrepresentation which would of itself avoid the policy.

Any implied warranty of seaworthiness is satisfied if, when the tug was put to work, she was in a condition proper for doing the work, and was kept so by reasonable repairs.

The defences of deviation, misrepresentation, and concealment are questions of fact for the jury and must be proved by the party alleging the same.

The term seaworthiness varies according to the occupation in which the vessel is engaged, and is a question of fact for the jury.

The contract of insurance must be construed in its fair meaning, and having been written and made out entirely by the company, in cases of doubt must be construed most strongly against the company.

If the jury find that the loss has happened wholly from one of the perils insured against, then the negligence of the master and crew in failing to perform their duties as such is no defence to the company when the same did not contribute in any way to such loss.

The warranty of seaworthiness at the commencement of each voyage contained in the policy is a condition precedent, and the plaintiffs cannot recover unless it was literally complied with.

The warranty of seaworthiness, as far as relates to the condition of the boat, requires that when she sails on a voyage under the policy, she should be well furnished, tight, sound, staunch, and strong; that is, competent in her hull to resist the ordinary attacks of wind and weather; and if the "Jennie" left Savannah during the currency of the policy in a leaky condition, and not sound and staunch in her hull, the policy was vitiated, and the underwriters were discharged. A policy of insurance on a vessel or tug imposes upon the insured at all times, during the continuance of the risk, the legal duty of keeping the boat in a condition of reasonable security, and if the plaintiffs, or their agents,

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*allowed the "Jennie" to remain in a leaky condition, anchored out in New River, with

nobody on board competent to protect her against the perils to which she was exposed, and by reason of their negligence she sank, the plaintiffs are not entitled to recover.

In all marine insurance the insured implicitly warrants that his vessel is competent to encounter all the ordinary perils of navigation, and if the "Jennie" sank because of her inability to resist the ordinary perils to which boats similarly situated are exposed, the plaintiffs are not entitled to recover. If the "Jennie" sank through the carelessness or negligence of the plaintiffs or their agents, either in leaving her in the river in a leaky condition, or by exposing her to perils which would not have been operative but for such negligence, the plaintiffs cannot recover. If an insured vessel is in a leaky and unseaworthy condition, so as not to be able to withstand the ordinary perils to which vessels in like place may be exposed, it is the duty of the owner to repair her, so as to make her reasonably competent to resist the perils to which her situation may expose her. If the "Jennie" was unseaworthy when she was laid up, and the plaintiffs failed to put her in a safe and seaworthy condition requisite for her safety when laid up, then the plaintiffs cannot recover. It was the duty of the plaintiffs to keep the "Jennie" in such condition as to be reasonably sufficient to withstand the ordinary perils attending a boat so laid up at that time and place, and if she was not so kept, the plaintiffs cannot recover.

If a boat sinks without any known cause, the law presumes that such sinking is caused by the unseaworthiness of the boat. So if the loss of the "Jennie" arose from ordinary wear and tear, or from unseaworthiness, or from encountering any ordinary perils of the river, the plaintiff cannot recover, for as to these they are their own insurers. It is the duty of the assured to adopt such measures and to take such precautions for the safety of the boat as a prudent owner uninsured under the circumstances of time and place would have adopted, and if the "Jennie" sank because of the failure of the plaintiffs, or their agents, so to do, the plaintiffs are not entitled to recover. The burden of proof is upon the plaintiffs to show that the "Jennie"

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*sank through the extraordinary dangers and unforeseen accidents against which only the defendants insured them; and if the jury believe that the loss was caused, partly by the insufficient condition of the boat, and partly by the negligence of the plaintiffs, they are not entitled to recover.

In marine insurance anything that materially varies the risks insured against discharges the insurer; and unexcused or unreasonable delay, not justified by necessity, or incurred bona fide, with a view to the purposes of the voyage, does so vary it.

Those are the legal propositions which I charge you, gentlemen. I do not think of

anything else to say to you. If you find for the plaintiff, you will find for the full amount of their loss; and if you find for the defendant, you will say: "We find for the defendant."

The jury found for the plaintiffs three thousand dollars.

The exceptions are fully stated in the opinion.

Mr. J. N. Nathans, for appellant, cited the following authorities:

First exception. 15 S. C., 93; Rev. Stat. U. S. §§ 4377, 4189, 4320; 8 Cranch, 398; 14 Wall., 57; 11 Johns., 293; 15 Id., 24; 1 Phil. Ins., 129; 1 Whart. Cont., § 362; Cons. of U. S., Art. VI.

Second exception. 1 Arn. Ins., 418, 388, 394; 2 Pars. Mar. Ins., 1; 7 Cranch, 26; 19 S. C., 124.

Third exception. 3 Blatch., 276; 1 Pars. Mar. Ins., 374, 381; 2 Mete. (Mass.) 443; 4 Rich., 419; 3 S. C., 59.

Messrs. W. J. Whaley and Buist & Buist, contra.

July 3, 1885. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action of plaintiffs upon a policy of insurance issued by the Providence Washington Insurance Company, incorporated under the laws of Rhode Island, and doing business in this State, "on the tug boat 'Jennie,' her hull, tackle, apparel, boiler, machinery, appurtenances, and furniture, on board, for one year from October 20, 1882, at noon. Vessel valued

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at \$4,000. Privilege to tow phosphate and lumber in and around the rivers and creeks between Beaufort, S. C., and Savannah, Ga., and to proceed to Charleston, S. C., if necessary, and also to tow vessels, not oftener than twice a month, from and to sea, off Tybee Light. Vessel valued at \$4,000, including premium. Insurance on vessel \$3,000, premium \$150." The complaint made an exhibit of the policy and set forth the interest of the plaintiffs in the boat, being as stated, for "the repayment of advances made to one Schlegelmilch, who was the purchaser, and engaged in the lumber business on New River; the bill of sale of said tug boat being taken in the name of W. B. Pringle, Jr., the chief clerk of the plaintiffs, and a citizen of the United States, who held the same as security for the repayment of said advances to the plaintiffs." It charged that within the time insured the tug was lost "by the perils of the sea," &c.

The defendants answered, admitting the execution of the policy, but making several defences, which may be condensed as follows: 1. They deny that the legal title to the tug was in the plaintiffs, and insist that the equitable title was not an insurable interest. 2. They allege concealment of their true title by the plaintiffs. 3. Misrepresentation by them.

4. Unseaworthiness of the tug. 5. That the loss of the boat was occasioned by the negligence of insured and agents; and, 6. "Deviation."

The cause was heard by Judge Kershaw and a jury, when much testimony was taken, all of which is printed in the "Brief." In general terms, the testimony tended to show the execution of the policy and the receipt of the insurance by the defendants after full knowledge of the relations of the plaintiffs to the vessel—who had purchased the "Jennie" from the Urie Guano Company and paid the purchase money—that one F. Schlegelmilch was to have her, if he was able to work out her purchase money; and in the meantime the legal title was taken in the name of W. B. Pringle, Jr., the chief clerk of the plaintiffs, who really had no interest, but was to hold it for the benefit of his employers; that Schlegelmilch, the prospective owner, took charge of the boat as master, and ran her in his raft and lumber business; that generally, when she was unemployed, the boat was anchored out in the middle of New River, in

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front of the *house of the master, Schlegelmilch, which stood some fifty yards from the river, and in full view of the boat riding at anchor; that while in that position the master was absent, but the boat was under the charge of one Hahn, who visited her several times during the day and night, but slept at the house; and that in the evening of April 5, 1882, she was struck by a gale of wind from the southwest, which continued all night, and before daylight the next morning the boat dragged her anchor, went ashore, and sank.

It seems that both parties made requests to charge, but they are not in the "Case," nor is it stated whether the judge refused any of the requests made. Upon the charge, the jury found for the plaintiffs the full amount of the policy, \$3,000. The defendants made no motion before the Circuit Judge for a new trial, but appeal to this court upon three exceptions, which will be considered in their order.

The first exception alleges error in the following part of the charge: "If the jury find that the plaintiffs paid the money for the purchase of the tug and for subsequent repairs, and the premiums and insurance, and that the legal title to said tug was taken and held in the name of W. B. Pringle, Jr., to dispose of the same as the plaintiffs should direct, the said W. B. Pringle assenting thereto, then the plaintiffs had an insurable interest in said tug, and if entitled to recover at all, are entitled to recover to the extent of that interest up to \$3,000, provided such interest be covered by the policy, and the policy be in force at the time of the loss." "Whereas it is submitted that the plaintiffs, being aliens, could not acquire an interest as equitable owners in the tug, and could have no insurable interest as such in the same."

This exception seems to concede that a mere equitable interest in property may be the subject of insurance as charged by the judge, and in that view we concur. From the terms in which the proposition was announced, it must be assumed that the jury found that the plaintiffs had paid the purchase money of the tug and for subsequent repairs, premiums, and insurance, and that the legal title was held by Pringle only for their benefit. Under these circumstances it would require a

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very strong case to authorize the insurers, after loss actually occurred, to deny liability according to the terms of a contract made by themselves, with full knowledge of the circumstances, and as to the manner in which the property was held. It has even been matter of controversy whether a mere hope or expectation without any interest in the subject matter, a mere wager policy or bet that a certain event would or would not take place, might or might not be recoverable as a valid contract; but there can be no doubt that any lawful interest existing at the time of the loss will entitle the insured to recover on his contract, whether that interest in the subject insured be absolute or contingent, legal or equitable. A creditor to whom property is assigned as collateral security has an insurable interest to the extent of his debt. Chancellor Kent, with whom the subject of marine insurance seems to have been a sort of specialty, says: "The interest need not be a property in the subject insured. It is sufficient if a loss of the subject would bring upon the insured a pecuniary loss, or intercept a profit. Interest does not necessarily imply a right to, or property in, the subject insured. It may consist in having some relation to, or concern in, the subject of the insurance, and which relation or concern may be so affected by the peril as to produce damage. Where a person is so circumstanced, he is interested in the safety of the thing, for he receives a benefit from its existence, and a prejudice from its destruction, and that interest, in the view of the English law, is a lawful subject of insurance," &c. 3 Kent Com., 276; Arnould Ins., 229.

It is, however, claimed that on the trial below, the plaintiffs themselves proved the fact that, although residing in this State and doing business here, they were British subjects, aliens; and as soon as that fact appeared, there was introduced a new defence not adverted to before, viz., that the plaintiffs, being aliens, could not, under the navigation laws of the United States, hold any interest in a vessel licensed in accordance with those laws; and that, therefore, they could not recover upon a policy insuring said vessel even against those who had made the contract and received the consideration; and that it was error on the part of the Circuit Judge to omit so to charge. The issue of the alienage of the plaintiffs was not made in

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the pleadings. The evidence was not developed with reference to such issue, and the fact of their being British subjects only fell out casually and incidentally, being assigned as a reason why the legal title to the vessel was taken by Mr. Pringle; yet it was urged before us that the defence, based upon this new fact, should have been held conclusive, and that the omission of the Circuit Judge so to charge was error of law.

It does not appear that the Circuit Judge was requested so to charge, and we do not consider the point properly before this court. In a law case, as frequently held, our only province is to correct errors of law committed below, and that cannot be affirmed of a mere omission to charge, even in a case when the issue is made by the pleadings, unless it appears that the judge refused to charge after he was so requested. It is the office of exceptions to bring before the court only such matters as were contested below. Exceptions going beyond that will not be considered. Any other course, as we conceive, would be in excess of our very limited jurisdiction, and neither just to the Circuit Judge nor promotive of a systematic, orderly administration of the laws. "To permit this court to consider alleged errors of the Circuit Judge in omissions to charge, it is absolutely necessary that the case should show that he was requested so to charge." Sawyer, Wallace & Co. v. Macaulay, 18 S. C., 543, and authorities cited.

It is, however, ingeniously urged that as soon as the evidence that the plaintiffs were British subjects fell out on the trial, that fact became a part of the case, and the Circuit Judge was bound, without being specially requested so to do, to charge that the plaintiffs, as aliens, could not hold "an equitable interest" in the boat "Jennie," for the reason that, under the navigation laws of the United States, aliens can hold no interest in an American vessel; that being incapable of holding any interest, they could not, on the principle that the whole includes all its parts, hold an "equitable interest," and that the failure so to charge was really not a mere omission, but an error of commission in charging the law incorrectly on the facts fairly in the case. This is certainly plausible, but it does not seem to us sound. The question made by the pleadings was not whether the plaintiffs had any interest in the boat, but that having

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only an equitable interest, that would not support the policy and authorize a recovery on it. The defence that the plaintiffs were aliens was a very different affirmative defence, which was not made in the pleadings. When the proof of alienage fell out, it was really irrelevant to the issues joined, and as such possibly might have been stricken out or disregarded. "The question of the relevancy of a fact to a given inquiry is of impor-

tance, because evidence is not admissible to prove an irrelevant fact." Best Evid., 352; Steph. Dig. Evid., 135; 2 Rap. & Law. Dict., 1092.

If the defence of the alienage of the plaintiffs, under the complex and numerous provisions of the navigation laws of the United States, was to be insisted on, it should have been distinctly stated in the answer and argued before the Circuit Judge. But it does not appear that it was considered at all, or that even the statutes of the United States, under which the defence is claimed to arise, were submitted for his consideration and construction, or that he was requested to charge the jury upon the subject. In his charge, the judge appears to have made no reference to the matter, and we cannot say that he committed error of law in confining himself to the issues made in the pleadings. As was said in the case of *Eason v. Miller & Kelly* (15 S. C., 202): "Generally the issues of fact involved in a case will be found contained in the allegations of the plaintiff and the statements of the defence as stated in the answer: and where there is nothing more in the complaint and answer but questions of fact, then an examination of these pleadings will present the true issues submitted to the jury, and to which their verdict will be understood to be responsive. But the pleadings, in addition to questions of fact, may also raise questions of law. In such case, the questions of law do not go to the jury, but must be decided by the court," &c.

But as the court is always desirous that every case should have full consideration and be decided according to the law and the evidence, we have looked through the authorities upon the subject of the alienage of the plaintiffs, so far at least as to satisfy ourselves that no injustice has been done. There can be no doubt that in this State an alien who is not an alien enemy may acquire, hold, and contract concerning property in the same manner as a natural born citizen. Gen. Stat.,

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§ 1768. There is *nothing about the contract of insurance which makes it an exception. 3 Kent, 253. But it is claimed that, in reference to a certain kind of property, American vessels, there is in the laws of the United States a prohibition against ownership by aliens on pain of forfeiture. The point as applied to this case has a double aspect: that the "Jennie" at the time she was insured was liable to forfeiture under a section of those laws (U. S. Rev. Stat., § 4320 [U. S. Comp. St. 1913, § 8068]), which, among other things, provides that "The master of such vessel shall also swear that he is a citizen, &c., * * * and if such vessel be less than twenty tons burden, the husband or managing owner shall swear that she is wholly the property of citizens of the United States," &c.; and that, therefore, being liable to a

forfeiture for the violation of this law, a policy on the vessel was illegal and void.

It will be observed that the vessel had not been forfeited, and that this was not a proceeding on the part of the government to have a forfeiture declared, and therefore, we need not inquire whether the facts would make out a violation of the law; but it was an action on a contract to insure the vessel made by the defendants themselves upon fair and valuable consideration received. In such an action, as we understand it, the insurers may not escape the consequences of their contract by interposing the defence that the boat insured was liable to forfeiture. The *Ocean Insurance Company v. Polleys*, 13 Peters, 163 [10 L. Ed. 105]. That case was very analogous to this. The defendants had insured the schooner "Mary" for one year. They were afterwards sued on the policy, and made defence that the "Mary," at the time she was insured, was liable to forfeiture under a law of the United States, and therefore the policy was not binding. The Supreme Court overruled the defence, and Judge Story, in delivering the judgment, said: "The objection then as insisted on by the counsel for the company involved two distinct propositions. The first was that the schooner was liable to forfeiture: the second was that the policy on her was therefore void. Now, the first might have been most fully admitted by the court, and yet the second have been denied, upon the ground that the policy was a lawful contract in itself, and only remotely connected with the illegal use of the certificate of registry, and in no re-

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spect designed to *aid, assist or advance any such illegal purpose. We all know that there are cases where a contract may be valid, notwithstanding it is remotely connected with an independent illegal transaction, which, however, it was not designed to aid or promote. * * * Suppose the "Mary" had been repaired in port, and the shipwrights had known the circumstances under which she had obtained the new certificate of registry, would they, in consequence of such knowledge alone, have lost their right to recover for their work and labor? Suppose a vessel had been actually forfeited by some antecedent illegal act, are all contracts for her future employment void, although there is no illegal object in view, and the forfeiture may never be enforced?" &c.

In this case the legal title to the vessel was in Pringle, a citizen, but even if the equitable interest of the plaintiffs made the use of the certificate of license illegal, we cannot see that the policy, a contract in itself lawful and in no way forbidden, was in any respect designed to aid, assist, or advance that illegal purchase. See *Clark v. Protection Insurance Company*, 1 Story, 131 [Fed. Cas. No. 2,832]; *Wilkes v. People's Fire Insurance Company*, 19 N. Y., 187; The

Kate Heron, 6 Sawyer, 106 [Fed. Cas. No. 7,619].

The second exception complains that the Circuit Judge "erred in charging that 'the defences of deviation, misrepresentation, and concealment are questions of fact for the jury, and must be proved by the party alleging the same'; whereas it is submitted that the interpretation of the policy as to the voyage prescribed therein and the causes thereof was a question of law for the court, and not of fact for the jury. The court should have construed the terms of the policy in relation thereto, and the jury have applied the facts adduced in evidence to the law so declared."

This exception states the law correctly, but, as it seems to us, there is a misapprehension as to what the judge did charge. There cannot be a doubt as to all questions of misrepresentation and concealment being pure questions of fact for the jury. That narrows the complaint down to the subject of "deviation," which, as applied to marine insurance, is somewhat in the nature of a technical term. We concur that it was the duty of the Circuit Judge to construe the policy,

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a written instrument, explain what *was meant by the term "deviation" and its effect, and then leave it to the jury to say whether the facts found made out the defence. It would be unjust to take particular detached sentences of the charge and construe them without reference to the context, and taking the different parts of the charge and considering it as a whole, it seems to us that the judge did all it is said he should have done. In the very same connection from which the words quoted in the exception were taken, he proceeds to say: "In marine insurance, anything that materially varies the risk insured against discharges the insurer; and unexplained and unreasonable delay, not justified by necessity or incurred bona fide with a view to the purposes of the voyage, does so vary it."

We do not well see how the judge could have said more. The only "deviation" complained of was that of "delay"; that the boat was not fully manned and engaged every day; but at the time of the accident was lying at anchor in New River. In strictness, the doctrine of "deviation" applies to a particular voyage between places named, as to which delay in starting, change of season, local divergence, longer route, and many other circumstances may materially change the risk from that which was intended by all parties when the policy was effected. We do not, however, see how these things could be properly considered in reference to a policy not for a particular voyage, but for a year, so long as the insured vessel kept within her privilege "to tow phosphate rock and lumber in and around the rivers and creeks between Beaufort and Savannah, and to proceed to Charleston if necessary; also to tow vessels, not oftener than twice a month, from and to

sea, off Tybee Light." 1 Am. Ins., 383, 409. But be this as it may, after the judge had charged the jury that "anything that materially varies the risk discharges the insurer," it was for them to say whether the risk had been so varied.

The third exception is as follows: That "his honor erred in charging: 'If the jury find that the loss has happened wholly from one of the perils insured against, then the negligence of the master and crew in failing to perform their duties as such is no defence to the company when the same did not contribute in any way to such loss.' This language, appellants submit, assumed as a fact the presence of a master and crew, whose

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negligence *would not exempt the insurers, and was calculated to mislead the jury."

We make the same remark as to this exception. The charge must be considered as a whole. The Circuit Judge seems to have been particularly careful to state the law fully upon the subject of seaworthiness. Among other things, he said: "A policy of insurance on a vessel or tug imposes on the assured at all times during the continuance of the risk the legal duty of keeping the boat in a condition of reasonable security, and that if the plaintiffs or their agents allowed the 'Jennie' to remain in a leaky condition, anchored out in New River, with nobody on board competent to protect her against the perils to which she was exposed, and by reason of their negligence she sank, the plaintiffs are not entitled to recover," &c. The defendants certainly had no right to complain of this charge. Considering it as applicable only to the question of seaworthiness, we cannot say that it was error, but it came very near trenching on that other doctrine announced by the judge that "when the loss has happened wholly from one of the perils insured against, the negligence of the master and crew in failing to perform their duties as such is no defence to the company where the same did not in any way contribute to such loss."

For a period the effect of negligence on the part of the insured was in cases of insurance a vexed question; but it seems to have been finally settled upon the ground that *causa proxima non remota spectatur*. *Busk v. Royal Exch. Ass. Company*, 2 Barn. & Ald., 82; *Columbian Ins. Company v. Lawrence*, 10 Peters, 507 [9 L. Ed. 512]; *Street v. Augusta Ins. Company*, 12 Rich., 13 [75 Am. Dec. 714]. In the case first cited, the "Carolina," a Russian vessel, being delayed by stormy weather, was frozen up in the Gulf of Finland. The crew was discharged until the breaking up of the ice the following spring, and the ship was left in charge of the mate, who lighted a fire in the cabin and went on board another ship to sleep. About 4 o'clock the next morning the ship was discovered to be on fire, and was consumed to the water's edge. It was conceded that the loss arose

from the negligence of the mate, and it was held that "where the assured had once provided a sufficient crew, the negligent absence

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of all the crew at the time *of the loss was no breach of the implied warranty that the boat would be properly manned." This case has been followed, and the question may now be considered as finally settled. In our own case of *Street v. Augusta Insurance Company*, supra, Judge Wardlaw said: "A policy of insurance is construed so as to preserve its practical usefulness without nice metaphysical refinements. If a peril that has been insured against has been the immediate cause of the damage, the purpose of insurance would be defeated, and the general principle upon which courts refrain from considering 'the causes of causes' would be violated, by looking behind this peril for its cause."

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 205

DOUTHITT v. HIPPI.

(April Term, 1885.)

[1. *Mortgages* ⇨426, 427, 434.]

In an action simply for foreclosure of mortgage to recover the debt secured thereby, and with no purpose of adjudicating the rights of other encumbrancers, a subsequent encumbrancer is a proper, but not a necessary party.

[Ed. Note.—Cited in *Sale v. Meggett*, 25 S. C. 80.

For other cases, see *Mortgages*, Cent. Dig. § 1285; Dec. Dig. ⇨426, 427, 434.]

[2. *Mortgages* ⇨532.]

Where the master sells a tract of land as a whole and by name, representing it as "containing 900 acres, more or less," in action against the purchaser for foreclosure of the mortgage given by him to secure his bid, no abatement will be allowed for a deficiency of 40 acres, it not being a gross deficiency.

[Ed. Note.—Cited in *Lyles v. Haskell*, 35 S. C. 405, 14 S. E. 829; *Erskine v. Wilson*, 41 S. C. 200, 19 S. E. 489; *Harsey v. Busby*, 69 S. C. 263, 48 S. E. 50.

For other cases, see *Mortgages*, Cent. Dig. § 1552; Dec. Dig. ⇨532.]

Before Pressley, J., Newberry, November, 1884.

This was an action of foreclosure brought by S. J. Douthitt, master for Greenville County, against David Hipp, and was commenced in September, 1884. The opinion fully states the case.

Messrs. Moorman & Simkins, for appellant.

The Circuit Judge erred in refusing to make the subsequent encumbrancer a party. 4 S. C., 338; 7 Id., 329; 9 Id., 197; 11 Id., 545; 12 Id., 61; 4 De Saus., 330; Bail. Eq.,

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479; 4 *Johns. Ch., 605; Pom. Rem., § 331. Appellant is entitled to abatement for deficiency. 1 De Saus., 433; 13 S. C., 203, 216.

Mr. J. F. J. Caldwell, contra.

Defendant is not entitled to any abatement. 2 Hill., 657; 6 Rich., 37; 1 McCord, 121; 2 Gill (Md.), 125; 9 Paige, 168; 4 McCord, 434; Rice Ch., 55; 2 Speer, 68. The junior encumbrancer was not a necessary party. 11 S. C., 545; Pom. Rem., § 342; Story Eq. Pl., § 193; Calv. Parties, 128, 138. The junior encumbrancer here is the State of South Carolina: how can she be made a party, or served with process?

July 9, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, as master for Greenville County in 1884, sold a certain tract of land, located in Newberry County, to the defendant, appellant, at public sale. The land was described in the advertisement and sold as land belonging "to the estate of Reuben S. Chick, deceased, and known as the river or Hodge's place, containing nine hundred acres, more or less, and bounded by lands of Mrs. Worthy and Enoree River," and it was so conveyed to the defendant by deed without warranty. The bond for purchase money was secured by mortgage of the premises. The action below was on this bond, and to foreclose the mortgage. The answer alleges a subsequent encumbrance on the land in the shape of a judgment in a case of the State of South Carolina v. Uriah B. Whites and others for an amount greater than the value of the land, and that said encumbrancer is a necessary party to the action. It is also alleged that there is a deficiency of forty acres in the quantity of the land, which deficiency, at the price paid, amounts in value to \$120.66.

His honor, Judge Pressley, presiding, overruled both of these defences, holding that the subsequent encumbrancer was not a necessary party, and that the appellant could not claim a deduction for the deficit of forty acres alleged under the facts of the case, and he decreed a foreclosure for the whole amount of the mortgage debt. The

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appeal questions the correctness of the *above rulings of the judge, so that the questions raised are, did the judge err, 1, in refusing to make the subsequent encumbrancer a party? 2, in refusing to allow the appellant an abatement for the deficiency in the quantity of the land?

The case does not involve the discussion of the question whether the subsequent encumbrancer might have been made a party without error, nor whether he may not have been a proper party, but it rests upon the question whether under the facts of the case he was a necessary party to such extent as that the plaintiff could not proceed without bringing him in. The appellant has not brought

to our attention any case from our reports, nor any authority from text writers sustaining so rigorous a principle as that contended for, as applicable to this case, and he admits that the result of his research in our State reports is that he has found no case where it has been held that a Circuit Judge could properly refuse to make a subsequent encumbrancer a party to an action for foreclosure when defendant insisted upon it. In other words, he has found no case in which the precise question now raised has been determined, to wit, whether in such case the subsequent encumbrancer is a necessary party.

In *Adger & Co. v. Pringle* (11 S. C., 545), Mr. Justice McIver, in delivering the opinion of the court, said: "There can be no doubt that all prior as well as subsequent encumbrancers, while not necessary, are proper parties to an action for the foreclosure of a mortgage of real estate, and in order that the land may produce its full value at the sale sought by such action for foreclosure, it is desirable that such encumbrancers should be made parties." And Mr. Pomeroy, in his *Remedies and Remedial Rights*, § 342, says: "It is a rule universally established that all subsequent encumbrancers, who are holders of general or specific liens on the land, whether mortgages, judgment creditors, or whatever be the nature of the lien, if it can be enforced against the land, are not necessary parties, in the sense that their presence is indispensable to the rendition of a decree of sale, but they are necessary parties defendants to the recovery of a judgment which shall give the purchaser a title free from their liens and encumbrances. If they are not joined as defendants, their rights are unaffected, their liens remain undisturbed

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and continue upon the land while in the hands of the purchaser, and they retain the right of redemption from the holder of the mortgage before the sale, and from the purchaser after the sale."

We think the real distinction is drawn here by Mr. Pomeroy. If the object of the proceeding is to adjudicate the right of the encumbrancers, as well as to foreclose for the benefit of the immediate plaintiff, then such encumbrancers are necessary parties, because their rights cannot be determined in their absence. If, however, the proceeding is a proceeding for foreclosure simply, instituted for the recovery of the debt secured by the mortgage sought to be foreclosed, while the subsequent encumbrancer may very properly be brought in, yet there is no legal necessity that he should be. See *Story Eq. Pl.*, § 193. In the case referred to by appellant (in *Ensworth v. Lambert*) 4 Johns. Ch. [N. Y.] 604, a case of foreclosure where a subsequent mortgagee, on the petition of the defendant, was made a party, Chancellor Kent did say: "That it was a fixed rule and

essential to justice that no decree should pass until all necessary parties were brought in; all encumbrancers existing at the commencement of the suit must be made parties, or else their rights will not be affected by the decree and sale thereof." This is not in conflict with the quotation from Mr. Pomeroy above, nor what Mr. Justice McIver said in *Adger & Co. v. Pringle*, supra; on the contrary it is in accord therewith, to wit: where the decree is intended to adjudge or affect the rights of the subsequent encumbrancer, he must be made a party, otherwise he may not be.

The law applicable to the second question is not doubtful. As a general principle, where lands are sold by the acre, the party purchasing cannot be made to pay for more acres than the tract contains, or where lands are sold by any special description, to such extent as that a failure in that respect would amount to a misrepresentation on the part of the vendor, an abatement will usually be allowed in accordance with the facts. But where it is sold as a whole, in gross, and under the name by which it is known as a certain tract, though the number of acres in the general description is mentioned, yet, accompanied with the words, "more or less," an abatement will not be allowed as a matter of course, because there is a deficiency in the quantity afterwards ascertained. On the

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contrary, abatement will be refused ordinarily. To this, however, there are exceptions, as in a case of a very gross deficiency. On this subject, see the cases referred to in respondent's argument.—*Commissioner in Equity v. Thompson*, 4 McCord, 434; *Peden v. Owens*, Rice Eq., 55; *Morris Canal Co. v. Emmett*, 9 Paige [N. Y.] 168 [37 Am. Dec. 388]; *Jones v. Banskett*, 2 Speers, 68; *Ellis v. Hill*, 6 Rich., 37.

Here the land was sold by the master under an advertisement stating "that it belonged to the estate of Renben S. Chick, deceased; that it was known as the river or Hodges place, containing nine hundred acres, more or less, and bounded by lands of Mrs. Worthy and the Enoree River." The defendant must have known that the vendor, acting as master, and selling, not his own property, but the property of a deceased party, under an order of the court, could not be very well informed as to the precise character or quantity of the land. Besides, the land was not offered by the acre. These facts and the absence of all precise description should have put him on his guard. The deficit of forty acres is not of such gross character, when compared to the whole tract, as to bring the case within the exception which sometimes allows parties relief, and the general rule is against the appeal.

It is the judgment of this court that the judgment of the lower court be affirmed.

23 S. C. 209

STATE v. EVANS.

(April Term, 1885.)

[1. *Trial* ⇐191.]

There is no error in refusing a request to charge that assumes the existence of a fact at issue.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. ⇐191.]

[2. *Indictment and Information* ⇐168.]

Where an indictment charges the defendant with stealing three hogs, the property of J., the defendant may properly be convicted if the evidence shows that any one of the hogs was the separate property of J.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 534; Dec. Dig. ⇐168.]

Before Aldrich, J., Berkeley, February, 1885.

Edward Evans was indicted for stealing three hogs. The evidence showed that one of the hogs belonged to Toney Jackson, one to his wife, and the third to her father, who put it in the same pen with the other two to

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be taken care of, and to be the *property of Jackson's wife, if he (the father) never came for it; and that he had never come for it. Other matters are stated in the opinion.

Messrs. Lee & Bowen, for appellant.

Mr. Solicitor Jervey, contra.

July 9, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was indicted for larceny of live stock. The case was heard at the February term of the Court of General Sessions for Berkeley County, 1885, the indictment being as follows: "That * * * certain live stock, to wit, three (3) hogs of the value of twelve (\$12) dollars, of the proper goods and chattels of one Toney Jackson, then and there being found, he feloniously did steal, take, and carry away," &c.

At the close of the testimony for the State, the defendant requested his honor, Judge Aldrich, presiding, to charge the jury "that the ownership of the property being laid in one Toney Jackson, and the evidence being that the same was the property of Toney Jackson and two other persons, the variance was fatal, and the defendant should be acquitted on said indictment." His honor declined to charge as requested, but charged as follows: "Gentlemen of the jury, I shall not speak to you of the objection to the indictment by counsel; I still have some doubt as to that; but inasmuch as the State has no hesitation, I give the facts of the case to the jury, because, if I am wrong on the law, I may be corrected." The defendant was convicted, and has appealed, assigning as error the refusal of his honor to charge as requested.

The request to charge assumed as a fact that the evidence in the case had shown that the property in question belonged to Toney Jackson and two other persons, and upon this assumption the request as to the law was made. In other words, it was a request, in substance, that the judge should first instruct the jury that, as a matter of fact, the State had not only failed to sustain the allegation in the indictment, that the property belonged to Toney Jackson alone, but had prov-

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ed that it belonged to two *other persons with the said Jackson, and then to apply the law to this state of facts. The judge could not have done this without invading the constitutional province of the jury as to the facts. There was, therefore, no error in his refusal to make the charge as requested. And, besides, even if the judge had been authorized to look into the question of fact as a foundation for the charge, he would have found no evidence sustaining the assumption that the property belonged jointly to Toney Jackson and to two other persons, which, if true, would have prevented a conviction under the cases of *State v. Owens*, 10 Rich., 169; *State Dwyre*, 2 Hill, 287; *State v. Risher*, 1 Rich., 219.

It seems to be true, however, that all of the property mentioned in the indictment did not belong to Toney Jackson. The indictment charged the stealing of three hogs alleged to be the property of Toney Jackson, when the evidence, as it seems, and as is admitted by the solicitor, established title as to one of the hogs only in Toney Jackson. The case has been argued here on both sides as if the judge had charged as a matter of law that defendant could be convicted if only a portion of the property was found by the jury to belong to Toney Jackson. The judge did not, however, charge this as is seen above; he simply refused the request of the defendant, which he was compelled to do when presented in the shape it was, involving, as it did, the assumption of a fact, the truth of which the jury alone could determine. But even had the judge so charged, we do not think it would have been error on his part. True, it has been held in several cases *supra*, that where the indictment charges the property in question to belong to one person, and the evidence establishes title jointly in that person and another, the accused cannot be convicted, simply for the reason that the allegation in the indictment has not been sustained by the testimony; not that the indictment is informal, but because there is a failure of proof.

But we have been cited to no case where the accused was entitled to an acquittal on the ground that all of the property alleged to have been stolen had not been proved to belong to the party named in the indictment as the owner. In the case before the court, one of the hogs was proved to be the prop-

erty of Toney Jackson alone, and this, we

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think, was sufficient. *State v. John*son*, 3 Hill, 1. In that case the indictment charged the stealing of three negroes in one count, and it was held that the accused could be convicted if he stole either one of them. See *Whart. Cr. Prac. & Pl.* (5th edit.), § 252. In such a case it should appear that the larceny alleged embraced that portion of the property which belonged to the prosecutor or the party named in the indictment, and the defendant would be authorized to request the judge to charge that he could not be convicted unless the testimony established title to said portion of the property stolen in such party. This request, however, was not made in this case, and there was no error, therefore, in the fact that the judge made no charge upon this precise point. The only error assigned in the appeal is that the judge failed to charge as requested. In this, as we have seen, there was no error.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 212

DICKSON v. SCREVEN & CRITTENDEN.

(April Term, 1885.)

[1. *Appeal and Error* ¶987.]

Findings of fact by the Circuit Judge in a law case cannot be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3894; Dec. Dig. ¶987.]

[2. *Principal and Agent*, ¶60.]

An agent is responsible to his principal for losses resulting to the latter from negligence or bad faith in the conduct of the agency.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 95; Dec. Dig. ¶60.]

[3. *Factors* ¶27.]

Where an agent fails through negligence to collect cotton due to his principal, the agent is liable for the value of the cotton, with interest thereon.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 28; Dec. Dig. ¶27.]

Before Hudson, J., Greenville, April, 1884.

The judgment of the Circuit Court was as follows:

After full argument of counsel for the plaintiff and defendants in this case, which by consent was submitted to the court for trial without a jury, I concur with the master in his findings of fact, except, perhaps, modified below, and I arrive at the following conclusions of law governing the case:

By the terms of their contract with the plaintiff, the defendants undertook, for certain specified commissions, to receive from

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the *plaintiff certain fertilizers, to sell the same, collect the price thereof, either in a specified amount of cotton, at a specified price, or in money, and to turn over to the plaintiff said proceeds, less stipulated com-

missions. To the extent of these commissions they became the guarantors of the sales. In making all sales, however, the defendants were bound to act in good faith to their principal; that is, they were bound to exercise reasonable diligence in making the sales, and reasonable judgment and circumspection in selecting purchasers and securing the payment of the purchase money, or delivery of the price in cotton according to contract, and were bound to be reasonably active and diligent in making collections. They were also responsible to their principal for good faith and promptness in accounting to him for all collections. Having become agents, they were by that relation to their principal prohibited by the rules of good faith and good stewardship, from sacrificing the interest of the principal to promote their own.

Having advanced the fertilizers of the plaintiff to one engaged in cultivating they had a right also to advance supplies to the same person from their own storehouse to enable him further to make and gather the crop. But in all cases where this course was pursued they had no right to exhaust the crop so made by these manures in paying their own private supply accounts and merchants' accounts to the entire loss of the plaintiff. They could not rightfully thus sacrifice their principal's interest to promote their own. Good faith forbids this, yet the defendants have certainly pursued this course, and from crops raised with the aid of these fertilizers they have reaped a handsome harvest, and by exhausting the crops to pay their store accounts and for animals sold have left nothing to be collected and turned over to the plaintiff.

I find that they are liable to account to the plaintiff for the full balance of the cotton which represents that part of the fertilizers sold and not collected and accounted for. This the master has proven to be 2,399½ pounds, less 63 pounds, which leaves 2,246½ pounds of cotton due by the defendants to the plaintiff November 1, 1882, or at the farthest, January 1, 1883, allowing reasonable time for

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collecting after maturity. The price *of this cotton, under the testimony, 1 place at 10 cents per pound, but do not allow interest thereon, except from January 1, 1883. From this amount must be deducted the defendants' commissions, amounting in all to sixty-nine 50-100 dollars. Deducting these sums, and counting interest on the balance since January 1, 1883, there remains the sum of one hundred and sixty-eight 75-100 dollars, now justly due by the defendants to the plaintiff, and for which he must have judgment.

Upon the payment of this sum and costs the defendants will be entitled to retain the notes for guano sold and to collect and use the proceeds, but until that is done these

notes are subject to the demand of the plaintiff, who, if he collects any part thereof, must credit this judgment with the same, and it is so ordered and adjudged; and it is further adjudged, that the plaintiff do recover of the defendants the sum of one hundred and sixty-eight 75-100 dollars and costs, and that he have leave to enter up formal judgment therefor and issue execution to enforce the same.

Exceptions by defendants for the purposes of an appeal were as follows:

I. That his honor erred in deciding that the appellants acted in bad faith towards the respondents.

II. That appellants conducted the business in the manner usual among fertilizer dealers in the city of Greenville, and are therefore not responsible for the losses enumerated in his honor's decree.

III. That the respondent was fully informed as to the manner in which the appellants were conducting the business, and having made no objection thereto, he is now estopped.

IV. That his honor erred in deciding, in substance, that the appellants are guarantors to the full amount of all fertilizers sold by them, while the agreement specifies that they are guarantors to the extent of their commissions only.

V. That even if his honor had not otherwise erred, it is submitted that the appellants could not be held responsible for cotton at more than 9¼ cents per pound, that being the price at which the parties made their final settlement, and that they are not responsible in any event for interest.

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*Mr. Julius H. Heyward, for appellant.

Messrs. Geo. Westmoreland and W. L. Wait, contra.

July 13, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case was heard by his honor, Judge Hudson, upon the report of the master, to whom it had been previously referred, "to take the testimony and state the various matters of accounts involved, with instructions to report the same, together with his conclusions of fact." His honor concurred in the findings of fact by the master, with some slight modification, and decreed to the plaintiff the sum of one hundred and sixty-eight 75-100 dollars and costs. From this decree this appeal has been taken.

The defendants were agents of the plaintiff in the sale of certain fertilizers under a written agreement or contract which is set out in the "Case." Under this agency the defendants sold a quantity of the fertilizers mentioned and took notes as directed; a portion of these they failed to collect, resulting in loss to the plaintiff. For this loss the action

below was brought, the plaintiff alleging that the failure to collect by the defendants was occasioned by their gross negligence; and this alleged negligence was the gist of the action. His honor, the Circuit Judge, found the fact of the negligence, and upon this finding based his decree.

Now, the case below being a case at law, we cannot go behind the findings of fact as found by the Circuit Judge. On the contrary, we must assume them to be correct. Such being the status of the case before us, it follows that the only question for our consideration is the question of law involved, to wit, whether an agent can be held responsible to his principal for loss resulting from negligence or bad faith in the conduct of the agency. Upon this question there cannot be two opinions. It therefore needs no discussion or citation of authority.

The Circuit Judge having found the question of negligence and bad faith against the defendants as a matter of fact, and having based his decree upon this finding, the question raised in appellants' exceptions, that the business was conducted in the manner usual among fertilizer dealers in the city of Green-

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ville, *and that respondent was informed thereof, and did not object, cannot be considered by us. These were facts which, if true, were involved in the general question of negligence, and we are bound to assume that the Circuit Judge fully considered them in his final judgment.

As to the exception "that his honor erred in deciding in substance that the appellants are guarantors to the full amount of all fertilizers sold by them, while the agreement specifies that they are guarantors to the extent of their commissions only," it is only necessary to say that the action below did not involve the question of guaranty stipulated in the agreement, but, as we have stated, its gist was the alleged negligence of the defendants in the management of the business entrusted to them, and the action was to recover the damages resulting from this negligence not covered by the guaranty.

We see no error as to the price of the cotton or the fact that interest was allowed in the decree.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 216

DICKSON v. DICKSON.

(April Term, 1885.)

[1. *Wills* ⇐551.]

A testatrix, after a bequest of personalty to her three sons, A, B, and C, by name, devised and bequeathed all the rest and residue of her estate to her daughters, D and E, for life, with remainder to their issue. The will then provides: "But in default of such issue, then the property so given to go to my three sons, share

and share alike, or in case of the death of any of them at that time, to and among their then surviving children, such children collectively taking their parent's share." The three sons died, A without children, and B and C both leaving children, and afterwards the daughter D died without issue. *Held*, that the interest of the sons upon the determination of the life estate in the daughters was a contingent remainder, but nevertheless transmissible to their representatives; and therefore, upon the death of D, the estate held by her for life passed—one-third to the children of B, one-third to the children of C, and one-third to the legal representatives and heirs of A.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1188; Dec. Dig. [§551](#).]

[2. Wills [§523](#).]

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*The gift of the remainder to the sons was a gift to them individually and not as a class.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. [§523](#).]

[3. Wills [§551](#).]

Where the will does not make the limitation depend upon surviving the first taker, but places it upon some other contingent event, non-survivorship will not defeat the remainder, and upon the happening of the contingency after the death of the contingent remainderman, the remainder will vest in his heirs or representatives.

[Ed. Note.—Cited in *Roundtree v. Roundtree*, 26 S. C. 472, 2 S. E. 474; *Dukes v. Faulk*, 37 S. C. 268, 16 S. E. 122, 34 Am. St. Rep. 745; *Brown v. McCall*, 44 S. C. 520, 521, 22 S. E. 823; *Tindal v. Neal*, 59 S. C. 17, 18, 36 S. E. 1004; *Brantley v. Bittle*, 72 S. C. 184, 51 S. E. 561.

For other cases, see Wills, Cent. Dig. § 1188; Dec. Dig. [§551](#).]

Before Fraser, J., Charleston, November, 1884.

This was an action by Louisa O'Hear Dickson, daughter of the testatrix, Sarah O'Hear, against her infant daughter, Sarah O'Hear Dickson, and the children, their heirs and representatives, of James O'Hear and John S. O'Hear, and the administratrix of Joseph O'Hear. The action was commenced in June, 1884, for the purposes stated in the opinion of this court. The case was referred to G. H. Sass, Esq., master, whose report stated the facts and the questions involved, and then continued as follows:

The whole question turns upon the character of the estate created in the second class of remaindermen under the executory devise. It is claimed by the administratrix of Joseph O'Hear that Joseph took an absolute interest in his share; that the gift was an executory devise to the three sons absolutely, subject to be destroyed by the life-tenant's leaving issue, and by no other contingency whatever. The words which follow merely substitute the children of a deceased son in place of the parent as to their parent's share. The right to have the benefit of the terms of the devise became fixed on the death of testatrix. The gift to Joseph being absolute, with no proviso that he was to outlive the life-tenant, but mere provision that should he not, children of his might succeed to his rights, cannot be

divested for others. And it is contended that the gift is not to "sons" as a class, but to "my three sons" (as if nominatim they having just been named), "share and share alike." Whatever doubts I might otherwise have had upon the point raised, they must yield to the authority of the case of *McElwee v. Wheeler*, 10 S. C., 392.

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Applying this principle to the present case,

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it seems to me *clear that the interest of the sons must be held to have been wholly contingent. By the terms of the will, "in case of the death of any of them (the sons) at that time," the property was given "to and among their then surviving children, such children collectively taking their parent's share." I take the words "in case of the death of any of them at that time" to mean "in case any of the sons should be dead at the time of the death of either life tenant without issue." And the effect of this clause is to substitute the children of any deceased son in their parent's place, such children collectively taking their parent's share. The remainder to Joseph (the son who died in the life-time of the life-tenant without children) never took effect at all.

The testatrix designated the persons who were to take upon the happening of the contingency of the death of the life-tenant without issue. They were her three sons. She further contemplated the possibility of one or more of the sons being dead at the time the contingency happened, and she provided that, in such case, the children of such son should stand in their father's place. In my judgment, the bequest to the sons was to them as a class, as contradistinguished from the daughters. Where a bequest is to children at the death of a tenant for life, those who then answer the description take. *Cole v. Creyon*, 1 Hill Eq., 311 [26 Am. Dec. 208]; *Conner v. Johnson*, 2 Id., 41.

At the death of the tenant for life in this case, there were no persons alive answering the description of "sons," but there were persons answering the description of the further clause of the will—i. e., there were children of dead sons then surviving, and I think that those children took the whole property. Otherwise the share of Joseph must be regarded as having lapsed. Joseph died before the life-tenant. His chance of future possession, which was a mere possibility, was not such an interest as was devisable or transmissible. He left no children who could take it under the terms of the will. Either the bequest was to a class—"sons, or surviving children of dead sons"—in which case the children of James and John take the whole, or the share of Joseph falls into the estate. Courts will always, if possible, avoid the latter construction, and will endeavor to ascer-

tain and give effect to the real intention of

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testator. It is my judgment that *upon the death of Amelia without leaving issue, her share passed to the then surviving children of the deceased sons, James and John, there being no children of Joseph to fulfill the terms of the devise.

That this result is in accordance with the intention of the testatrix is, I think, very clear from the construction of the will taken as a whole. Her purpose evidently was to provide for descendants of her own blood. She provides first for her daughters and their issue, and failing that, she substitutes her sons and their children who may survive the life-tenant. It was not in her contemplation that any strangers to her blood should inherit. And the husbands of her daughters and the wives of her sons are equally excluded. It seems to me that the construction which I have given to the devise is fully in accord with the purpose and intent of testatrix.

The devise to the children of the sons will not include grandchildren, and the grandchildren of James do not take. Grandchildren do not take under a bequest to children, unless there are no children, or there are strong and conclusive circumstances to show that such was the testator's intention. *Ruff v. Rutherford*, Bail. Eq. 7; *Izard v. Izard*, 2 Desaus., 309.

As it is considered important to have the judgment of the court upon the points thus ruled by me, in order that the principle of the distribution of the estate may be fixed, I have thought it best to file this preliminary report, so that the question of the construction of the will may be settled by the court.

The case came on to be heard in the Circuit Court upon exceptions duly taken to this report by the plaintiff and such of the defendants as were not the children of James and John O'Hear. The Circuit decree, omitting its statement, was as follows:

The question, as stated by the master, is this: Is Joseph, who died in the life-time of Amelia leaving no children, excluded from sharing in the estate, so that the share of Amelia shall be divided between the children of James and John—one-half to the children of James collectively and one-half to the children of John collectively; or did Joseph take a vested estate upon the death of testatrix liable to be divested upon the death

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of the life-tenant *leaving issue, and did such vested interest pass upon his death to his personal representative or to his devisees?

I am unable to concur with the master in his conclusion on this point. A gift to persons as a class "is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time * * *." 1 Jarm. Wills, 534 (edit. of 1880, by Linn & Co.). The gift

here to the three sons, a definite number of persons, is just the same as if they had been called by name in the will. When there is a remainder to a person who is certain on an event which must happen, as the death of A, the remainder is vested. It is always contingent when the limitation over is on an event which may never happen, as the death of A without issue surviving him. The principles which distinguish vested and contingent interests are clearly set forth in *McElwee v. Wheeler* (10 S. C., 392), a case relied on here. Judged by these principles, the interest of Joseph was contingent.

It does not follow, however, that because it was contingent it does not now go to the personal or legal representatives of Joseph. "A contingent interest will or will not be transmissible to the personal representatives of the legatee, according to the nature of the contingency on which it is dependent," as where the contingency is a collateral event. 2 Jarm. Wills, 479-480, same edition. See also 1 Wms. Exec., 637-638. So where a testator devised to A and his heirs, and if A should die before twenty-one, then to B and his heirs. A died before twenty-one, but B died before him. Such a devise was "considered equivalent in point of interest to a contingent remainder, and consequently transmissible." 1 Fearnle Rem. 559-560.

I find in this clause no words indicating that the interest of the sons, in case of death in the life-time of the tenant for life, was at all dependent upon that fact, except in the case of their leaving children, in which event the children of the one so dying were substituted for the parent. If all had thus died leaving no children, then there would have been, upon the theory of the report, a case of intestacy as to this property, which the courts ought to avoid if it can be done on any fair interpretation of the will.

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*I find nothing in the will which enables me to conclude that the word children includes grandchildren. If any child of either of the sons died in the life-time of the life-tenant, a question might possibly arise as to whether such child had a transmissible interest; but there is nothing in the case before me to raise such a question.

It therefore is ordered that one-third of the estate shall go to the personal representatives of Joseph, or to his heirs or devisees, according as it may be real or personal estate; one-third be divided amongst the children of James, and one-third amongst the children of John S., who survived the life-tenant, Amelia. It is ordered that the case be recommitted to the master with this construction of the said clause of the will and otherwise as directed by the said order of August 4, 1884.

The children of James and John O'Hear appealed upon the following exceptions:

I. Because his honor erred in overruling

the report of the master that the devise to the sons of the testatrix was a devise to them as a class.

II. Because his honor erred in overruling the report of the master that the interest of a son dying in the life-time of the life-tenant was not devisable or transmissible.

III. Because his honor erred in holding that the devise to the sons was a devise to them as individuals, as if named.

IV. Because his honor erred in holding that there was nothing in the will indicating "that the interest of the sons, in case of death in the life-time of the tenant for life, was at all dependent upon that fact, except in the case of their leaving children;" whereas it is respectfully submitted that the provisions of the will, taken as a whole, show the intention of the testatrix to have been clear to provide for her sons as a class, the individuals to take to be ascertained upon the death of the life-tenant without issue, and his honor should have so held.

V. Because his honor erred in not holding that the interest of Joseph F. O'Hear was but a "bare possibility," and that such interest was not devisable, transmissible, or assignable.

VI. Because his honor erred in not holding

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that the remain^{der}, after the death of Mrs. Amelia Hoyt, the life-tenant, should be divided equally between the children of James and the children of John surviving at that time; one-half to the children of James, and one-half to the children of John.

Mr. W. W. Johnson, for appellants, cited 3 Peters, 377; 59 N. Y. 202; 1 Desaus., 521; 19 S. C., 351; 1 Hill Ch., 322; 10 S. C., 364, 392; 2 Hill Ch., 43; 17 S. C., 512; 21 Id., 513; 4 Kent, 262, and note "a"; 14 Ves., 256.

Mr. Langdon Cheves, contra, cited 2 Hill Ch., 638; 1 Jarm. Wills (Big. 5 edit.), 871, 872; 2 Ibid., 155; 9 Ch. Div., 117; 1 Wms. Exec. (3 Am. edit.), 759; 1 Br. C. C., 181; 101 Mass., 336; 10 Rich. Eq., 394; 9 Sim., 644; 9 Ves., 233; 1 Price, 264; 3 Rich. Eq., 254; 1 Hill Ch., 359.

July 15, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case involves the rights of certain parties (named in the pleadings) under the will of Sarah O'Hear, deceased, late of the city of Charleston. The will is set out in full in the "Case," but as the questions before the court arise more especially out of one clause thereof, it will only be necessary here to refer to that clause. The testatrix left surviving two daughters and three sons, and in the clause of the will referred to supra, she bequeathed and devised as follows: "Item. I give unto my son, Joseph F. O'Hear, my servant boy Peter, absolutely. Item. To my son, John S. O'Hear, my boy Wells, absolutely. Item. To my son, James, my boy Charles, absolutely.

Item. To my two daughters, Louisa and Amelia F. O'Hear, I leave all the rest and residue of my estate, both real and personal, for their own use and benefit during the term of their natural lives, and upon the death of either, leaving issue, such issue shall take their parent's share at marriage, or on arriving at age, absolutely and forever. But in default of such issue, then the property so given to go to my three sons, share and share alike, or in case of the death of any of them at that time, to and among their then surviving children; such children, collectively, taking their parent's share. It is my

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meaning and intention, however, *that the interest or income only, arising from the most judicious investment of the said property by my trustees, be paid to my daughters for their maintenance and support, they being allowed to select such servants as they please as attendants about them, and to choose their residence, which shall be purchased or hired, as may be deemed most advisable by a majority of my executors."

Amelia F. O'Hear, one of the life-tenants, died in 1882, leaving no issue. Her sister, Louisa, the other life-tenant, survived her, and has issue living; she is the plaintiff in this action. The three brothers of Amelia predeceased her. Joseph died in 185, unmarried, and leaving no issue. He left a will, dated August, 1852, by which he gave all of his property to his brothers and sisters, in equal division. His brothers were appointed his executors, both of whom have since died, and the defendant, Mrs. S. Isabel O'Hear, has administered de bonis non. James O'Hear died in 1864, leaving children, some of whom have since died, leaving children. John S. O'Hear died in 1875, leaving children.

Upon this state of facts the questions presented for consideration are these: 1st. Joseph, one of the brothers, having died before the life-tenant, Amelia, leaving no issue, is his estate excluded from sharing in the distribution of that portion of the estate of his mother enjoyed by Amelia for life, and shall said portion be divided between the children of James and John, one-half to each family of children? Or, did Joseph take such an interest in the estate of the testatrix as under the facts will entitle his representatives or devisees to receive the same?

The Circuit Judge, his honor, Judge Fraser, overruling the conclusions of the master, held that the representatives of Joseph, or his heirs and devisees, according as the property was real or personal, were entitled to one-third of the estate in contest, and that the children of James and John, who survived Amelia, were entitled among them, each set, to one-third, no part going to the grandchildren. The appeal questions this holding, the appellants contending that the remainder after the death of Amelia should have been

divided equally between the children of James and John, surviving at that time, that is, one-half to the children of James, and one-half to the children of John, Joseph having died unmarried and without issue, be-

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fore the death of Amelia; and, therefore, in the opinion of the appellants, not entitled to any portion of said estate.

It is conceded on both sides that the interest bequeathed and devised to the sons of the testatrix upon the termination of the life estate given to her daughters, was a contingent interest as contradistinguished from a vested one, the contingency being the death of the life-tenants, one or both, without issue surviving. That this is a correct construction, we think is fully sustained by our recent cases of *McElwee v. Wheeler*, 10 S. C., 392; *Boykin v. Boykin*, 21 S. C., 513.

The appellant, however, contends that the interest to the sons was given them as a class, and that only such of the sons as were in existence at the time of the happening of the contingency, could take the share of such as may have died in the life-time of the tenant for life, being subject to the other provisions of the will, which directed that said share should go to their surviving children; and that, inasmuch as no one of the class was in existence at the death of Amelia, the life tenant, all of her brothers (the sons) having predeceased her, the contingency never happened upon which either of these sons was to take, and that under these circumstances such of the children of the deceased sons as survived become entitled under that provision of the will, which declared that in case of the death of either of the sons before the death of the life-tenant, leaving children, they should take their parent's share. There is a class of cases in which, when property is given by will to be distributed among a class of persons at some future time, or on some future contingency, all are let in who come into existence before the time or the happening of the event; provided they be in existence at the happening of said event, and no one but such as may be in existence at that time can take. This case, however, in our opinion, does not fall within that class.

As was said by the Circuit Judge, quoting from 1 Jarm. Wills, 534: "A gift to persons as a class is a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time." Here the gift was not to a body of persons uncertain in number, and to be ascertained at a future time; on the contrary,

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it was to the three sons of the testator alive and in being at the time of the execution of the will, and the direction was that the property should go to these three sons, share and share alike, upon the death of the life-tenant, leaving no issue. Certainly it could not be contended that if the testatrix had

named the sons, each to be entitled to a share upon the contingency specified, that in such case the doctrine as to the gifts to a class would apply, excluding such as were not in existence at the happening of the contingency, and giving the whole estate to such only as were then in being; and yet the language used seems to us to exclude the idea of a class as fully as if the sons had been named individually. The testatrix had but the three sons, and among these three she directed the estate to be divided upon the happening of the contingency mentioned, share and share alike; calling them by name could not have emphasized the idea that they were to take individually, and not as a class, more strongly.

Our conclusion is, that each of the sons was a contingent remainderman, to the extent of one-third of the property given to the life-tenants. See cases of *McMeekin, admr., v. Brummet*, 2 Hill Eq., 638, and *Pritchett et al. v. Cannon et al.*, 10 Rich. Eq., 394.

The important question, however, what became of the interest of Joseph on his death before the life-tenant leaving no children? still remains. Had he left children, as did his brothers upon their death, the provision in the will giving the shares of the deceased sons to their children would have met the case; but, as we have said, he died leaving no issue. It appears somewhat anomalous that a contingent remainder which never, in fact, vests in the remainderman during his life, should yet be transmissible to his representatives. But that there are such contingent remainders is well settled. There are several kinds of contingent remainders classified by the character of the contingency upon which they are based. Mr. Fearne divides them into four classes. It is not necessary, however, to discuss all of these. It is sufficient for our present purpose to say that where the existence of the remainderman himself at the time of the event upon which the remainder is to take effect does not constitute the contingency, then the remainder

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is transmissible. A testator may make it one of the conditions of the limitation that the remainderman shall survive the first taker; but where he fails to do this and places the remainder upon some other event or contingency, wholly disconnected from the survivorship of the remainderman, the fact of his non-survivorship will not defeat the remainder, for the obvious reason that the testator has not so declared and directed. *McMeekin, admr., v. Brummet*, and *Pritchett et al. v. Cannon et al.*, *supra*; *Fearne Rem.*, 559, 560.

It is true that the will here defeats the remainder to such of the sons as may die in the life-time of the tenant for life, leaving children, by substituting in such an event the children of such son in the place of the par-

ent. But there is nothing in the will which indicates a purpose that the remainder shall be defeated simply by the death of the sons before the death of the life-tenant. Nor is the remainder either expressly or impliedly made dependent upon the existence of the sons at the death of the life-tenant. On the contrary, it is made dependent wholly upon the event of the life-tenant dying without issue, which event having happened as to Amelia, the remainder takes effect, the share of Joseph being transmissible, and the shares of the other two sons going to their children as by the will directed.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 226

HYRNE v. ERWIN.

(April Term, 1885.)

[Reported and annotated in 55 Am. Rep. 15.]

[1. *Physicians and Surgeons* ¶16.]

Partners in the practice of medicine are all liable for an injury to a patient resulting from the negligence, either of omission or commission, of any one of the partners within the scope of their partnership business; but for an injury resulting from the act of one partner outside of the common business, the offending partner is alone responsible. The subject of the liability of partners generally considered.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 31; Dec. Dig. § 16.]

[2. *Physicians and Surgeons* ¶16.]

There is no error in charging a jury that partners in the practice of medicine are sureties for the proper and faithful performance of their engagements by each of them.

[Ed. Note.—For other cases, see *Physicians and Surgeons*, Cent. Dig. § 31; Dec. Dig. ¶16.]

[3. *Appeal and Error* ¶110.]

The judgment of the Circuit Court on a motion for a new trial in a *case at law, is final as to all questions of fact involved in the motion; for alleged errors of law therein involved, an appeal lies.

[Ed. Note.—Cited in *Webber v. Ahrens*, 36 S. C. 587, 15 S. E. 732; *State v. Don Carlos*, 38 S. C. 227, 16 S. E. 832; *State v. Fullmore*, 47 S. C. 40, 24 S. E. 1026; *State v. Jones*, 89 S. C. 52, 71 S. E. 291, Ann. Cas. 1912D, 1298.

For other cases, see *Appeal and Error*, Cent. Dig. § 746; Dec. Dig. ¶110.]

[4. *Appeal and Error* ¶218, 219.]

A point not brought to the attention of the judge below by request to charge, and not ruled upon, not considered here.

[Ed. Note.—Cited in *Dargan v. West*, 27 S. C. 157, 3 S. E. 68; *Bomar v. Railroad Co.*, 30 S. C. 455, 9 S. E. 512.

For other cases, see *Appeal and Error*, Cent. Dig. § 1315; Dec. Dig. ¶218, 219.]

Before Wallace, J., Barnwell, November, 1883.

This was an action by E. W. Hyrne against J. D. Erwin and C. W. Erwin, partners in the practice of medicine, commenced in December, 1882, to recover \$5,000, damages for neg-

ligent and unskilful conduct in the setting and treatment of plaintiff's broken arm. The testimony shows that the arm was set on the night of December 6, 1881, by Dr. C. W. Erwin, who visited the patient again the next day, but not afterwards until December 10, when sent for, and again the next day, when he took his father, Dr. J. D. Erwin, with him, who then, for the first time, saw the plaintiff. The negligence alleged was in the treatment of the plaintiff's arm by the younger Erwin, before his father was called in, and in the failure to visit between the 7th and 10th of December.

The testimony for the plaintiff tended to show negligence by Dr. C. W. Erwin on these occasions; the testimony for the defendant tended to show that the surgeon had done all that approved practice required.

The opinion of this court states all of the charge that is furnished in the Brief. The exceptions are sufficiently stated in the opinion.

Mr. Robert Aldrich, for appellant.

Mr. J. J. Brown, contra.

July 15, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The appellants, father and son, are partners in the practice of medicine in Barnwell County. In December, 1881, the plaintiff had his arm broken by the falling of his horse, and the defendants were called in. Both attended in the first instance, but the case was principally managed afterwards by Dr. C. W. Er-

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win, the son, both, however, attending occasionally.¹ The plaintiff alleged that the attention given was so negligent and unskilful that he lost the use of his arm; that he is no longer able to engage in his accustomed pursuits; that he has been, and still is, disabled from attending to his ordinary business, whereby he has heretofore obtained support and maintenance for himself and family, to his damage \$5,000. The case was heard by Judge Wallace and resulted in a verdict of \$1,000 for the plaintiff. The appeal assigns error to the presiding judge at two stages of the case: the first involves his charge to the jury, and the second his refusal to grant a new trial on motion made on the minutes of the court after verdict.

The portion of the charge excepted to was as follows: The judge said "that when two gentlemen associate themselves together in the practice of medicine or law or any other scientific profession, each becomes surety for

¹To prevent misapprehension, I desire to say that in the statement of facts, it was not intended to convey the idea that Dr. James Erwin attended in the first instance, as the testimony shows that he never saw the case until the Sunday after the accident, which occurred on Tuesday.—W. D. SIMPSON, C. J.

the other that he will faithfully and properly perform his engagements. And if either fail to display reasonable care, diligence, and skill in the performance of his duties, both are liable." He further said: "That if the jury believed the plaintiff and his witnesses as they testified on the point of the setting of the arm by Dr. C. W. Erwin, and the plaintiff's complaint at the time that the bandages were too tight, the great swelling of the arm and the discoloration of the fingers the next day, the earnest request of the plaintiff and his wife to him to loosen the bandages, his refusal and leaving the patient in this condition, and not returning for several days, when mortification had ensued in consequence, then this made out a case of wanton injury, in which event the defendant, C. W. Erwin, alone would be liable."

When these two portions of the charge are considered together, the law laid down by the Circuit Judge seems to have been this, to wit, that when two or more physicians are practising their profession in partnership, reasonable care, diligence, and skill on the part of each in the performance of their du-

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ties is guaranteed *by each and all of them, and if either fails to exercise such reasonable care, diligence, and skill in the management of a case entrusted to his care, resulting in damages, all will be responsible. If, however, a wanton case of mismanagement is made out against one alone, and damage result from this, the others would not be responsible. Was this error? Certainly not such an error, if any, as to give cause of complaint to either of the defendants. It did no harm to the younger Dr. C. W. Erwin, and it opened a door of escape for the elder Dr. J. D. Erwin, to which, according to strict law, it may be, he was not entitled.

The law applicable to such cases, as we understand it, is the same as that which obtains in the general doctrine of agency; it applies, too, in the relation of master and servant, and like cases. It is this: In a partnership the parties associated are, in one sense, agents of each other, and the act of one within the scope of the partnership or business is the act of each and all, as fully so as if each was present and participating in all that is done. And each guarantees that within the scope of the common business reasonable care, diligence, and skill shall be displayed by the one in charge. Or at least that a failure on the part of one thus to exercise such reasonable care, diligence, and skill is a failure in law of each and all, and an injury resulting from such failure is the act of all. Where, however, the injury results from a wanton or wilful act of one of the parties committed outside of the agency or common business, and not from negligence or the failure to bestow reasonable care, diligence, and skill within the agency, then a different principle applies, to wit, that the

party doing the act and causing the injury is alone responsible—the distinction between the two cases growing out of the fact that the relation which the party doing the act bears to the others, is different in the one case from the other. In the first his act being within the scope of the business, he acts both for himself and as agent of the others; in the other his act, being beyond and outside of the scope of the business, he acts for himself.

It will be observed, then, that two things are necessary to make the principal responsible for the acts of the agent, under the doctrine of respondent superior, and the same

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doctrine applies *to partnerships of the character under discussion. First, there must be negligence or a want of reasonable care, diligence, and skill; and, second, an injury must result from this. If either of these is absent, no responsibility attaches to any one, because it requires the presence of both to give rise to a cause of action. Now, an injury in a special case may be the result of an omission on the part of the agent or the party in charge to bestow proper care in doing what he is authorized and attempting to do. Or it may be produced by a direct act on his part within the scope of the business, which act reasonable care and the possession of reasonable skill would have forbidden. Or it may be produced by an act altogether outside of the business and not intended or calculated to further and advance said business. In the first two classes of cases the principal is liable, because here is negligence, the want of proper care within the scope of the business, and resulting in injury. And it makes no difference whether this negligence results from inattention, incompetency, or wantonness. But in the last class of cases, where the party causing the injury has stepped beyond the agency or common business, and committed an act either from wantonness or other motive, the act is his, and he alone can be made responsible. These principles, we think, will be found to be sustained by Story on Partnership, § 166, and the cases and authority cited there; by Cooley on Torts, and Wood on Master and Servant, 593, et seq. The charge of the judge is possibly susceptible of the construction that a wanton act of one partner, even within the scope of the business, would relieve the other parties, as he pointed out no distinction between such an act done within and one done without. But if this be so, yet, as we have said above, neither of the defendants could complain for the reason given above.

The appellant complains, however, of the use of the word "surety" by the judge. It is true, as argued by appellant, that this precise term has not been employed in any of the cases involving the relation of partners to each other or in the elementary books on the subject, but we see no error in its use here.

It certainly did not intensify, or make more rigid or binding, the responsibility of parties, growing out of partnerships, than if it had been omitted. In fact, its tendency was rather

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er to modify *that responsibility, as sureties on a note might possibly be released sometimes when partners would not be.

This brings us to the question of the refusal to grant a new trial. Under our practice, governed by the code, motions for new trials must always, in the first instance, be made to the court below, either on the minutes of the judge or upon a case or exceptions made. Such motions should be based upon an error of law affecting the verdict or upon error involving the facts, such as insufficient testimony, excessive damage, and the like. If based upon errors of fact, the judgment of the Circuit Judge is final. There can be no appeal to this court in such case, for the reason that this court under the constitution has no appellate power in a jury case, its only province being to correct errors of law in such cases. See *Brickman v. S. C. R. R. Co.*, 8 S. C., 173; *Steele v. C., C. & A. R. R. Co.*, 11 Id., 589. If, however, the motion below is based upon an alleged error of law occurring in the charge, or otherwise in the progress of the trial, it may be the subject of appeal to this court, and it is only in such cases that a motion below for a new trial can be reviewed here.

Now, was the motion below in this case made upon an alleged error as to facts or an error as to the law? The first ground as found in the case is "that no actual damage being proved, there was no evidence upon which to base a verdict." The second ground starts out with the statement that the verdict was not sustained by the evidence in any sense and more especially in this—then follows a particular specification of the facts intended to show that the verdict was not sustained by the evidence. The third and last is the general ground that the verdict of the jury is otherwise contrary to law, which as is well understood raises no question. It will be seen at once, then, that the motion below having been based entirely upon alleged errors of fact, there is nothing in the appeal as to this motion within the cognizance of this court, under the code, *supra*.

As to the point which was so earnestly pressed by appellant's counsel upon us, to wit, that there being actual damage alleged in the complaint nor proved, the verdict for consequential damages could not as a matter

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of law be sustained, it is sufficient to say that there does not seem to have been any ruling of the Circuit Judge upon that question from anything that appears in the "Case." Nothing in reference to it appears in the charge, nor was there a request made that the judge should instruct the jury upon

it. Nor do we see how, after verdict upon the motion for a new trial upon the ground stated, it could be raised as a question of law so as to reach this court, inasmuch as the grounds of that motion, as we have already seen, involved nothing more than a plain question of fact, to wit, whether the verdict of the jury, both as to the fact of negligence and of damage, was sustained by the evidence. The judge, in refusing the motion for a new trial, must have held that the evidence was sufficient as to both of these questions, and we are not at liberty to go behind this finding and consider a question of law which might or might not be applicable in case the finding was reversed.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 232

McCOWN v. KING.

(April Term, 1885.)

[1. *Deeds* ⇨93.]

Deeds and other papers must, under the rules of law, be so construed as to reach the intention of the parties.

[Ed. Note.—Cited in *Fuller v. Missroom*, 35 S. C. 327, 14 S. E. 714; *Pope v. Patterson*, 78 S. C. 340, 58 S. E. 945; *Crawford v. Atlantic Coast Lumber Co.*, 79 S. C. 168, 60 S. E. 445.

For other cases, see *Deeds*, Cent. Dig. §§ 231, 232; Dec. Dig. ⇨93.]

[2. *Deeds* ⇨120, 123, 124, 128, 129.]

Under a deed to A "to have and to hold to A, his heirs and assigns forever," followed by the warranty clause, and concluding "in trust nevertheless for the benefit of the heirs of his body, and not subject to any debts now or hereafter to be contracted by him, and at his death to be equally divided between the heirs of his body," A took no express grant of a beneficial interest in the land, but he was simply a trustee.

[Ed. Note.—Cited in *Mims v. Machlin*, 53 S. C. 9, 30 S. E. 585; *DuBose v. Flemming*, 93 S. C. 184, 76 S. E. 277.

For other cases, see *Deeds*, Cent. Dig. § 421; Dec. Dig. ⇨120, 123, 124, 128, 129.]

[3. *Deeds* ⇨95.]

Clauses of a deed may be transposed in order to arrive at the intention of the grantor.

[Ed. Note.—Cited in *Chavis v. Chavis*, 57 S. C. 176, 35 S. E. 507; *Pope v. Patterson*, 78 S. C. 344, 58 S. E. 945.

For other cases, see *Deeds*, Cent. Dig. §§ 238, 241-254; Dec. Dig. ⇨95.]

[4. *Deeds* ⇨120, 123, 124, 128, 129.]

A gift to the heirs of the body of A without a gift of a prior estate to A, makes these words "heirs of the body," to be words of purchase and not of limitation.

[Ed. Note.—Cited in *Miller v. Graham*, 47 S. C. 294, 25 S. E. 165; *Mattison v. Mattison*, 65 S. C. 349, 351, 43 S. E. 874; *Duckett v. Butler*, 67 S. C. 134, 45 S. E. 137; *Church v. Moody*, 98 S. C. 234, 82 S. E. 430.

For other cases, see *Deeds*, Cent. Dig. § 421; Dec. Dig. ⇨120, 123, 124, 128, 129.]

[5. *Deeds* ⇨129.]

There was in this deed no express gift to A, and if there was any estate at all in A by implication, it was only an estate for his life.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 351, 360-365, 416-430, 434, 435; Dec. Dig. ⇨129.]

Before Witherspoon, J., Darlington, October, 1884.

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*This was an action by G. J. McCown against Mary E. King and others, heirs at law of James King, deceased, commenced in May, 1883. The opinion states the case.

Messrs. Ward & Nettles, for appellants, cited Will. R. Prop., 251; 2 Wash. R. Prop., 270; 18 Am. Rep., 593; 68 Ill., 594; 4 Burr., 2529; 3 Rich. Eq., 158; 2 DeSaus., 113; 1 McCord Ch., 78; Fearne Rem., 49; 1 Strob. Eq., 346; 1 Ves. & B., 456; 2 Fearne Rem., 238; 5 Ind., 283; 3 Jarm. Wills, 118; 5 Strob., 134; 3 Rich. Eq., 574; 4 DeSaus., 330, 630; 16 S. C., 293, 311; Bail. Eq., 49; 3 Wash. R. Prop., 440.

Messrs. Dargan & Dargan, contra, cited 2 Bl. Com., 381; Harper, 492; 2 Pars. Cont., 513; Pot. Dwar., 177; 11 S. C., 75; 4 Kent, 468; 2 Hill. Ch., 639; 3 Strob. Eq., 66; 2 DeSaus., 126.

July 15, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. There is but one question in this case, and that arises upon a deed of which the following is a copy, to wit:

"State of South Carolina, Darlington County.

"Know all men by these presents that I, William King, Sr., of State and district aforesaid, for and in consideration of the love and affection I bear my son, James King, as well as the sum of ten dollars to me paid, the receipt of which is hereby acknowledged, have granted, bargained, sold, and released, and by these presents grant, bargain, sell, and release unto the said James King that tract or parcel of land where he now resides [describing the land by metes and bounds], supposed to contain three hundred acres, more or less, together with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in any wise incident or appertaining; to have and to hold, all and singular, the said premises before mentioned, unto the said James King, his heirs and assigns forever. And I do hereby bind myself, my heirs, executors, and assigns to warrant and forever defend, all and singular, the said premises unto the said James King and his heirs against myself, my heirs, and against every person lawfully claiming, or to claim, the same or any part thereof. In

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trust, nevertheless, for the benefit of the heirs of his body, and not subject to any debts now or hereafter to be contracted by him, and at

his death to be equally divided between the heirs of his body.

"Witness my hand and seal this the twentieth day of January, one thousand eight hundred and sixty, and the eighty-fourth year of American independence.

"(Signed) ^{his} William X King.

"Signed, sealed, and delivered in the presence of ^{mark}

"T. C. Law and Albert J. Law."

James King, the son, took possession under this deed; or, as it appears, he was already in possession at the execution of the deed, but how and upon what terms is not stated. He died in 1883, leaving the defendants, his heirs at law, in possession. During his lifetime, a judgment was obtained against him by McCown & Bass, under which the land was sold, after first setting off a homestead of a portion thereof to said James King, which was not included in the levy and sale. At the sale, the plaintiff became the purchaser and received titles from the sheriff in 1882 for two hundred acres, more or less, levied on and sold as the property of James King, under execution in favor of McCown & Bass.

Under these circumstances, the action below was brought by McCown for the possession of the land and for damages for unlawfully withholding the same by the defendants. The defendants, taking the ground that James King acquired no interest under the deed aforesaid from his father through whom plaintiff claimed, offered no testimony on the trial. The case was heard by his honor, Judge Witherspoon, who, holding that James King had a leviable interest in the land under the deed from his father, which had been sold and purchased by the plaintiff, adjudged possession to plaintiff with costs. His honor did not state in terms in the decree pronounced by him the precise character of the estate which in his opinion had passed to James King under the deed in question. But he used the following language in reference thereto, to wit: "The defendants, as heirs of the body, can only claim the land by succession from their ancestor, James King, and in his right subject to his debts," from which the ap-

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*pellants have assumed, in their grounds of appeal, that his honor held that James took a fee thereunder, which no doubt was the construction placed by Judge Witherspoon on said deed.

The appeal raises the single question of the interest of James King under this deed. It is admitted that the execution of McCown & Bass was levied on this land as the property of James King, that plaintiff was the purchaser at sheriff's sale, and that he has the sheriff's deed conveying the same to him. But appellants controvert the construction of the Circuit Judge of the King deed and seek

to have it reversed, claiming that his honor, instead of holding that James King took a fee to himself, should have held (in the language of the fourth exception) "that James took an estate in the land conveyed by the deed from William King in trust for his children, and that he had no other interest whatever therein."

The object of construction as to deeds—in fact, as to all papers in contest before the courts—is to reach the intention of the parties, because it is this which must control: otherwise the contract would be the contract of the court and not of the parties. The ascertainment, however, of this intention is not to be had by conjecture, or by what seems to be natural justice, or what the court would have done under the circumstances, but it must be had by the application of the rules of construction laid down in the books, and which the wisdom of the past has established as the best means of reaching the true meaning and intent of such papers. Whatever the application of these rules evolves, nothing more, nothing less, must be regarded and declared to be the intent of the matter under construction, whether it be in consonance with our notions of what it ought to be or not. Now, the application of these rules to the deed in question, we think, results in a different conclusion from that reached by the Circuit Judge.

Take the deed as a whole, and seek the intention of the grantor (William King) through the language employed when reading it as an entirety, and there is no beneficial interest, either equitable or legal, conveyed to James King, as far as we can see; on the contrary, he seems to be expressly excluded by the expression that in no event is the property to

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be made liable *for his debts now or hereafter to be contracted. The deed is somewhat inartificially drawn, in the fact that the trust clause is separated from the granting clause by the interposition of the warranty; but this may have been, and no doubt was, accidental; yet the deed must be read as a whole, giving effect to each part, but in general harmony if possible. Now, to do this, let the trust clause be attached to the granting clause, and read in connection therewith. It will then read as follows: "Have granted, bargained, sold, and released, and by these presents grant, bargain, sell, and release unto the said James King that tract or parcel where he now resides, &c., to have and to hold all and singular the said premises mentioned unto the said James King, his heirs and assigns for ever. In trust, nevertheless, for the benefit of the heirs of his body, and not to be subject to any debts now or hereafter to be contracted by him, and at his death to be equally divided between the heirs of his body."

When thus read, and it is legitimate to transpose these clauses in this way, there is

certainly no beneficial interest expressly conferred or conveyed to James King, but the estate is in trust for the heirs of his body, he being made the trustee simply. Suppose the language had been to James King, his heirs and assigns for ever, in trust, nevertheless, for the benefit of his children, and at his death to be equally divided between his children, could it be successfully contended in such a case that he would take a fee subject to his debts? We think not. Would he be entitled to any beneficial interest under such a deed? Could such a deed be construed in any other way than as conveying the estate (whatever it might be) directly to the children through the operation of the statute of uses (there being nothing for the trustee to do) in common until his death, then to be divided equally between them?

Now, can the words "heirs of the body," as used here, be properly construed to mean children, and therefore intended as words of purchase, indicating who were to take under and by virtue of the deed, or must they be understood as defining the quantity of the estate granted to James King, and, therefore, as words of limitation? These words, when used in the latter sense, to wit, of words of

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limitation defining the quantity of an *estate, always follow and are attached to terms granting an estate to the ancestor, as where an estate is given to one and the heirs of his body. Here these terms are words of limitation and indicate that the grantee takes a fee conditional at common law. In other words, they are used for no other purpose but to point out how much and what quantity of the fee has been given to the grantee. So, too, under the rule in Shelley's Case, where an estate is given to one for life, then to the heirs of his body, these terms have been held to enlarge the life estate to a fee conditional, being regarded as words of limitation instead of purchase. But where they are not attached to the grant of a previous estate the quantity of which is to be ascertained, there is nothing for them to operate upon, and it cannot be said that in such case they were used as words of limitation.

Now, in the case before the court, could these words have been used to define the quantity of an estate given to James King? Before thus concluding, we must see that a beneficial estate of some kind was intended for him in the deed. Was there any such estate intended for him? By the terms of the deed a full fee is conveyed to James, the words heirs and assigns forever being used, but this was certainly not for his benefit, because, if so, why afterwards was the term heirs of the body used, words which, if used in connection with the estate granted to James, would cut down the fee already granted to him to a fee conditional? There is certainly no estate expressly granted to James, the quantity of which might be ascertained

under the light of these words. There is no express estate to him and the heirs of his body, nor is there an express estate to him for life, and then to the heirs of his body, either of which would be a fee conditional, the first under the general law, and the other under the rule in *Shelley's Case*. But the estate is to him in fee absolute, in trust, however, for the heirs of his body.

There, then, being no beneficial estate to James in express terms to which these words, "heirs of the body," could be attached indicating its quantity, can an estate be raised in him by implication? This must have been the theory of the decree. Inasmuch as the deed directed that no division of the estate between the heirs of the body should

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take place until the death of *James, and no express grant thereof during the life of James awaiting the final division at his death; and inasmuch, further, as the fee was conveyed to James, there is some ground for the position that the grantor intended that he, James, should enjoy the estate for his life, and then, at his death, the division was to be made between the heirs of his body. Under this view the deed would be read as follows, to wit, to James during his life, and at his death to be equally divided between the heirs of his body. We do not think that this is the proper construction of the deed; but concede that it is, what would be the result as to the quantity of the estate to which James would be entitled? Under the rule in *Shelley's Case*, as we have seen, where an estate of freehold is given to the first taker as an estate for life, and then to the heirs of his body, with nothing more, these latter words would be construed as words of limitation and not of purchase, and the first taker would take a fee conditional, which would be subject to his debts.

But it is said in several cases, it is always open to inquiry whether the words "heirs" or "heirs of the body" are used in their proper technical sense, or in a more inaccurate sense, to denote children, issue, or next of kin. *Bailey v. Patterson*, 3 Rich. Eq., 158; 2 Jarm. Wills, 13. And this rule does not apply if enough can be found in the deed to show clearly that the grantor did not intend the words heirs of the body as words of limitation defining the quantity of the estate to the first taker, but that he intended them as words of purchase, indicating that the heirs of the body were to take directly under the deed, and not by succession or inheritance. *Holeman v. Fort*, 3 Strobb. Eq., 66 [51 Am. Dec. 665]; *Darblison v. Beaumont*, 1 P. Wms., 230; *Thomas v. Bennet*, 2 Id., 340; *Simms v. Garrot*, 1 Dev. & Batt. Eq., 393; *Bailey v. Patterson*, 3 Rich. Eq., 158, *supra*.

Now, we think that the term "heirs of the body," as used in this deed, even though a life estate be determined to James, was not

used in their technical sense as words of limitation, but was used in the sense of children, and was intended to denote a class of persons who were to take as purchasers. In the case of *Bailey v. Patterson*, where Ch. Dunkin, who decided the case on Circuit, and who held that the words "heirs of the body"

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there *meant children, said: I think the words "to be equally divided among them" also indicate that the words were used in their ordinary, and not technical, sense. The Appeal Court, *per curiam*, concurred. So that, whether we construe this deed as a conveyance directly to the heirs of the body of James, executed through James by the statute, or as creating by implication a life estate to him, and then to the heirs of his body, to be equally divided between them at his death, it was error on the part of the Circuit Judge to hold that James had a fee which passed to the plaintiff by his purchase at sheriff's sale. In no event could he have taken more than a life estate, and admitting that this passed to the plaintiff by his purchase, yet James having died before this action, the plaintiff would have no standing in court by virtue of that interest.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

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COOKE & CO. v. PEARCE.

(April Term, 1885.)

[1. *Corporations* ◊338.]

A corporation organized in January, 1882, under the act of 1874, providing for the granting of certain charters (15 Stat., 557), was subject to the requirements of chap. LXIII. of the General Statutes of 1872, which made the directors personally responsible for the debts of the company, if they failed to submit to the stockholders a statement of the capital stock paid in and of the assets of the company, or to publish such statement; and, in action by a creditor of the company against the directors individually, the Circuit Judge properly refused a non-suit, there being some evidence of such failures.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1461-1466; Dec. Dig. ◊338.]

[2. *Bills and Notes* ◊370; *Corporations*, ◊354.]

In action by a bona fide endorsee for value before due of a promissory note against the maker, its consideration cannot be inquired into; and the note in this case being, for this reason, a binding debt of the company, and the directors being personally liable under the statute and the facts of this case for the debts of the company, the note is their debt also, and they cannot, when sued thereon, question its consideration.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 963; Dec. Dig. ◊370; *Corporations*, Cent. Dig. § 1496; Dec. Dig. ◊354.]

[3. *Corporations* ◊338, 339.]

The directors were required by law to make certain annual statements to the stockholders and to publish the same, under penalty of a personal liability for the debts of the corporation.

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Held, that the state*ment and publication should have been made, whether the stockholders met in annual convention or not.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1460; Dec. Dig. *Ⓒ*338, 339.]

[4. *Evidence* *Ⓒ*164.]

The character of a corporation should be determined by its charter, and oral testimony upon the point is inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 546, 547; Dec. Dig. *Ⓒ*164; *Corporations*, Cent. Dig. § 849.]

[5. *Corporations* *Ⓒ*340.]

The directors were liable for the amount of the note of their company and interest thereon, but not for the amount of a judgment based upon this note previously rendered against the corporation itself, to which judgment they were not parties.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1477; Dec. Dig. *Ⓒ*340.]

Before Fraser, J., Richland, April, 1884.

This was an action by H. D. Cooke and Lester A. Bartlett, copartners under the firm name of H. D. Cooke, Jr., & Co., against Samuel A. Pearce, W. T. C. Bates, A. P. Butler, and A. D. Goodwyn, directors of "The South Carolina Cotton Gin Improvement Company," a corporation holding the following charter:

"State of South Carolina.

"Know all men, that in accordance with an act entitled 'An act to provide for granting of certain charters,' approved the twentieth day of February, A. D. 1874, that on the seventeenth day of January, A. D. 1882, a majority of the stockholders of the South Carolina Cotton Gin Improvement Company having by petition applied for a charter for the said South Carolina Cotton Gin Improvement Company: Therefore, know all men by these presents, that J. P. Richardson, R. M. Sims, Jno. Bratton, A. P. Butler, J. D. Neel, T. C. Brown, J. A. Sligh, S. A. Pearce, J. N. Huffman, A. D. Goodwyn, John Taylor, F. B. Orchard, citizens of the State of South Carolina, together with such other persons as now are, or may hereafter be associated with them, and their successors, be, and they are hereby made and created, a body politic and corporate, under the name and style of the South Carolina Cotton Gin Improvement Company; and by said name they are hereby made capable in law to carry on and conduct the business of manufacturing, using, and applying, and granting the right to others to use, manufacture, and apply the Briggs' cotton gin saw cleaner and brush, patented October 28, A. D. 1879, and the various industries connected therewith, and to exercise all the powers suitable and proper for that purpose, and to hold, purchase, receive, work, sell, mortgage, lease, enjoy, and retain to them, their successors and assigns, lands, tenements, goods, and chattels, of whatsoever kind, as may be deemed by them conducive to the objects and interests of said

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corpora*tion. The said corporation, by its

corporate name may sue and be sued, plead and be impleaded," &c. * * *

"In witness whereof, I have hereunto set my hand and affixed the seal of the court at Columbia, this twenty-third day of February, in the year of our Lord one thousand eight hundred and eighty-two, and in the 106th year of the independence of the United States of America.

"E. R. Arthur, C. C. P. & G. S."

This charter was duly accepted by the company at a meeting of the stockholders held February 25, 1882.

At the trial, defendants moved for leave to amend their answer by inserting an allegation that on two occasions they had made an effort to obtain a stockholders' meeting, but had failed. The judge refused to allow the amendment, because he deemed such an allegation to be immaterial. Other matters are stated in the opinion.

The judge's charge to the jury was as follows:

Many allegations of the complaint are admitted by the answer. It is admitted that the note set forth in the complaint was executed by the company of which these defendants were the directors. And I charge you that possession of the note by the plaintiffs is *prima facie* evidence of ownership, and that they are the holders thereof for a valuable consideration. In an action on the note by the plaintiffs against the maker, it would be incompetent for the latter, upon the plea of original want or failure of consideration, to inquire into the consideration of the note, without some notice of failure of consideration, of which there is no evidence. Such negotiable paper implies a consideration, and between the maker and endorsee cannot be impeached. And so I charge you that, in the present action, it is equally incompetent for these defendants to inquire into the consideration of the note upon which the action is based. I have therefore excluded all evidence in reference to the consideration of the note. With that you have nothing to do.

If the defendants were directors, they had no right to resign, as stated by the witness for defendants, so as to relieve themselves of any liability. And if they resigned at any time short of the completion of the twelve

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months, they are liable for the *non-performance of any of the duties which the law requires of the directors during that period.

Now, the defendants are alleged to be liable upon several grounds:

1. That a portion of the capital stock of the company, greater in amount than its indebtedness to the plaintiff, was withdrawn and divided among the stockholders of the company with the consent of the defendants. Now, I do not hesitate to charge you that there is no evidence whatsoever of this allegation.

2. That before the maturity of the note, and during the administration of the defendants as directors, the debts of the company exceeded the amount of the capital stock paid in by an amount greater than the amount of its indebtedness to plaintiffs. This is altogether a question of fact, to be decided by the jury. I therefore leave it to you upon the evidence which you have heard.

3. That the defendants have failed to make the annual statement to the stockholders, and to make publication of same in the newspapers, as required by law. It is admitted that the statement and publication were not made. I am not prepared to say that the General Statutes of 1882 would not relieve the defendants from the obligation to publish the statement. You need not, therefore, consider the question of publication, and you may assume it to be unnecessary, as the case must turn on the failure of the defendants to make the annual statement to the stockholders. If the defendants were directors, they were bound to make this annual statement. This statement is a great safeguard against the mismanagement of the corporation by its directors. Whether these defendants have reasons or excuses for not making this statement cannot affect the case. The legislature has required them to make it, and attached the penalty unconditionally upon their failure so to do. I therefore charge you that if they have failed in this, they are liable, no matter what may be their excuses.

The only remaining question is, whether this company was a manufacturing corporation. This is a question of law. If the charter which has been proved is the charter under which this company organized and operated, then I charge you, as matter of law, that it was a manufacturing corporation.

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The only material question for your consideration is whether the charter proved is the charter of this company.

If you shall find for the plaintiffs, you can only find the amount of the note and interest. The plaintiffs are not entitled to recover against these defendants the amount of the judgment recovered by the plaintiffs against the company.

The defendants appealed upon the following exceptions:

The defendants except to the rulings of his honor, T. B. Fraser, presiding judge, upon the following grounds:

1. Because his honor erred in ruling that the consideration of the note described in the complaint could not be inquired into, and in excluding the testimony of the witnesses, S. A. Pearce and J. P. Richardson, as to the same.

2. Because his honor erred in ruling that testimony in support of any efforts on the part of the directors to obtain a meeting of the stockholders of the "South Carolina Cotton Gin Improvement Company" for the pur-

pose of submitting to such meeting a statement of the financial condition of said company irrelevant; and in excluding the testimony of the witnesses, S. A. Pearce and J. P. Richardson, as to the same.

3. Because his honor erred in ruling that the nature of the business in which the "South Carolina Cotton Gin Improvement Company" was engaged could not be shown by parol, and in excluding the testimony of the witnesses, S. A. Pearce and J. P. Richardson, as to the same.

4. Because his honor erred in refusing to allow the defendants to amend their answer as requested.

5. Because his honor erred in refusing the defendants' motion for a non-suit.

The defendants further except to the charge of the presiding judge upon the following grounds:

1. Because his honor erred in charging the jury, "that in the present action it is equally incompetent for these defendants to inquire into the consideration of the note upon which the action is based."

2. Because his honor erred in excluding all evidence in reference to the consideration of the note.

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*3. Because his honor erred in charging the jury, "if the defendants were directors, they had no right to resign as stated by the witness for defendant, so as to relieve themselves of any liability."

4. Because his honor erred in charging the jury, "if the directors resigned at any time short of the completion of the twelve months, they are liable for the non-performance of any of the duties which the law requires of the directors during that period."

5. Because his honor erred in charging the jury, "if the defendants were directors, they were bound to make this annual statement."

6. Because his honor erred in charging the jury, "whether these defendants have reasons or excuses for not making this statement cannot affect the case. The legislature has required them to make it, and attached the penalty unconditionally upon their failure so to do. I therefore charge you that if they have failed in this, they are liable, no matter what may be their excuses."

7. Because his honor erred in charging the jury, "the only remaining question is, whether this company was a manufacturing company. This is a question of law. If the charter which has been proved is the charter under which this company organized and operated, then I charge you as matter of law that it was a manufacturing company. The only material question for your consideration is, whether the charter proved is the charter of the company."

The plaintiffs appealed upon the following assignments of error:

1. That his honor charged the jury that the plaintiffs could not recover the amount

of the judgment in their favor against "The South Carolina Cotton Gin Saw Improvement Company" and interest, but were restricted to recovery at most of the amount of note on which said judgment was based and interest.

2. That his honor refused to charge that if the defendants were directors, they were bound by statute to publish as well as make the annual statement, and withdrew from the jury all consideration of the liability of the defendants consequent upon the failure to make such publication.

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*Messrs. Bachman & Youmans, for plaintiffs.

Messrs. Clark & Muller, for defendants.

July 16, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In January, 1882, the defendants, appellants, with others, obtained a charter from the clerk of the court for Richland County, acting under an act to provide for granting charters, approved 1874, for the incorporation of the "South Carolina Cotton Gin Improvement Company." Of this company the defendants, with one J. N. Huffman, since deceased, were elected directors in January, 1882. On the thirteenth of April thereafter the company made its promissory note for \$750, payable to the order of J. H. Sypher, president of the "American Cotton Gin Saw Cleaning Company," on the first of November, 1882. This note was afterwards endorsed before due to the plaintiffs, who, in July, 1883, recovered judgment thereon against said "South Carolina Cotton Gin Improvement Company" for the sum of \$878.77, which judgment, and the execution thereon, remain unsatisfied. In the latter part of February, 1883, the defendants resigned their office as directors aforesaid.

The action below was brought, alleging liability on the part of the defendants on the following grounds: 1st. That before the maturity of the note, and during the administration of the defendants as directors, the debt of the company exceeded the amount of the capital stock paid in by an amount greater than the amount of its indebtedness to the plaintiffs. 2d. That a portion of the capital stock of the company greater in amount than its indebtedness to the plaintiffs, was withdrawn and divided among the stockholders of the company, with the consent of the defendants. 3d. That the defendants, as directors, failed to make to the stockholders of said company the annual statement, setting forth the amount of capital stock paid in, and the general assets of said company, or to publish the same in the newspapers, as required by law.

The defendants relied on three defences: 1st. A denial that this company was a manu-

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facturing company. 2d. A general *denial of

allegation contained in the grounds above, 1 and 2. They admit, however, that they did not submit the statement or publish the same referred to in ground 3, but allege that before the expiration of the year after organization they resigned their office and severed their official connection with said company. 3d. They allege a total failure of consideration in the note.

At the trial, his honor, Judge Fraser, presiding, refused a motion for non-suit, and during the progress of the trial ruled that testimony as to failure of consideration was incompetent, and he excluded certain witnesses offered to that end. He also excluded testimony offered as to the inability of the defendant directors to obtain a stockholders' meeting for the purpose of making a statement of the financial condition of the company, and also parol testimony offered to show the nature of the business of the company, whether manufacturing or not, and he refused to allow the defendants to amend their answer, as requested, which refusals were excepted to, and have been made grounds of appeal. In addition, the judge charged that the consideration of the note could not be inquired into; that the directors could not, by resigning, relieve themselves of the necessity of making the annual statement referred to; that they could have no excuse for said failure; and, further, that whether the said company was a manufacturing company, was a question of law dependent on the construction of the charter—to all of which the appellants have assigned error in the appeal. The jury found verdict for the plaintiffs, but under the charge of the judge, they found for the amount of the note, and interest thereon, instead of the amount of the judgment against the company. From this portion of the charge the plaintiffs have appealed, and also from the refusal of the judge to charge that the defendants were bound to publish, as well as make, the annual statement mentioned above.

It will be seen from the foregoing statement that the appeal involves the following questions for our consideration: 1. Should a non-suit have been granted? 2. If not, was the consideration of the note subject to inquiry on the trial? 3. Could the failure of the directors to get a meeting of the stockholders be a legal excuse for not making the annual statement required? 4. Was it error on the part of the judge to exclude testi-

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mony going to *show the character of the company, to wit, whether a manufacturing company, the judge holding that that was matter of law depending upon the charter? 5. Was it error in the judge to confine the jury to the note and interest, instead of allowing the amount of the judgment obtained thereon against the company? 6. Did the judge err in withdrawing from the jury the fact of publishing the annual statement, and

restricting their investigation to the fact of making, simply, said statement to the stockholders?

1. Should the non-suit have been granted? The rule upon that subject, as established in many cases, is that where there is a total failure of evidence as to the plaintiff's cause of action, or to any material portion thereof as alleged in the complaint, the defendant has the legal right to arrest further proceedings by a non-suit. *Carrier & Harris v. Dorrance*, 19 S. C., 32. Was there such total failure here? The motion for non-suit was based upon two grounds: 1. That there is nothing in the act of the general assembly under which the company was incorporated, to wit, act of February 20, 1874 (15 Stat., 557), which would make the officers of the corporation responsible for the matters alleged in the complaint; nor is there any other act applicable to said company under which they could be so held responsible—in other words, that plaintiffs had no cause of action. This objection is more in the nature of a demurrer for the want of a cause of action in the facts alleged, than a motion of non-suit for a failure of evidence, and in strict practice it should have been presented in this form. We will, however, consider it as it arises.

"The South Carolina Cotton Gin Improvement Company," of which the defendants were directors, was chartered under the act of 1874 (15 Stat., 557), which is an act entitled "an act to provide for the granting of certain charters," the authority to grant such charters being therein given to the clerk of the court of the county wherein they reside, or propose to carry on business, or hold property. It is admitted that there is no express provision in this act which makes the officers of the corporation organized under charters granted by the clerk responsible, as claimed herein.

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*At the time, however, that this act was passed, there were two chapters in the General Statutes of 1872, then of force, on the subject of corporations, to wit, chapter LXIII., p. 337, and chapter LXIV., p. 338. The first chapter is headed, "Of corporations organized under charters;" the second, "Of corporations organized under general statutes." These two chapters, up to the passage of the act of 1874, *supra*, embraced all the statute law of the State on the subject of corporations, all other acts on that subject having been repealed by the General Statutes of 1872, in which, as we have said, these two chapters were found.

After the adoption of the General Statutes of 1872, corporations could be created in one of two ways: 1. By a direct act of the general assembly granting a charter; or, 2, by the provisions of chapter LXIV., above, of said General Statutes, 1872. In other words, first, by charter moulded, shaped, and grant-

ed by special act creating the corporation; or, second, by organization without charter under chapter LXIV. The distinction is seen in the heading or title of the two chapters referred to, the first being "Of corporations organized under charters," and the second, "Of corporations organized under general statutes." In support of this, it will be observed that under chapter LXIV. there is no provision for the granting of charters by any official or other party. The act provides only for articles of agreement entered into between the parties desiring to unite together.

Now, in chapter LXIII. are found the matters upon which the plaintiffs have based their cause of action. Does that chapter apply to this company? In section 3, we find the following: "That all manufacturing companies which shall be incorporated in this State shall have all the powers and privileges, and be subject to all the duties, liabilities, and other provisions contained in sections 4 to 19, inclusive, of this chapter." Among these sections is the section upon which plaintiffs' claim is founded. It is claimed by defendants, appellants, that these sections have no application to the "Cotton Gin Improving Company," and as no such grounds of responsibility on the directors appear in chapter LXIV., nor in the act of 1874, under which said company was incorporated, the plaintiffs have no cause of action thereon, the appellants contending that these sec-

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tions had application only to *the companies chartered by express act of the general assembly, this position being founded on the fact that said sections appear in the chapter which is headed, "Of corporations organized under charters," and the further fact that they do not appear in the chapter headed, "Of corporations organized under general statutes."

It should be remembered that the general statutes are mostly but the consolidation of previous acts, those touching upon cognate subjects being incorporated in separate chapters, divided into sections, each act thus incorporated still retaining, however, its original force and effect unless otherwise provided. Now, the sections referred to above, incorporated in chapter LXIII., were sections of the act of 1847 (11 Stat., 459), entitled "an act to define the terms upon which manufacturing companies shall hereafter be incorporated." This was a general act, and it applied in express terms "to all manufacturing companies thereafter to be incorporated in this State." If this act, as it originally stood in the statutes, was still a separate act, could it be doubted that it would apply here? Certainly not, if this is a manufacturing company, because then it applied to all such companies. Why should its application be limited now to only such companies as are incorporated by special act of the legislature? Can the fact that the original act in its sep-

arate form has been repealed and its sections incorporated into the general statutes have the effect of thus curtailing it? We think not.

But even if we give full effect to the exact heading of chapter LXIII., and confine its application to "corporations organized under charters," still it could not be claimed that this company would be free from its operation. Because this company is organized under a charter granted by virtue of the act of 1874, and therefore, by the express terms of the heading of chapter LXIII., comes within its provisions. And here we might say, in reference to the first ground of the plaintiffs' appeal, that it being required by one of the sections above that the directors of said company should not only make an annual statement to the stockholders, but should also publish the same, we think the Circuit Judge was in error in striking that ground from the case. True, this requirement is not found in the General Statutes of 1882, but it was the law when the debt here was contracted, and

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it *thereby was a part of the contract. Now, was there a total failure of evidence as to the fact whether or not a statement had been made to the stockholders, which, under the charge, becomes the main ground of fact in the case? We think there was sufficient evidence on the question to carry the case to the jury. The non-suit, therefore, was properly refused.

Was the consideration of the note a legitimate subject of inquiry? Our judgment upon this question will determine the correctness both of the rulings of the Circuit Judge during the progress of the trial as to the testimony offered by the defendants on that subject and also his charge to the jury on said subject. The note given by the company was a promissory note dated April 13, 1882, and payable at a future date. It was transferred to the plaintiffs before due. It is not necessary to cite authorities for the position that, if this action was directly upon the note by the plaintiffs and against the company, failure of consideration could not be interposed as a defence. This is familiar law. The act provides that the directors of the company, in certain contingencies (one of which is the failure to make to the stockholders an annual statement), shall be personally liable, jointly and separately, for all debts of the company then existing, &c. This act was intended to protect the creditors of the company, and wherever a creditor holds a debt against said company the act applies.

Did the plaintiffs here hold a debt against the company? They held a note which is not disputed, except these defendants allege that it was without consideration. But be that fact as it may, the company could not interpose such a defence. The note in the hands of the plaintiffs stands against the company

as if founded upon the most perfect and valuable consideration. This the court is bound by law to assume and take for granted. It is certainly then a debt of the company, and being such a debt, it is also, under the act, a debt of the directors. Not by virtue of their individual contract in making the debt, when in such case the consideration might be inquired into, but because under the act they have in substance contracted to pay the debt of the company upon the happening of a

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certain contingency, which contingency, it is alleged, has happened in this case. We see no error in the judge's rulings or charge upon this subject.

We think the directors were bound to make the annual statement to the stockholders required by the act, whether there was an actual convention of said stockholders or not, and also that the statement should have been published as required in General Statutes of 1872, which was of force when this company was chartered.

We concur with the Circuit Judge, too, that the character of the company depended upon its charter, and was not, therefore, the subject of oral testimony.

And we think the Circuit Judge was right in restricting the verdict to the note and interest. That was the primary evidence of the debt, and, although it has been reduced to judgment against the company, yet the defendants were not parties to that proceeding, and were not bound thereby.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 251

BROWN v. CAVE.

(April Term, 1885.)

[1. *Witnesses* ⇨143.]

In action for dower, the grantor of the land with warranty is not incompetent as a witness against the demandant to testify to communications between himself and his grantee, the deceased husband, as to the actual ownership of the purchased land.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 620; Dec. Dig. ⇨143.]

[2. *Witnesses* ⇨139.]

Quere: Is an action for dower, prosecuted by a widow, within the proviso to section 400 of the code?

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 582-597; Dec. Dig. ⇨139.]

3. Findings of fact by the Circuit Judge from written testimony taken and reported by the master, approved.

[4. *Trusts* ⇨72, 88.]

The facts necessary to raise a resulting trust may be proved by parol; and the payment of the purchase money by five persons, under an agreement that one should take the title for the benefit of all, raises a resulting trust in their favor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 102, 103, 130-133; Dec. Dig. ⇨72, 88.]

[5. *Trusts* ⚡77.]

Such payments must be made at the time of the purchase; they are so made, if the payments were complete before conveyance executed, although after the agreement to purchase.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 109; Dec. Dig. ⚡77.]

[6. *Frauds, Statute of* ⚡129.]

The possession and use by the parties of their respective shares, and the payment of their several portions of the purchase money, with

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the acquiescence of the grantee of the legal title, brings the case within the doctrine of part performance.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287–292, 303, 306–308, 311, 314, 318–320, 322, 325, 326; Dec. Dig. ⚡129.]

[7. *Dower* ⚡12.]

The husband held the legal title, but the equitable right to four-fifths of the land attached in favor of others before his marriage. *Held*, that the widow was dowerable of only the one-fifth remaining absolutely in the husband.

[Ed. Note.—Cited in *Shell v. Duncan*, 31 S. C. 563, 10 S. E. 330, 5 L. R. A. 821.

For other cases, see *Dower*, Cent. Dig. § 48; Dec. Dig. ⚡12.]

Before Hudson, J., Barnwell, November, 1884.

This case is fully stated in the opinion of this court.

Mr. I. L. Tobin, for appellant.

Messrs. J. J. Maher and C. C. Simms, contra.

July 18, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The pleadings are not in the case, but from the evidence and the statements of the parties, we gather substantially the following state of facts: Boston Cave died in 1880, having the legal title to three tracts of land, viz., the Hayes tract, 280 acres, the Brown tract, 181 acres, and the Thomas tract, 142 acres. He left a widow, Fanny Cave, and four sons by a former wife, viz., Alexander, David, Henry, and Jacob. He left a will by which he devised one-fifth of his estate to his widow Fanny, and the remaining four-fifths to his aforesaid sons. It appears that at the time of the death of Boston, the plaintiff, Simon Brown, held two mortgages on the aforesaid lands, one upon the parcel known as the Thomas tract, given to one Dowling, and assigned to him, and one upon the entire tract given to him. The testator was further indebted to him on note and open account, and to secure this indebtedness the four sons gave him a mortgage of their undivided interests in the land. The action originally was instituted to foreclose these three mortgages, and also to subject the one-fifth devised to Fanny, the widow, to the payment of the debts for which the sons had given their mortgage, and Fanny, as one of the devisees, was made a party. The adult defendants did not answer. It was referred to the master to ascertain the amount due, &c. He made his report, which was confirmed.

At this stage of the proceeding Fanny Cave

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put in an answer, *setting up a claim for dower in all the lands, subject to the Dowling mortgage, which was executed before her marriage with Boston. Whereupon the four sons also answered, resisting the claim of dower by their stepmother, except as to one-fifth of the land, in respect to which they admitted her right, subject to the Dowling mortgage. This substantially changed the nature of the action, and made it really a claim for dower on the part of the widow, Fanny. Upon this issue the allegations on the part of the sons were, that the several parcels of land (though legal title in Boston) were bought by Boston and themselves together, and were paid for by the five together, each contributing one-fifth of the purchase money, with the mutual understanding that the titles should be taken in Boston's name for their equal benefit as tenants in common; that they occupied and used the land in common; each holding a several possession and planting separately, and that such possession was held under said agreement from the time of the several purchases to the death of Boston, the testator. They claimed that Boston held the legal title in trust for them as equitable tenants in common with him to the extent of their several undivided shares, and that they were entitled to partition, but as against the creditor they did not insist upon that right. They did, however, insist that Fanny Cave intermarried with Boston after the lands had been purchased and the parties were in possession under said agreement, and therefore any inchoate right of dower which may have accrued upon the marriage was subject to their rights as tenants in common, and that the dower should be limited to the undivided fifth part of the land, which was the share of Boston. In this new phase of the case, it was again referred to the master to take the testimony in relation to the claim of dower, which is all printed in the Brief.

The cause came on for hearing before Judge Hudson, who found as matter of fact, "that Boston Cave and his four sons were the joint purchasers of the several tracts of land involved in this controversy, although the title was taken in the name of the father. They labored in common and purchased the land in common, but mortgaged and contracted in the name of Boston Cave. There is abundant evidence to sustain this conclusion,

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*exclusive of the testimony of the sons, which is, I think, excluded under section 400 of the code. That the debts for which Boston gave mortgages prior to his marriage, were really the debts as well of his sons by his first wife," &c.; and as matter of law he held as follows: "In a Court of Equity, therefore, this real estate must be regarded as belonging,

one-fifth to Boston Cave's estate, and one-fifth to each of the four sons. The widow, therefore, of Boston Cave will take dower in the share of her deceased husband, but subject to one-fifth of the liens created thereon by Boston Cave prior to his marriage. Now, as all the lands must be sold under the mortgages in this suit, and consequently the widow must take dower in the proceeds, so to speak, the only mode of assessment will be to take one-fifth of the entire proceeds of the sale of the lands, then subtract therefrom the one-fifth of the amount of the mortgage liens (Dowling) existing on said lands prior to Boston's marriage. This will leave the estate of which she is endowed. Of this net sum she is entitled to the one-sixth, plus the interest thereon since her husband's death," &c.

From this decree the widow, Fanny Cave, appeals to this court upon the grounds: 1. Because the testimony does not prove the existence of a trust. 2. Because the testimony does not show that the purchase money, or any definite portion thereof, was paid by the alleged cestuis que trust at the time of the purchase. 3. Because his honor erred in permitting parol proof to show that the purchase was made for the benefit of, or on account of, the alleged cestuis que trust, they having made no payment at the time of the purchase, which is the foundation of such a trust. 4. Because his honor erred in holding, substantially, that after advances or funds subsequently furnished can, in the law, create a resulting trust. 5. Because there was no plain proof of the application of the funds of the party, for whose benefit the trust is sought to be raised, and a trust cannot be raised by construction merely. 6. Because the testimony of Simon Brown, a party in interest, was inadmissible to prove declarations and transactions between himself and the deceased, and his honor erred in admitting the same. 7. Because all the testimony introduced to prove the trust, as well parol as

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written, *was vague, uncertain, and indefinite, and does not furnish the clear proof that the law requires. 8. Because the testimony of John A. Hays, the grantor of the deceased, Boston Cave, under warranty deed of the property, the subject matter of the controversy, was inadmissible to prove "declarations and transactions" between himself and the deceased in reference to same, &c.

First. As to the exceptions concerning the admission of testimony, proof, &c. We do not see that it was error to admit the testimony of John A. Hays, who sold and conveyed with warranty one of the tracts of land. He was not a party to the proceedings, and had no interest in the determination of the action, whether Fanny Cave should have dower in the whole of the lands, or only in a part of it. Besides, he testified that he made the trade with the sons as well as with Boston. "A. C. Cave and the father told him

they were acting for all the parties. They said they could not buy unless all the boys and the old man joined together." The testimony of Simon Brown did not refer exclusively to "transactions and communications" with the deceased, Boston Cave, but also with his sons, who are still living, and to that extent the objection does not apply. He says: "A. C. Cave came to me and asked me to buy a tract of land which adjoined him for him and his brothers and father. This is the land which I sold them for \$1,000, and they paid me some cash. I did not deliver the title until the money was paid. Each of the boys and the old man brought me cotton—each one paying his share. When I sold the land they asked me to make the title to the old man and each would pay me \$200, and they would divide it after the land was paid for," &c.

As to the testimony of the four sons, which the judge excluded as not admissible under section 400 of the code. The respondents, in case it should be necessary, gave notice that they would insist that said testimony should have been received and considered by the Circuit Judge. Section 400 of the Code has certainly given rise to many difficult questions, and unless it is applied with careful consideration, the danger is that it may produce the very injustice it was intended to prevent. It is not clear that an action for dower (to which this seems to be reduced) can be said to be "prosecuted" by the widow as

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"executrix, heir *at law, next of kin, assignee, legatee, devisee, or survivor" of her deceased husband. But, as we agree with the Circuit Judge that there was sufficient evidence in the case, without considering that which involved "transactions or communications" with the deceased, Boston Cave, it is unnecessary to make any ruling upon the point, and we prefer to reserve our judgment.

We have read all the testimony with care, and considering only that which was undoubtedly admissible, we concur in the findings of fact of the Circuit Judge that the sons and the father agreed to purchase, and did purchase, the lands together, each having an equal interest, and in pursuance of that agreement the titles were taken in the name of the father in trust for all of them, to the extent of their respective interests. The parol evidence alone established the existence of such agreement, and it was strongly corroborated by the conduct of the parties, and the very terms of the father's will, which, seemingly in accordance with the terms of the agreement, gave to the aforesaid four boys four-fifths of the lands and to his widow, Fanny, only his own share, one-fifth.

But it is contended that most of the testimony was parol, and being introduced to establish a verbal agreement, in conflict with absolute conveyances of land, should have been rejected under the statute of frauds.

This case in several particulars is very much like that of *Mims v. Chandler* (21 S. C., 480), in which this court had occasion to consider the admissibility of parol evidence to establish the facts which will suffice for the purpose of raising a resulting trust, and also the particulars and circumstances of part performance which will take a case out of the statute of frauds. There is no doubt that a resulting trust, or the facts necessary to raise it, may be proved by parol; and we incline to think that the facts proved here made out such a trust in favor of the four sons as to their respective interests of one-fifth in the said lands. Each certainly paid his part of the purchase money, and it has often been said that the whole foundation of the trust is in the payment of the money.

But the objection is interposed that it does not appear that the four sons each paid a definite portion of the purchase money at the time of the purchase, which was necessary

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according to the case of *Ex parte Trenholm*, 19 S. C., 127. When must the purchase be considered as having been made? When the minds of the parties first met in verbal agreement or at the time the titles were executed? We take it that, in reference to the rule in question, we must consider the purchase made when it was consummated by conveyance; and, if so, it is certain that, at least as to two of the purchases, the deeds were not executed until after the whole purchase money was paid, each having paid his part. We suppose that a payment made before the execution of the deed would, in the sense of the rule, be a payment at the time of the purchase. In the case of *Taylor v. Mayraut* (4 Desaus., 516), it is said: "It appears from the authorities quoted that a resulting trust cannot be raised by construction. It must be grounded on plain proof of the application of the funds of the party for whom it is raised."

But if there should be any serious difficulty as to the proof to raise a resulting trust, it would seem that there can be no doubt that there was ample proof to take the case out of the statute of frauds by part performance. "It is well settled that the Court of Equity will enforce specific performance of a contract within the statute when the parol agreement has been partly carried into execution. The distinct ground upon which Courts of Equity interfere in cases of this sort is that otherwise one party would be able to practise a fraud upon the other." 2 Story Eq., § 759; *Mims v. Chandler*, supra. We think the possession of the parties of their respective shares with the knowledge and consent of Boston, the improvement and cultivation of the same without notice or warning, considered in connection with all the circumstances, and especially the payment of the purchase money, were sufficient evidence of part performance to take the case out of the statute. The agree-

ment alleged by the respondents was proved. They had the equitable right to have specific performance of that agreement, and, if they chose, partition, giving to each his share in severalty. *Johnson v. Gilbert*, 13 Rich. Eq., 42.

The only remaining question is whether this equity was sufficient to bar the widow's right to dower, which is generally considered a legal right. All the deeds had been execut-

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ed on December 19, 1876, when Boston Cave intermarried with Fanny. At that time the equitable right of the parties had attached, and the four sons were living upon and cultivating their respective parcels. The widow's inchoate right to dower originated in her marriage with Boston Cave, and must be considered as arising subject to the state of things which existed at that time. "As a general principle, it may be observed that the wife's dower is liable to be defeated by every subsisting claim or encumbrance in law or equity, existing before the inception of the title, and which would have defeated the husband's seizin. An agreement by the husband to convey before the dower attaches will, if enforced in equity, extinguish the claim to dower. * * * The right to dower is regulated in equity by the nature of the property in the equity view of it." &c. 4 Kent, 50; 1 Scrib. Dow., 591, 594, 410. "The principle is that the widow can have dower of no greater or better estate than existed in the husband at some period during the coverture. Her right attaches subject to all encumbrances or equities existing at the time of the marriage or attaching with the purchase by the husband, and is liable to be defeated by every subsisting claim which might have defeated the husband at the period of his best estate." 1 Scribner, 564, 410; and see *Jones v. Miller*, 17 S. C., 380, and *Shiell v. Carderelli* [Id.], and *Same v. Sloan and Seibels*, 22 Id., 151.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 258

LOPEZ v. LOPEZ.

(April Term, 1885.)

[1. *Wills* ⇐ 195.]

A testator died leaving of force a last will containing several bequests and inter alia the following: "Third, I give and bequeath to my executor M. the sum of \$25,000 in trust for my daughter H. to be invested according to his judgment in safe productive securities; the interest or income therefrom to be paid to my said daughter for her own use during her life, and after her death then the said sum to become and be a part of my residuary estate, to be divided according as I shall hereinafter give and bequeath the same. And any further estate the said H. may derive as residuary legatee is to

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be held by my executor, *and shall be held by him subject to the same trusts above recited and set forth. It is my intent and meaning, and I do hereby declare and direct, that my said daughter shall have full power and authority by her last will and testament, either before or after my death, to dispose of the above named share of my residuary estate hereby given in trust for her use unto and among her children, in such shares and in such proportion as she, in her discretion, may deem proper and think advisable. And in case my said daughter shall depart this life, either before or after my death, without leaving in full force any last will and testament disposing unto and among her children of the aforesaid share of my residuary estate given by this will in trust for her use, then in that case it is my will, and I do hereby direct, that the same shall be held in trust as aforesaid for the use of and to go to and be distributed among her children as follows, &c. * * * Seventh. The balance of my estate, after paying the above bequests, I give, share and share alike, to my children, M., II., A., J., and E." The daughter II. having died, the testator executed a codicil to his will wherein he declared: "It is the intent and meaning of my said will, and I do hereby will and direct, that the children of my lately deceased daughter II. shall take the share of my residuary estate given to her, and that it be held and divided among them (her children) in the same manner and proportions as are provided, named, and set forth in my last will and testament aforesaid, and also in her will." *Held*, that the \$25,000 was given to II. for life only, and at her death became a part of testator's residuary estate, divisible under the seventh clause of the will into five shares, one of which passed to the children of the deceased daughter H.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 492; Dec. Dig. ⚭195.]

[2. *Powers* ⚭36.]

II. left of force a will whereby she gave her entire estate to her children in the same proportions directed by her father's will in case she died intestate. II. had no property when she executed her will, which was dated a short time before her father's and was signed by him as one of the witnesses. *Held*, that the will of II. was not an execution of the power given to her by her father's will, but the property was given to her children by the will of her father, and must be administered by the executor of his will.

[Ed. Note.—For other cases, see Powers, Cent. Dig. §§ 137-149, 155; Dec. Dig. ⚭36.]

[3. *Wills* ⚭858.]

There may be a restrictive residuum, but the words in this will, "the balance of my estate after paying the above bequests," created a general residuum and included the \$25,000 given to the daughter II. for her life, she having predeceased the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. ⚭858.]

[4. *Wills* ⚭858.]

It is not necessary that a residuary clause should be at the end of a will; it may be written in the body thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. ⚭858.]

[5. *Wills* ⚭858.]

The words "after her death to become and be a part of my residuary estate" mean the same thing as the words "at her demise shall revert to my estate."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2173-2183; Dec. Dig. ⚭858.]

Mr. Chief Justice Simpson dissenting.

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*Before Fraser, J., Charleston, November, 1884.

The opinion states the case. The Circuit decree, omitting its statement, was as follows:

The plaintiff and the three defendants, Aaron M., Julian L. and Edward H. Lopez, claim that at the death of Mrs. Hart the sum of twenty-five thousand dollars (\$25,000), given in the first paragraph of the third clause of the will, fell at her death into the balance given under the seventh clause to Mrs. Hart and the above named four sons, and is divisible under the last named clause into five equal shares, the four sons taking each one share and the children of Mrs. Hart one share among them, according to the terms of her will. The children of Mrs. Hart claim that the said sum of twenty-five thousand dollars (\$25,000) does not pass into said balance, but that it passes to them, and that they are entitled, in addition thereto, to one-fifth of said balance, as the further estate mentioned in the second paragraph of said third clause.

The difficulty in this case, it seems to me, arises from the use of the words "residuary estate" in the will and codicil, and the words "residuary legatee" in the will, in reference to this fund. The fact that this will was witnessed by distinguished counsel, is by no means conclusive proof that the will was drawn by one who knew the meaning of the technical terms employed in it. (Where, however, technical words are used, the presumption is that they are used in their technical sense, unless the context clearly indicates the contrary.)

It is by no means clear to my mind that this twenty-five thousand dollars (\$25,000) is, by any fair interpretation, included in the balance given in the seventh clause, because it is a balance "after paying the above bequests," amongst which is this bequest of twenty-five thousand dollars (\$25,000). If it was a bequest to some one else besides the executor himself, as trustee, it seems to me it would plainly be excluded from this balance; it is, however, just as much a payment after it is set aside and invested by the executor, as if it had been paid to some one else; the balance to pass under this seventh clause, is the balance after this payment of this legacy, as well as of the other legacies given in the will.

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*If, however, this is a residuary clause, as is claimed, it may cover everything not otherwise disposed of; it can cover no more. Now, the legacy, which is to be subject to the will of Mrs. Hart, or in case she dies without a will to go to her children, is thus described in paragraph 3 of the third clause of the will; it is described as the "above named share of my residuary estate, hereby given in

trust for her use." In paragraph 4 of the third clause, it is described as "the aforesaid share of my residuary estate, given by this will in trust for her use." In the codicil it is described as "the share of my residuary estate, given to her (Mrs. Hart)." Now, this twenty-five thousand dollars (\$25,000) had been mentioned in this third clause before either of these expressions occur as "a part of my residuary estate," and it was certainly in this clause "given in trust for her use;" it was "aforesaid and above named;" it was called "a part of the residuary estate;" it was "given in trust hereby" by this will," for her use. It was described in the codicil, which does not alter but confirms the will, as "given to her." It seems to me, therefore, that this sum of twenty-five thousand dollars (\$25,000) is covered by the terms describing the property which Mrs. Hart was empowered to dispose of by will, and which on her failing to make a will went under the will of David Lopez to her children.

It should, therefore, go to these children, unless there is something in the will to give it a different direction. The only clause bearing directly on the subject is the seventh, the alleged residuary clause in the will. This clause, for the reason already assigned, seems to me to exclude this twenty-five thousand dollars from its scope, even if the testator called it "residuary." If it had been the intention of the testator that this sum of money should come back to the estate, or "revert to estate" and fall into a residuum, as contended here, it would have been very easy for him to say so, as he has done in reference to the gift of five thousand dollars (\$5,000) to each of his sisters, and directed the sum to "revert." If he had done so, the fund would be divisible as now contended by the sons. It seems to me that he has plainly directed otherwise.

This is one of those cases where the intention of the testator can be best gathered from

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the language used by himself, and *while it may be one of those cases where counsel and even courts may differ, the court must ascertain the intention as well as it may, from the obscure and sometimes conflicting language of the will itself.

The conclusion that I have reached is, that the sum of twenty-five thousand dollars (\$25,000), given by the will in trust for Mrs. Priscilla L. Hart, for life, passes with whatever further estate comes to her share in the residuary estate to her children, under the provisions of her will, as directed also by the will of her father, in the last codicil.

It is therefore ordered and adjudged, that the executor of David Lopez, deceased, do pay over the said sum of twenty-five thousand dollars (\$25,000), mentioned in the first paragraph of the third clause of his will, to the children of Priscilla L. Hart, as directed by her will. That in addition thereto, he do

pay over to the said children any further sum which would have gone to the said Priscilla L. Hart, as residuary legatee, if she had survived her father. All of said payments to be made to the executors of the last will and testament of the said Priscilla L. Hart, to be by them held for her children, according to the provisions of her will. It is further ordered, that any matter within the scope of the pleadings in this case, and not herein adjudicated, be reserved for the future order of the court. It is further ordered, that the costs of this action to this date be paid out of the estate of David Lopez, deceased.

Mr. A. M. Lee, for executor.

Mr. A. T. Smythe, for appellants.

Messrs. A. D. Cohen and Simonton & Barker, contra.

July 18, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. David Lopez, late of Charleston, departed this life April 21, 1884, leaving in full force his last will and testament. This action, in the nature of a bill in equity, was instituted by Moses E. Lopez, the executor, for construction of the will. There was no parol testimony of consequence, and the single inquiry is as to the

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proper construction of the will and *codicils as they are written. The will was executed on January 19, 1882, and among others contains these provisions:

"Third. I give and bequeath to my executor, Moses E. Lopez, the sum of twenty-five thousand dollars, in trust for my daughter, Priscilla L. Hart, to be invested according to his judgment in safe productive securities, the interest and income thereof to be paid to my said daughter for her own use during her life, and after her death then the said sum to become and be a part of my residuary estate, to be divided according as I shall hereinafter give and bequeath the same. And any further estate the said Priscilla L. Hart may derive as residuary legatee is to be held by my executor, and shall be held by him subject to the same trusts above recited and set forth."

After making several other bequests in the fourth, fifth, and sixth clauses of his will, it provides as follows: "Seventh. The balance of my estate, after paying the above bequests, I give share and share alike to my children, Moses E. Lopez, Priscilla L. Hart, A. M. Lopez, Julian L. Lopez, and Edward H. Lopez."

After several clauses providing for the adjustment of some debts due him by several of the children, the testator provides: "Lastly. I direct my executor to set aside from my estate the sum of five thousand dollars to and for the use of my sister, Miss Sally Lopez. And a like sum of five thousand dollars to and for the use of my sister, Mrs. Louisa A. Moise. The income thereof to be paid to them semi-annually for and during their nat-

ural lives. And at the demise of either of my sisters, the share apportioned to her of five thousand dollars shall revert to my estate and be administered according to the provisions of said will."

Previous to the execution of the will of David Lopez, viz., on June 25, 1880, Mrs. Hart had executed her own will, of which her father was one of the witnesses. In her will she gave all her property to her children in proportions similar to those which were afterwards provided by the will of David Lopez as to the property therein given to them. It was said that at the time Mrs. Hart wrote her will she had no property of her own, nothing but the expectancy from her father's estate. After the execution of her father's will, but before his death, she died, August 9, 1882.

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*A few days after Mrs. Hart's death David Lopez added a codicil to his will, which provides as follows: "I. It is the intent and meaning of my said will, and I do hereby will and direct, that the children of my lately deceased daughter, Priscilla L. Hart, shall take the share of my residuary estate given to her, and that it be held and divided among them (her children) in the same manner and proportions as are provided, named, and set forth in my last will and testament aforesaid, and also in her will," &c.

The cause was heard by Judge Fraser, who held: "That the sum of twenty-five thousand dollars (\$25,000), given by the will in trust for Mrs. Priscilla L. Hart for life, passes with whatever further estate comes to her share in the residuary estate, to her children, under the provisions of her will, as directed also by the will of her father in the last codicil," &c.

From this decree A. M. Lopez, J. L. Lopez, and E. H. Lopez appeal to this court upon the grounds:

1. "Because his honor, the Circuit Judge, erred in holding that if the bequest of \$25,000 were to any other person than the executor himself, it would be excluded from the division directed by the seventh clause of the will; and, further, that the balance in such clause directed to be divided is only what remains after the payment of this legacy as well as of the other legacies given in this will; whereas he should have held that under the express words of the will the said sum upon the death of Mrs. Hart was to become a part of his residuary estate, and be divided as he afterwards gave and bequeathed the same, and therefore passed under the terms of the said seventh clause as the residuary clause of the will.

2. "That by the words 'share of my residuary estate hereby given in trust' for his daughter was included in the specific devise of the specific sum of \$25,000, specifically given for his daughter's use only during her life, and at her death specifically made part

of his residuary estate; whereas he should have held that such words referred only to the interest, share, or estate which his daughter took in his residuary estate, and not to such specific devise.

3. "In not giving to the words 'residuary

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estate' and 'residuary legatee,' their ordinary and technical meaning, there being nothing in the context or the rest of the will to show that the testator intended to use them differently.

4. "In so construing this will as practically to disinherit the other children of the testator in favor of the children of one deceased child, the will itself not clearly showing any such intention.

5. "That the specific sum of \$25,000 passes with whatever further estate comes to the share of Mrs. Hart in the residuary estate to her children, whereas he should have held that the said sum, Mrs. Hart being dead, became a part of testator's residuary estate, and should be divided among his five children named in the residuary clause of his will, the children of his deceased child, Mrs. Hart, taking among them the share which their mother, if alive, would have taken," &c.

The principal contention is in regard to the \$25,000, whether given, as it was, for the benefit of Mrs. Hart during her life, it should, after her death, before that of her father, go in solido to her children, in addition to their equal share of the residuary estate; or, falling into the residuary estate, should be divided as a part thereof equally among all the children, the children of Mrs. Hart taking among them her share, one-fifth. After carefully reading the wills and codicils, and considering all the parts with reference to each other and to the whole, it does not strike us that there is as much obscurity or confusion as seems to have been supposed. It is perfectly clear that the direct bequest of the \$25,000 for the use of Mrs. Hart was given expressly for her life, and no interest whatever was given thereby to her children after her death. On the contrary, the said clause carefully and particularly provides that "after her death, then the said sum to become and be a part of my residuary estate, to be divided according as I shall hereinafter give and bequeath the same." What "same"? Of course, not the \$25,000 ordered to be merged in it, but the "residuary estate" just referred to. Accordingly the seventh clause gives and bequeaths the residuary estate, "share and share alike," to all the children of the testator by name, including Mrs. Hart. And after her death, in the lifetime of the testator, the last codicil confirms this by de-

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claring "that 'it is the meaning of my last will, and I do hereby will and direct, that the children of my lately deceased daughter, Priscilla L. Hart, shall take the share of my residuary estate given to her,' &c.

As the object of construction is simply to ascertain the intention of the testator, it would seem that in this case the intention is placed beyond the possible reach of inference or implication, first by the express limitation of the bequest for the life of Mrs. Hart, and at her death to become "a part" of the residuary estate; and, second, by the reiterated provisions speaking of the interest of Mrs. Hart, and afterwards of her children, as "her share in the said residuary estate." We think that, upon the death of Mrs. Hart, the \$25,000 legacy fell into and enlarged the residuary estate, and of this, thus enlarged, the children of Mrs. Hart take among them their mother's share, one-fifth. It is not perceived that the will of David Lopez made any other provision for these children; and they can take nothing under the will of their mother, for the reason that she died before her father, who after that event republished his will, and gave to them directly what he had before given to their mother, outside of her interest for life in the \$25,000. Mrs. Hart's will disposes of no part of this property, because it never belonged to her, and it cannot possibly be considered as the execution of a power given by the will of David Lopez, which was not in existence until afterwards. The whole property was disposed of by the will of David Lopez, and must be administered by the executor of his will as herein construed. See the case of *Williams v. Kibler*, 10 S. C., 429, where it is said: "But the wife died during the life-time of the testator, and after her death he republished his will. The will must, therefore, be read as if all that portion which provides for the wife, or refers to such provision, were erased; unless it should be found necessary to refer to such portion to expound some ambiguous part of the instrument." &c.

This construction is so obvious that we suppose it never would have been questioned, but for the paragraphs which immediately follow the bequest as to the \$25,000, as follows: "And any further estate the said Priscilla L. Hart may derive as residuary legatee, is to be held by my executor, and shall be held by

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him *subject to the same trusts above described and set forth. It is my intent and meaning, and I do hereby declare and direct, that my said daughter shall have full power and authority, by her last will and testament, either before or after my death, to dispose of the above named share of my residuary estate hereby given in trust for her use, among her children in such proportions, &c. And in case my said daughter shall depart this life, either before or after my death, without leaving any last will and testament, disposing unto and among her children the aforesaid share of my residuary estate, given by this will in trust for her use, then and in that case it is my will, and I do hereby direct, that the same shall be held as aforesaid, for the

use of and to go to and be distributed among her children as follows * * *."

It is claimed that the reference here made to a "further estate" indicates that the will made a double provision for Mrs. Hart—first and principally the legacy of \$25,000, and also "a further estate as residuary legatee," and from this, and the direction that they should both be held subject to the same trusts, the inference is sought to be drawn that both these provisions were intended to reach beyond the death of Mrs. Hart and go to her children, either under her will as the execution of a power or under that of her father. When properly considered, this alleged obscurity is more apparent than real. It clearly arises out of the fact that Mrs. Hart predeceased her father, and the legacy for her during her life never took effect at all. In construing the will, we should put ourselves in the place of the testator when he executed it. At that time Mrs. Hart was alive, and of course he supposed she would survive him; otherwise the provision would not have been made. If she had survived him, she would have had two separate interests under the will, the use of the \$25,000 for life, and her share of "the residuary estate"; and in contemplation of this state of facts, it was strictly correct to refer to the latter interest as "a further estate." He had just directed how the \$25,000 should be held for his daughter, and it was natural that, in that connection, he should go on and declare that the "further estate" should be held under the same trusts.

But in all this there is nothing that even purports to change the terms of the bequest

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of \$25,000 as being for life only, or to *extend the double provision beyond her death. It was merely a direction as to the manner (by trustee, &c.) in which the provisions should be held. We cannot say that the testator thereby intended to give Mrs. Hart the right to dispose of the \$25,000 by her will. He certainly did not say so, and we are not at liberty to assume it, for that would be directly in the face of the positive provision just made that at her death it should become "a part of his residuary estate." This view is based on the express terms of the will, and is strongly corroborated by the fact that after the clause making the bequest for life, the will nowhere refers to the \$25,000 specifically as a distinct bequest; but in every instance in which the interest of Mrs. Hart or her children is referred to the expression is limited to "her share of the residuary estate."

It seems to us that it would be an unauthorized liberty with the will of the testator and a great stretch of construction to hold that by the words "share of the residuary estate" he meant such "share" with a super-added legacy of \$25,000 still retaining its character as a specific legacy; especially when there was an intent in the will answer-

ing precisely to the words used, and the aforesaid legacy, after the death of Mrs. Hart, was expressly declared to be "a part" of the residuary estate. We do not see any provision in the will or codicil giving to the children of Mrs. Hart anything beyond their mother's share of the residuary estate. If they do not take as residuary legatees, we do not see how they can take at all, and coming in as residuary legatees, they must take as such their mother's share, one-fifth.

But it is earnestly urged that there is really no "residuary clause" in the will; that it contains no provision which has the resemblance of one, except the seventh clause, and that cannot be considered as such. If this be so, the \$25,000, now that Mrs. Hart is dead, is intestate property. But is it so? It is manifest that the testator intended to make such a provision, and thought he had done so; for in the will and codicils he repeatedly refers to his "residuary estate," and we think the seventh clause is residuary in its character. It is in the following words: "The balance of my estate, after paying the above bequests, I give, share and share alike, to my children, Moses E. Lopez,

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Priscilla *L. Hart, A. M. Lopez, Julian L. Lopez, and Edward H. Lopez." It may be true that the word "balance," in the sense of residue or remainder, is not considered elegant English, but in this country it is very often used in that sense, and there is no difficulty in understanding what the testator meant by the phrase "balance of my estate." In one of his definitions, Worcester gives the sense in which it is understood: "The remainder of anything, as the balance of an edition," &c. "No particular form of words is required to pass a residuum. It is sufficient if the testator's intention to include everything not otherwise disposed of is shown." 2 Wms. Exrs., 1310. "The balance of my estate" held to be a residuary clause. *Skinner v. Lamb*, 3 Ired. [25 N. C.] 155. "I also give all my other property of every kind and description whatever, to be equally divided," &c., held to be a residuary clause. *Williams v. Kibler*, 10 S. C., 428.

It is, however, still further contended that if the seventh clause is residuary in character, it is not a general residuum, but restrictive, and is capable only of disposing of particular property, viz., the odds and ends of the estate which were overlooked and not disposed of in the will at all; and that the words in the clause, "after paying the above bequests," show that "the balance" contemplated did not embrace property which had been already given, and the \$25,000, having been so bequeathed, cannot pass under the residuary clause. A will of personal property speaks at the death of the testator, and it therefore results, as a rule of law, that a general residuum carries all property of the testator which at that time is undisposed of,

including not only that which was omitted from the will, but also that which was ineffectually given by it, as in the case of a lapsed legacy; otherwise, to the extent of such legacy, there would be an intestacy. See *Cheves v. Haskell*, 10 Rich. Eq., 538, and authorities there cited.

It is true that there is such a thing as a restricted residuum, and the rule just stated does not apply when the residuary bequest is of a particular fund or description of property or other certain residuum. See *Glover v. Harris*, 4 Rich. Eq., 27. In regard to what constitutes such a restricted residuum, and as to what will pass under it, there is much learning and some refinement in the books. But we do not think it necessary to enter upon

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*that subject in this case. The words "after paying the above bequests" must of course be understood with reference to the nature and terms of those "bequests." There was a bequest of the \$25,000, but it was only the use of it during the life of Mrs. Hart; and, of course, the "paying" referred to was of that bequest. According to our construction, the corpus or remainder in the \$25,000 was not included in that bequest for the use of Mrs. Hart, and therefore it cannot be said to be excluded from the residuary clause because given away from those interested in it. On the contrary, the exact fact is that, instead of being given away from the residuary legatees, the very clause which made the bequest for the life of Mrs. Hart provided that, after her death, "the said sum should become and be a part of the residuary estate." No controversy can arise here as to whether the seventh clause creates a residuum so restricted as to be incapable of receiving and carrying the remainder in the \$25,000; for that being a pure question of intention, is conclusively settled by the terms of the will. The testator himself expressly declares that it shall fall into the residuary estate and be distributed as he should give and bequeath the same; and in a subsequent clause of his will he does give and bequeath it equally among his five children.

We cannot suppose that the character or capacity of the seventh clause is changed in any way by being in the body instead of at the end of the will. It would probably strike a lawyer that the orderly method of proceeding would be to set down first the provisions giving specific property, and then the clause intended to cover everything that might remain undisposed of; but it is believed that the relative position of the different clauses is purely arbitrary. Usually the last clause in a will appoints the executors, and yet in this will he was appointed by the very first.

No question is made as to the construction of the bequest for the use of each of the testator's sisters, which is in the following words: "And at her demise the share apportioned to her of \$5,000 shall revert to my estate and be administered according to the

provisions of said will." In respect to the point made, we do not see any substantial difference between this provision and that for Mrs. Hart, "and after her death the said

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sum to *become and be a part of my residuary estate, to be distributed according as I shall hereinafter give and bequeath the same." The words in the first are, "at her demise," and those in the second, "after her death"; and it seems to us that the phrase "to become and be a part of my residuary estate" means the same thing as "shall revert to my estate." That is to say, upon the event indicated, the sum in question shall fall into and be administered as a part of the residuary estate.

The judgment of this court is that the judgment of the Circuit Court be modified so as to conform to the conclusions herein announced.

Mr. Justice McIVER concurred.

Mr. Chief Justice SIMPSON, dissenting. I am unable to concur in the majority opinion for the following reasons:

In the third clause of his will the testator bequeathed \$25,000 to his executor, the interest and income thereof to be paid to his daughter during her life, and after her death to become a part of his residuary estate, to be divided according as I (he) shall hereinafter give and bequeath the same. And any further estate the said Priscilla may derive as residuary legatee is to be held by my executor, and shall be held by him subject to the same trusts and limitations above recited and set forth. He then gave off other pecuniary bequests, and finally, in the seventh clause, he directed as follows: "The balance of my estate, after paying the above bequests, I give, share and share alike, to my children, Moses Lopez, Priscilla L. Hart, A. M. Lopez, Julian L. Lopez, and Edward H. Lopez."

The question is, did the testator intend the \$25,000 to fall into the general residue and pass under the seventh clause of the will above, subject to division among his five children, Priscilla being one, and each to take one-fifth, Priscilla's share to be held by his executor for her use during life? I think not, for the following reasons: 1st. The testator, after setting apart the \$25,000 for Priscilla for life, then said: Any further estate that Priscilla might derive as a residuary legatee should be held by his executor subject to the same trusts as the \$25,000 al-

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ready *bequeathed to Priscilla. Here he evidently referred to some additional estate that Priscilla would take under the division of the general residue over and above the \$25,000. Besides, he certainly intended that the residue covered by the seventh clause should be distributed as soon after his death as practicable. Now, if the \$25,000 was to

constitute a portion of the residue, Priscilla already having a life estate therein, no distribution could take place thereof until her death.

2d. The testator could not have intended that the \$25,000 should fall into the residuary at the death of Priscilla and then one-fifth to go to her, for the reason that he directs that any further estate that Priscilla shall get under the residuary shall go to his executor, to be held for her use for life, as he held the \$25,000. Where would be the use of directing that one-fifth of the \$25,000 should be held for the life of Priscilla when he had already given the entire \$25,000 for her use for life? And further, the theory of the \$25,000 falling into the general residue at the death of Priscilla, and then divided under the seventh clause, would involve the idea of her enjoying one-fifth for life after her death when she had already enjoyed the whole amount during her life. On the theory that testator intended the \$25,000 to fall into the residue and be distributed under the seventh clause, these conflicting and strange results would follow: 1st. The amount of the residue could not be ascertained until the death of Priscilla. 2d. The distribution could not be made until her death. And then she would be entitled to one-fifth only of the \$25,000 for life, when she had already enjoyed the whole amount for life.

But it is said, how can the expression in the will, "then to become a part of my residuary estate, to be divided according as I shall hereinafter give and bequeath the same," be explained, otherwise than that the testator intended the \$25,000, of which he was then speaking, should become a part of his general residue and pass under the seventh clause, in which he directed a division of this residue? It appears to me that this expression is susceptible of the following interpretation. Of course, the testator knew that the corpus of the \$25,000 was a part of his residue, as he had given only a life estate

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therein to his daughter, and *recognizing this fact, he directed in the same clause that it should become at the death of his daughter a part of his residuary estate, to be divided according as he should thereafter give and bequeath the same. Now, what did he mean by the word "same"? Did he mean the whole of his residue, or only this portion thereof? Did he mean that the \$25,000 should be divided as he might thereafter give and bequeath his general residue, or did he mean that this \$25,000 should be divided as a portion of his residue as he might thereafter direct the same? He must have intended the latter, because otherwise the strange results suggested would follow. And, besides, the next clause in the will following the third, in which he directs a distribution, of some portion of his estate in the event that Priscilla failed to dispose of it by her will, can be

explained upon no hypothesis but that he referred to the \$25,000. In this clause he refers to the above named share of his residuary estate, giving Priscilla the power to dispose of it, and if she fails to do so, then he disposes of it to her children.

This construction is supported and sustained by the codicil executed after the death of Priscilla in which he provides that the share of his residuary estate given to her should go to her children, in the same manner as provided in his will, and also the will of his daughter. It is manifest that the testator, in using the term "share" in connection with the sum of \$25,000, constituting a part of his residuary, meant portion. He cut this off from the balance of his estate at the beginning of his will, and although the corpus would constitute a part of his residue in the sense that it was undisposed of to Priscilla, yet he never intended that it should be distributed with his general residue, but intended to direct a different and independent division thereof, which it appears to me he did, first in the clause following the third, and then after the death of Priscilla, by his codicil. I concur in the construction of the Circuit Judge.

Judgment modified.

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*GUGGENHEIMER & ADELSDORF v.
GROESCHIEL.

(April Term, 1885.)

[1. *Assignments for Benefit of Creditors* 316.]

Creditors having entered into a composition with their debtor after an assignment made by him of all his property for their benefit, the assignment was thereby vacated, and the property restored to the debtor; and the assignee could not thereafter seize such property.

[Ed. Note.—Cited in *Early v. Early*, 75 S. C. 17, 54 S. E. 827.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 926; Dec. Dig. 316.]

[2. *Assignments for Benefit of Creditors* 11.]

An insolvent living debtor having made no appropriation of his property to the payment of his debts, and there being no outstanding liens, his creditors cannot by action subject his property to distribution among his creditors; but such an action having been prosecuted without objection on the part of the debtor, the court treated the case as if an assignment had been made.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 14; Dec. Dig. 11.]

[3. *Assignments for Benefit of Creditors* 310.]

There being no liens and no preferred creditors, the property of the debtor must be distributed ratably among all the creditors.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 907-912½; Dec. Dig. 310.]

[4. *Assignments for Benefit of Creditors* 316.]

Where creditors, who have entered into a composition with their debtor, receive from him an amount in excess of their share under the composition deed, it is no fraud upon subsequent creditors; and under a subsequent assignment they are entitled to demand and receive their dividend upon a new debt, without accounting to subsequent creditors for the excess so received on their first debt.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 926; Dec. Dig. 316.]

[5. *Assignments for Benefit of Creditors* 297.]

Where a creditor surrenders his preference under a former assignment, he is not thereby stopped from claiming his debt under a subsequent assignment by his debtor.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 871; Dec. Dig. 297.]

[6. *Assignments for Benefit of Creditors* 301.]

Claims having been established before a referee, under a call for creditors, and there being no dispute as to the amounts due upon the several claims, it was error to direct the creditors to be again notified to present and prove their demands.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 885-887; Dec. Dig. 301.]

Before Cothran, J., Fairfield, September, 1884.

The opinion states the case. The Circuit decree, omitting its statement, was as follows:

The pivotal point of the case, in my judgment, is the transaction of March, 1882, by which the assignee gave up the control of the estate and Groeschel became possessed of it. This was either justified under the act (or deed, if there was one) of composition, or it was an unauthorized abandonment of the trust by Withers. I must assume the former to be the case, unless the latter were made to appear by proof, and of such there is none. I am forced by the proof further to conclude that Sternbach knew of the transfer and rati-

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fied it in August, 1882, by receiving \$1,000 of his claim from the hands of Groeschel. His letters show that he had confidence in Groeschel's integrity; and, as his relative, he was much concerned about his pecuniary condition, and was willing to assist him. The composition with the unpreferred creditors, to which Sternbach assented, superseded the assignment. See Bur. Ass., 567. Groeschel says in his testimony, and it is not contradicted, that the assigned estate sold for enough to pay the preferred creditors and the composition notes, except Samuels, who was secured by mortgage of real estate. Sternbach promoted the arrangement, was deeply concerned about it, acquiesced in it, ratified it by receiving a part of his debt, six months after it was made, from Groeschel, made no further demand for eighteen months, and until Withers again took charge of Groe-

schel's effects, and he is now estopped from setting up his claim here. 2 Pom. Eq. Jur., 965-1083; 4 Wait Act. & Def., 332.

The next question is, shall Kerngood Bros. and Wiesenfeld & Co. account for the excess over 36 per cent. received from Groeschel on their claims under the assignment before participating in the fund in hand? If it had been shown that such excess had been paid from the assigned estate, much, if not all, that has been said in argument about "clean hands," "he who asks equity must do equity," "equality is equity," &c., &c., would be of easy and necessary application to the case, but the only proof upon this point is directly to the contrary. The defendant, Groeschel, most likely of all to know the fact, says in his testimony, after some unbecoming hesitation, but positively touching both claims: "Did not pay this additional amount out of sales of either old or new stock." This is affirmative proof and repeated. The witness was not impeached. There was no countervailing testimony. It is not impossible, not improbable, nor without high precedent. He may have had other funds, and if so, with such it appears that he made unto "himself friends of the mammon of unrighteousness." In the absence of any proof to show that such excess was paid from the assigned estate, and with the positive proof that it was not so paid, I should not feel warranted in denying to Kerngood Bros. and to Wiesenfeld & Co. the right to participate fully in this distribution. These

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*claims are otherwise unquestioned, and certain it is that the very fund in controversy has been derived in part from goods and merchandise of theirs taken up by the defendant, Groeschel.

Wherefore it is adjudged and decreed: 1. That the funds in the hands of Isaac N. Withers, the former assignee, be turned over to the clerk of this court for distribution. 2. That the clerk do pay out first, the costs of this proceeding and any arrears of taxes that may be due upon said property. 3. That the balance be paid out pro rata to the creditors of Joseph Groeschel (excepting the defendant, Charles Sternbach), who shall, under the usual form of publication by said clerk, present and prove their demands before him within sixty days from the filing of this judgment. All creditors failing or refusing so to present and prove their demands within the said time, shall be debarred from all benefits hereunder. 4. Any of the parties in interest are hereby permitted to move for any further orders in their behalf.

The points raised by the exceptions are sufficiently stated in the opinion.

Mr. A. S. Douglass, for plaintiffs.

Mr. J. H. Rion, for Sternbach.

Mr. J. E. McDonald, for respondents.

July 20, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, Joseph Groeschel, on February 8, 1882, being then a merchant at Winnsboro, Fairfield County, and insolvent, made an assignment of all his real and personal property, consisting of a stock of goods and a certain lot situate in said town, for the benefit of his creditors, in which certain named creditors were preferred, among them the defendant, Charles Sternbach. The defendant, Isaac N. Withers, was the assignee. Shortly after the execution of this assignment, a meeting of the creditors was had in pursuance of the statute in such case made and provided, at which meeting the said Isaac N. Withers was appointed agent of the creditors.

Before anything was done by the assignee

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with the assigned *property, Groeschel, the debtor, compounded with his unpreferred creditors by agreeing to pay them 36 per cent. on their claims, this amount to be paid in four instalments and in full of said claims, for which he gave notes, bearing interest from February 18, 1882, and payable to James H. Rion, as attorney for the creditors, all of which have since been paid. He also made satisfactory arrangements for the payment of the claims of the preferred creditors, all of whom have since been satisfied, except the defendant, Charles Sternbach, there being still remaining on his claim some \$1,200, after crediting a payment of \$1,000 made in August, 1882.

After this composition and arrangement, to wit, in March, 1882, the assignee returned the stock of goods to Groeschel, the assignor, who immediately resumed his former business of buying and selling goods, commencing with this returned stock, in which he continued until January, 1884, depleting and replenishing his stock, from time to time, as the business required, and without interruption from any quarter. During this time he contracted many debts in the purchase of goods, and among them the plaintiffs'. In 1884, when the greater part of the stock, if not all, which had been returned to him by Withers, the assignee, had been exhausted and its place supplied by other purchases, being threatened by his subsequent creditors, Withers took possession, claiming, as it seems, under the original assignment. It does not appear whether this action of Withers was assented to or not by Groeschel. However, Withers took possession and immediately sold the goods on hand. Out of the proceeds of the sale, Withers paid off the last of the four notes given by Groeschel to his unpreferred creditors mentioned above, and also a note to one J. Herbst, with certain expenses and commissions, leaving in his hands the sum of \$2,978.64.

At this juncture of affairs, the plaintiffs commenced the action below, claiming to be a creditor on account of goods sold and delivered on December 16, 1883, amounting to \$274.91, and demanding judgment: 1st. That the defendant, Isaac N. Withers, assignee as aforesaid, be enjoined from paying out of the funds or assets in his hands, or under his control, any balance that may be claimed to be due the defendant, Charles Stern-

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bach, *as a preferred creditor, or from making any other disposition or application of said funds, except as ordered by the court. 2d. "That the plaintiffs be paid their debt, or their proportionate share thereof, in the ratable and equitable distribution of the same among such of the creditors as may come in and establish their claims in this action." The defendants answered the complaint, admitting the facts alleged in the complaint, except the statement that the stock of goods taken by Withers in 1884 had entirely "changed its component parts" from the stock turned over to Groeschel under the composition agreement in 1882, which was denied. It was also denied that Sternbach had "concurred and acquiesced in and assented to the transfer and delivery of the assigned goods and assets to the said Groeschel by Withers, and that he made a new agreement with Groeschel as to his debt," and Sternbach claimed that he was entitled to be paid the balance due him out of the funds in the hands of Withers as a preferred claim.

The case was ordered to a referee, with instruction to call in all creditors claiming to share in the distribution of the money in the hands of Withers. Under this call, three classes of creditors established their demands. 1. A preferred creditor under the original assignment who had not been paid in full, to wit, Charles Sternbach, whose claim is mentioned above. 2. The unpreferred creditors under said assignment who had been paid their then existing claims, but who since that time had become creditors of Groeschel for goods and merchandise sold him, to wit, Kerngood Bros. and Wiesenfeld & Co. And 3. Those who were not creditors at the time of the original assignment, but had become so since, to wit, the plaintiffs. Upon the coming in of the report of the referee, which contained the testimony upon the issues raised in the pleadings and the claims established, the case was heard by his honor, Judge Cothran.

In the testimony reported, it appeared that Kerngood Bros. and Wiesenfeld & Co., who, as stated, were unpreferred creditors of the original assignment, had received, by a private arrangement made with Groeschel in the composition with them, considerably more than 36 per cent. on their claims, and the plaintiffs contended that they should

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account for this excess on their new *claims now before the court. Plaintiffs also contended that the defendant, Charles Sternbach, having made a new arrangement with Groeschel as to his preferred claim, should be confined to that, and was entitled to nothing out of the funds in the hands of Withers.

His honor, the Circuit Judge, sustained the plaintiffs as to Sternbach's claim, but overruled it as to Kerngood Bros. and Wiesenfeld & Co., and he ordered (1) that the funds in the hands of Withers be turned over to the clerk of the court for distribution; (2) that the clerk, after paying the costs, taxes, &c., distribute the balance pro rata among the creditors of Joseph Groeschel (excepting Charles Sternbach), who shall, under the usual form of publication by said clerk, present and prove their demands before him within sixty days from the judgment rendered, &c.

The plaintiffs have appealed from so much of the decree as allowed Kerngood Bros. and Wiesenfeld & Co. to share in the funds in contest without accounting for the excess received in the composition, and also from so much as directed the creditors to establish their demands over before the clerk. Sternbach appealed because his claim was ruled out, and also from so much of the decree as directed the funds to be turned over to the clerk and that the creditors should again establish their demands before him.

This is a novel case, and in some of its features without precedent in the books. The main, and as was said by the Circuit Judge the pivotal, question is the effect of the composition upon the original assignment. The Circuit Judge held, in substance, that it annulled, cancelled, the assignment, and in this we think he was entirely correct. The object of the composition, no doubt, was to accomplish this, the creditors by their action at least assented to it, and the assignee carried it out by openly returning the assigned property to Groeschel, upon which he, Groeschel, again began to merchandise, continuing in the business for some two years without objection. We think these facts were entirely sufficient to authorize the conclusion of the judge, that the assignment was at an end. The assignment then being at an end, the property belonged to Groeschel, unencum-

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bered, and by *what right Withers afterwards seized the stock of goods in question, or upon what foundation the plaintiffs instituted the action below for the distribution of Groeschel's property among his creditors, we cannot exactly see. Groeschel is alive, and although insolvent, yet his property is not encumbered with conflicting liens, needing adjustment by the court. Nor has it become by the execution of any paper or agreement a common fund belonging to the creditors. But Groeschel has not objected, and we must suppose that Withers took posses-

sion by his consent, and that this transaction amounted to a verbal assignment by Groeschel of his property for the benefit of his creditors. In the absence of all objection by Groeschel, we must so regard it, otherwise the case has no status in court, the original assignment being cancelled.

What are the rights, then, of the parties under this view of the case? No creditor having a prior lien by judgment, mortgage, or otherwise over others, the property would be subject to be pro-rated among all. We cannot see how Kerngood Bros. and Wiesenfeld & Co. can be made to account for the excess which it is said they received in the settlement of their former claims, nor why Sternbach should be excluded altogether. All these parties have claims against Groeschel, his property is about to be distributed among creditors by his consent, no one of whom has a lien thereon, and if he does not object to these parties getting a share, who can?

It is contended, however, in reference to Kerngood Bros. and Wiesenfeld & Co., that under the law of assignments, where a composition takes place, if the debtor, by a secret agreement, pays more to one creditor than to another, that the transaction is fraudulent, and the amount paid by the debtor may be recovered back. Pom. Eq. Jur., § 967. This, no doubt, is good law. But upon whom is such a transaction fraudulent? and for whose benefit can the amount thus fraudulently paid be recovered back? It is fraudulent upon the other creditors entitled under the assignment, and if voidable, it is voidable by them, and by them alone. Because they are the only parties injured, and consequently the only parties having a cause of action. Pomeroy, § 967, *supra*; 1 Story Eq., §§ 378, 381. The plaintiffs here do not occupy the

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position of a *creditor at the time of the original assignment. Their claims have been contracted since, and we find no authority warranting them to claim in a proceeding like that they have instituted here, that Kerngood Bros. and Wiesenfeld & Co. should refund the alleged excess. Suppose they were required to refund, what lien would these plaintiffs have upon the money, or what right would the court have in the absence of such lien to appropriate any portion to the plaintiffs? If there is any party before the court who has a right to complain, it is Sternbach. He was a creditor at the time of the assignment, and was entitled to know the terms of the composition. But he makes no claim.

Next, why should Sternbach be excluded altogether? It is said that he was amply secured under the assignment, being a preferred creditor, yet he allowed the goods to be restored to his debtor, and permitted him to resume and continue business for nearly two years, when he ought to have interposed

and demanded payment of his claim. This, it is true, was enough to prevent him from now attempting to set up the assignment and claim as preferred creditor thereunder—perhaps so, if even he could find and identify the assigned property, certainly so, as to property since acquired by his debtor. But upon what principle can it be said that his debt should not be paid out of subsequently acquired property until all other debts are paid? It is contended by the plaintiffs, and by Kerngood Bros. and Wiesenfeld & Co., under the principle of *Goodhue v. Barnwell* (Rice Eq., 240), and other similar cases, he should be excluded. What is this principle? In the case of *Goodhue v. Barnwell*, the court held that if a creditor stands by and suffers the personal estate to be squandered, he will not afterwards be permitted to look to the heir for payment. In *Richardson v. Inglesby* (13 Rich. Eq., 59), an execution creditor allowed the bidder at sheriff's sale to take possession of the property without payment. It was held that the execution was satisfied.

The principle of these cases, and many others like them, is that a party will not be permitted to defeat other creditors on a certain fund by interposing a claim otherwise provided for, and which he has failed to secure out of the provided fund, on account of his negligence or bad faith. The doctrine of

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estoppel *to some extent comes in. But it would be straining this principle very far here—indeed, much too far—to bring Sternbach within it, and altogether exclude his claim. That he surrendered his claim as a preferred creditor under the assignment was an act of kindness to Groeschel, his debtor. Certainly no creditor then in existence had the right to object. He was injuring no one but himself. After he surrendered, his claim as a preferred claim over the property assigned was gone, and gone forever; and how, therefore, can he be charged with standing by and allowing his debtor to squander this property? When he surrendered he then became a simple creditor, just like the plaintiffs and Kerngood Bros., and had no higher rights than they, nor any greater power than they, to stop Groeschel in his downward mercantile career. We can see no legal reason why Sternbach should not have a share in these funds, which it seems Groeschel has consented to be distributed among his creditors without preference.

It being conceded that there are no other creditors of Groeschel except those before the court, and there being no dispute as to the amounts established before the referee, it would be incurring costs and expenses unnecessarily to require these debts to be again established. We think the funds in hand, after paying off expenses allowed, should be distributed by the clerk of the court for Fairfield County among the plaintiffs, Kerngood Bros., Wiesenfeld & Co., and Charles

Sternbach, pro rata, according to the amount of the claims of each. And to this end.

It is the judgment of this court that the judgment of the Circuit Court be modified as herein above. Let the case be remanded.

23 S. C. 282

LEVI v. LEGG & BELL.

(April Term, 1885.)

[1. *Chattel Mortgages* ⇨127, 129, 131, 161, 173.]

A chattel mortgage operates as a transfer of title, and the stipulation permitting the mortgagor to retain possession until condition broken, is personal to him and cannot be assigned; hence the mortgagee, before condition broken, may maintain action for recovery against the purchaser at sheriff's sale of the mortgaged chattels.

[Ed. Note.—Cited in *Ex parte Lorenz*, 32 S. C. 368, 11 S. E. 206, 17 Am. St. Rep. 862.]

For other cases, see *Chattel Mortgages*, Cent. Dig. §§ 216, 282, 320; Dec. Dig. ⇨127, 129, 131, 161, 173.]

[2. *Trial* ⇨191.]

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*The Circuit Judge could not, without invading the province of the jury, charge them that "no damages having been alleged or proved, they could not render a verdict for damages."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 420-431, 435; Dec. Dig. ⇨191.]

[3. *Detinue* ⇨17.]

The damages sustained by a plaintiff from the unlawful detention of his chattels, for the recovery of which he sues, constitute no part of his cause of action, but are incident to the violation of his rights; and where damages are not alleged in the complaint, but claimed as part of the relief demanded, the jury may find a verdict for damages.

[Ed. Note.—Cited in *Westlake v. Farrow*, 34 S. C. 273, 13 S. E. 469; *McMakin v. Fowler*, 34 S. C. 289, 13 S. E. 534; *Peoples v. Brown*, 42 S. C. 83, 20 S. E. 24; *Welborn v. Dixon*, 70 S. C. 114, 49 S. E. 232; *Southern Railway v. Gossett*, 79 S. C. 381, 60 S. E. 956; *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 141, 70 S. E. 396.]

For other cases, see *Detinue*, Cent. Dig. § 26; Dec. Dig. ⇨17.]

[4. *Appeal and Error* ⇨295.]

Error on the part of the jury in finding damages without sufficient proof, can be corrected only by motion on Circuit for a new trial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1704; Dec. Dig. ⇨295.]

[This case is also cited in *Norris v. Clinkscales*, 47 S. C. 489, 25 S. E. 797, and distinguished therefrom.]

Before Kershaw, J., Clarendon, October, 1884.

The opinion states the case.

Messrs. Earle & Purdy, for appellants.

Messrs. Moise & Huggins, contra.

July 20, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case so far as necessary to a proper understanding of the questions raised by this appeal, are

substantially as follows: On January 16, 1883, the defendant, Griffin, executed a mortgage on certain property, including the two mules which are the subject of the present action, to the plaintiff, to secure the payment of a bond which became payable on December 8, 1883. This mortgage contained the usual stipulation that upon default in payment of the amount which it was intended to secure the mortgagee might enter upon the premises of the mortgagor and take possession of the mortgaged property, &c., and that in the meantime the mortgagor might retain possession. On April 22, 1883, before the time fixed for payment of the mortgage debt, the property in question was sold by the sheriff under an execution against the mortgagor, and on the same day went into possession of the defendants, Legg & Bell, as purchasers from the party who had bid off the property at sheriff's sale.

While the property was in the possession of Legg & Bell, the plaintiff made a demand for it, which being refused, this action was commenced on April 3, 1883, to recover pos-

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session of the two mules so sold at sheriff's sale as the property of Griffin. In the complaint there is no specific allegation that the plaintiff has sustained any damages by reason of the unlawful taking or detention of the property, but in the prayer for relief judgment is demanded "for the possession of the said two mules; and in case possession thereof cannot be had, then for the sum of three hundred and fifty dollars, the value thereof, and one hundred dollars damages for the taking and detention thereof." It is stated in the "Case" as prepared for argument here that "the plaintiff did not attempt to offer any testimony whatever as to damages sustained by reason of the taking and detention of the mules."

At the trial below the defendants requested the Circuit Judge to charge the jury "that no damages having been alleged, and no damages having been proved, they could not render a verdict for damages." This request was refused, and the jury were instructed "that upon an allegation of a wrongful taking and conversion of property, damages followed as a corollary, and it was sufficient that damages be claimed in the demand for judgment; and that the jury were at liberty, under the pleadings, to find damages, if there has been any testimony upon that point." The jury were also instructed "that as soon as the property went into the possession of the purchaser at sheriff's sale under execution against the mortgagor, the mortgagee had the right to seize the same under his mortgage, although the condition thereof had not been broken."

The jury having found a verdict that the plaintiff was entitled to the property or its value, and for the sum of fifty dollars dam-

ages, the defendants appeal upon exceptions duly taken, which raise two questions: 1st. Could the plaintiff maintain the action before the condition of the mortgage was broken? 2d. Could the plaintiff, under the pleadings and evidence, recover any damage?

The first question, it seems to us, is conclusively determined by the decisions of our own courts in the case of *Spriggs v. Camp*, 2 Speers, 181, recognized and affirmed in *Belune v. Wallace*, 2 Rich., 80. These cases, which are binding as authority upon us, expressly decide that a mortgagee of chattels may maintain an action for a mortgaged chat-

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tel, even before condition *broken, against a purchaser from the mortgagor, either directly or through the process of the court. They rest upon the theory that a mortgage of personal property, unlike one of real estate, operates as a transfer of the title of the property, and that the stipulation usually found in mortgages of chattels, that the mortgagor may retain possession until condition broken, is personal to the mortgagor and cannot be assigned or transferred to another. Hence, whenever a mortgaged chattel is found in possession of another than the mortgagor, who alone can avail himself of the personal license to retain possession, the mortgagee, as the legal owner, may recover possession of such chattel. It is clear, therefore, that in this respect the Circuit Judge committed no error.

The next inquiry is as to the damages. The judge could not have charged as requested upon this point, because it required him to determine what was proved, which, of course, he could not do, as that was a matter exclusively for the jury. It therefore only remains for us to consider whether there was any error in the instruction which he gave to the jury as to the question of damages as that also was excepted to. That instruction practically amounted to this, that there was no necessity for any specific allegation in the complaint that the plaintiff had sustained any damage by reason of the unlawful taking and detention of his property, but that the violation of plaintiff's rights having been alleged, damages were a mere incident to such violation and need not be specially alleged, and it was sufficient that damages should be claimed in the demand for relief. In this we cannot say there was any error of law. It is true that the demand for relief constitutes no part of the plaintiff's cause of action, and cannot be resorted to for the purpose of supplying any fact necessary to the plaintiff's cause of action which has been omitted in the body of the complaint. Here, however, the damages which the plaintiff may have sustained constituted no part of his cause of action. They were only the consequences which flowed from the violation of the plaintiff's rights by the unlawful seizure

and detention of his property, and really constituted a part of the relief which he demanded for such violation of his rights. It is true that there may be cases in which it is necessary to the maintenance of the action that special damages should be alleged and

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*proved, but this is not such a case, and therefore we need not go into that matter.

Whether there was any proof, or any sufficient proof, to warrant the jury in finding the amount of damages which they did find, or any at all, are questions of fact over which we have no jurisdiction. If there was any error on the part of the jury in this respect, the proper mode of correcting it would have been by a motion, addressed to the Circuit Court, for a new trial.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 286

POOL v. COLUMBIA & GREENVILLE R. R. COMPANY.

(April Term, 1885.)

[1. *Carriers* ⇨78, 94.]

A plaintiff may prove enough to carry his case to the jury, and yet by the admission of other testimony before closing, render a non-suit in invitum proper.

[Ed. Note.—Cited in *Tutt v. Port Royal & Augusta Ry. Co.*, 28 S. C. 397, 5 S. E. 831; *Slater v. South Carolina Ry. Co.*, 29 S. C. 100, 6 S. E. 936; *Norris v. Clinkscales*, 44 S. C. 318, 22 S. E. 1; *Brodie v. Carolina Midland R. R. Co.*, 46 S. C. 216, 24 S. E. 180; *Powers v. Standard Oil Co.*, 53 S. C. 362, 31 S. E. 276; *Lyon v. Charleston & W. C. Ry.*, 77 S. C. 343, 58 S. E. 12.

For other cases, see *Carriers*, Cent. Dig. § 382; Dec. Dig. ⇨78, 94.]

[2. *Carriers* ⇨72, 74.]

A consignee has no cause of action against a common carrier who refuses to deliver the goods consigned after being forbidden to do so by the consignor.

[Ed. Note.—Cited in *Faust v. Southern Ry.*, 74 S. C. 367, 54 S. E. 566.

For other cases, see *Carriers*, Cent. Dig. § 250; Dec. Dig. ⇨72, 74.]

[3. *Carriers* ⇨94.]

In action of claim and delivery by the consignee against the carrier, the evidence showing an order from the consignor to the carrier not to deliver, the judge properly ordered a non-suit and gave judgment against the plaintiff for the return of the goods, taken by plaintiff into his possession under bond in the action, or for the value thereof.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 367-395, 456; Dec. Dig. ⇨94.]

Before Cothran, J., Laurens, February, 1885.

This was an action by W. H. Pool against the Columbia & Greenville Railroad Company, commenced September 4, 1884. The opinion states the case. The appeal was brought upon the following exceptions:

1. Because the complaint alleged owner-

ship and unlawful detention of the goods on the third and fourth days respectively of September, 1884, and there was some evidence to sustain these allegations. II. Because neither the answer nor defendant's evidence justified the defendant's conduct in refusing to deliver the goods, but, if so, it was a matter solely for the jury. III. Because the goods were not in transit, but had reach-

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ed their destination, and were in the constructive possession of the plaintiff. IV. Because the statement agreed upon by counsel was only evidence for the defendant, and should have been submitted to the jury. V. Because the complaint should not have been dismissed on motion of non-suit by defendant's counsel, and judgment should not have been entered up against the plaintiff for the return of the goods or their value.

Messrs. W. H. Martin and F. P. McGowan, for appellant.

Mr. J. C. Haskell, contra.

July 21, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. These actions were brought to recover certain personal property in the possession of the defendant, and alleged by the plaintiff to belong to him. At the close of the plaintiff's testimony the defendant moved for a non-suit, which was granted, the court ordering the cause to be dismissed, and with leave to the defendant, on failure of the plaintiff to return the goods in question within five days, to enter judgment against the plaintiff for the sum of \$363.67 in the one case, and for the sum of \$448.17 in the other, with costs in both, it appearing that the plaintiff had taken possession of the goods under bond to prosecute the actions, and to return the goods upon failure of success.

The plaintiff has appealed upon several exceptions. These exceptions, however, raise but a single question, to wit, was the non-suit rightfully ordered? This court has held in several cases that a non-suit is demandable by the defendant in a case where there is total failure of evidence, either as to the whole case stated in the complaint, or as to any material part thereof. Was there such a failure here? The complaint alleged that the plaintiff was the owner of the goods and chattels mentioned in the complaint; that he was entitled to immediate possession; that defendant detained them after demand made, to the damage of the plaintiff \$500. The answer admitted possession, but stated that the goods had been received by defendant as a common carrier from certain consignors in

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Richmond, Va., directed to the plaintiff, but before the goods were demanded or delivered to said plaintiff, defendant was instructed by said consignors, Wingo, Ellett & Crump, not to deliver said goods to plaintiff.

The only witness examined was the plaintiff himself. It will be seen upon examination of this testimony that while some question might arise as to its force and effect, yet it was upon the point at issue. He said that he had bought the goods in question in the month of August, 1884; that they consisted of fifteen boxes of boots and shoes, of the value of \$448.17, and also of a bill of hardware, valued at \$363.67; that he was the owner thereof on September 4, 1884; that they were in the depot of defendant at Laurens C. H., and were consigned and addressed to him at Laurens C. H.; that he had demanded the goods from the agent, and had tendered the freight account; that the agent had refused to deliver, and then stated the custom prevailing at that point as to the delivery of goods by the agent to merchants—this being objected to by the defendant. This testimony certainly touched the issues raised in the complaint, and up to this point it could not be said that there was total failure as to the whole case, or as to any material part thereof.

Before, however, the plaintiff closed his testimony, a paper was read by the defendant's counsel—read by him, as stated, because it "was in his handwriting"—in which the counsel of the plaintiff admitted "that the defendant in the above cases held the goods * * * in obedience to orders to that effect from the shippers, Wingo, Ellett & Crump, Richmond, and Robinson, Lane & Co., Baltimore." Now, what effect did this admission have, coming, as it did, as a part of the plaintiff's testimony, or, at least, before the plaintiff had closed? Did it negative and destroy the other testimony of the plaintiff, and leave the case as if no such testimony had been offered? Did it negative such portion of said testimony as was applicable to some one or more of the material allegations in the complaint and leave such allegations wholly without evidence? If it had these effects, either the one or the other, then there was a total failure of evidence, and the non-suit was proper. The admission was not in conflict with the facts, either of ownership by plaintiff, of possession by defendant, of the demand made, nor of refusal to deliver. As

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to these questions it had no effect, and the testimony which had been offered by the plaintiff bearing upon these questions still remained untouched.

It may be said, however, that one of the material allegations in the complaint was the alleged right to immediate possession, and that this admission, to wit, that defendants refused to deliver possession because they had been ordered by the shippers not to deliver, left that material allegation without any testimony to support it, and therefore the non-suit was right. Whether or not the plaintiff was entitled to immediate possession, was a question of law, dependent upon the facts of the case, to wit, ownership and

the character of the defence. But it may be true that where a plaintiff alleges in his complaint facts constituting a cause of action, and offers testimony sufficient to entitle him to go to the jury thereon in the first instance, yet if he admits the defence relied on, and that defence be one which, if true, would as matter of law defeat his action, his case becomes a case where there is a total failure of evidence—that is, a total failure of evidence as to his legal right, and subjecting him to a non-suit. Let this be granted as to this case. Then the question arises, was the admission of the plaintiff below an admission of the kind suggested?

No doubt, the goods in question were in a condition to be subject to the doctrine of stoppage in transitu. That is, they had been ordered by the plaintiff from merchants in Richmond and Baltimore; they had been shipped by these merchants to the plaintiff in boxes marked in his name. The defendant was a common carrier, and had not yet delivered them to the plaintiff either actually or constructively, and if the shippers had the right to avail themselves of the doctrine of stoppage in transitu, the goods not having been delivered to the plaintiff, or put under his control, were in condition to be made subject thereto. Now, when does the right of stoppage in transitu attach to the vendor, and what is its effect when applied to goods in the hands of a carrier? Mr. Benjamin, in his work on sales, where he has discussed this doctrine fully, referring to numerous cases both English and American, says that "this right arises solely upon the insolvency of the buyer" (§ 1229), and in section 1243 he

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*repeats the same in these words: "The vendor can only exercise this right against an insolvent or bankrupt buyer." So that in a contest between the vendee and the vendor, where the vendor has attempted to exercise this right, he cannot vindicate his action unless he proves that at the time of its exercise the vendee was insolvent.

But how is it in a contest between the carrier in whose hands the goods have been arrested and the vendee, as was the case below? And where a carrier is sued by the vendee for possession, what facts will justify him for having withheld the property? Mr. Benjamin says: "All that is necessary to stop the goods in the hands of the carrier is a simple notice from the consignor forbidding delivery to the vendee." He says the effect of this notice is to revert possession in the vendor, and if the carrier delivers after such notice to the vendee, he becomes liable to the vendor. § 1277, and the cases there cited in note. The carrier is not bound to know whether the consignor is exercising his right to stop delivery upon proper and legal grounds or not. All that he is bound to know is that the consignor has ordered a

stoppage before delivering, and if so, his delivery afterwards becomes illegal.

If this be the law (and of this there seems no doubt), the refusal of a carrier to deliver, with an order in his hands from the consignor not to deliver, is a full protection to him, the refusal under such circumstances affording no cause of action against him to the vendee. As we have said, the order of nondelivery reverts the possession of the property in the vendor in contemplation of law, and transfers the cause of action of the vendee for non-delivery from and against the carrier to and against the vendor. From this it follows that the defendant below had not only the right to refuse the demand of the plaintiff, but was legally bound to do so. And this fact appearing in the case by the admissions of the plaintiff, before the close of his testimony, it negated and destroyed the inference proper from the other facts of the case in its absence, to wit, that the plaintiff had the right to immediate possession.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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*HUCKABEE v. NEWTON.

(April Term, 1885.)

[1. *Parties* ⇨29.]

In actions affecting the fee in real estate, where the legal title is in a trustee, he is a necessary party to the action, or, if he be dead, his heirs.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 41, 47–49, 51; Dec. Dig. ⇨29.]

[2. *Partition* ⇨48; *Trusts* ⇨257.]

Under a deed to a trustee, his heirs and assigns, to permit L. to enjoy the land for her life without rent, and at her death to convey the same to her children then living, and to the children of such as were dead, the remainder was contingent, and the trust was not executed on the death of L.; and in action for partition, the trustee being dead, his heir was a necessary party.

[Ed. Note.—Cited in *Ayer v. Ritter*, 29 S. C. 137, 140, 7 S. E. 53; *Steele v. Smith*, 84 S. C. 471, 66 S. E. 200; *Cathcart v. Matthews*, 91 S. C. 470, 74 S. E. 985, Ann. Cas. 1914A, 36.

For other cases, see *Partition*, Cent. Dig. § 124; Dec. Dig. ⇨48; *Trusts*, Cent. Dig. § 363; Dec. Dig. ⇨257.]

[3. *Parties* ⇨75.]

In demurrer for defect of parties, the objection to the complaint must be so indicated as to enable the plaintiff to make the proper amendment, but it is not necessary to give the names of those who should be joined.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 116; Dec. Dig. ⇨75.]

Before Witherspoon, J., Marlboro, September, 1884.

The opinion states the case. The order of the Circuit Judge, omitting its statement, was as follows:

The defendants, William T. Newton, his wife, Mary Newton, and Rebecca Wright, de-

mur to the complaint on five grounds. The first and second grounds of demurrer allege a defect in parties in the omission of the names of certain persons. I find that nearly all of the persons named and alleged to have been omitted are embraced in the body of the complaint. Exception for want of proper parties can only be taken by demurrer when the omission appears on the face of the pleadings. *Clark v. Tompkins*, 1 S. C., 124. Where the omission does not appear upon the face of the complaint, the objection may be taken by answer. Code, § 168. The first and second grounds of demurrer must be overruled, as the defect of parties does not appear on the face of the complaint.

The third ground of demurrer is based upon the plaintiffs' omission to make ——— Pankey the eldest son of Stephen Pankey, the deceased trustee, a party. Is he a necessary or proper party? This will depend upon whether or not the titles to the land vested in the cestui que trust upon the death of the said Lucy Covington. The complaint alleges that Lucy Covington conveyed the land by deed to the trustee, Pankey, in trust that he

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would convey the same at her death to her children and grandchildren surviving her. Is this a passive trust when the title passes directly through the trustee to the cestui que trust? In *Bristow v. McCall* (16 S. C., 548), the court say the statute of uses never executes the use while there is anything for the trustee to do necessary to the accomplishment of the trust created by the deed; when the trustee is charged with the performance of some duty in connection with the property which cannot be performed except by the authority of the legal title vested in him, the statute has no application. In *Harley v. Platts* (6 Rich., 315), it is stated that whenever any act is to be done by the trustee, as to convey, it is a trust, and not a use executed. The parties to this action do not claim as heirs at law, but through the deed to the trustee, Pankey. The complaint alleges that Pankey, the trustee, is dead. He either left an elder son or heirs, who should be made parties to this action. The third ground of demurrer must be sustained.

I do not see how the fourth ground of demurrer can be sustained. It refers to plaintiffs' omission to state whether or not plaintiffs and defendants have or own other lands in common. The rule of court provides that where infants are concerned, the complaint should contain such statement. It does not appear from the complaint that any of the parties to this action are infants. Even if it did so appear, I think plaintiffs should be allowed to amend. The fourth ground of demurrer must be overruled.

The fifth and last ground of demurrer alleges that the complaint does not state facts sufficient to constitute a cause of action. This ground of demurrer must also be overruled. The form of plaintiffs' complaint is

objectionable, inasmuch as the names of parties, plaintiffs and defendants, are not set forth in the title. However, the requirements of the code will be satisfied if (as in this case) the names are intelligibly given in the body of the complaint. See 2 Wait Prac., 370.

It is therefore ordered and adjudged, that the third ground of defendants' demurrer be sustained, and that the first, second, fourth, and fifth grounds of said demurrer be overruled, with leave to plaintiffs, within twenty

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days from notice of the filing of *this order, to amend their complaint by making the eldest son or heirs of Stephen Pankey, the deceased trustee, parties, if they should be so advised.

Plaintiffs appealed upon the following exceptions:

I. There is error in holding that the eldest son or heir of Stephen Pankey is a necessary party in this case. II. There is error in holding that this is not a passive trust. III. There is error in holding that in this case the use was not executed. IV. There is error in holding that the estate was not vested in the cestuis que trust. V. There is error in assuming that the deceased trustee left either son or heir, no such statement appearing on the face of the complaint. VI. There is error in ordering a party to be made on demurrer unless the name, residence, or some other designation be given to enable the plaintiff to make such party. VII. The cestuis que trust had an equitable title at least, and could have compelled the trustee, if living, to make a conveyance, and it was error to hold the contrary or require the intervention of his son or heirs.

Messrs. Prince & Dargan, for appellants.

Messrs. Dudley & Newton, Townsend & Livingston, D. D. McCall, contra.

July 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. One Lucy Covington, late of Marlboro County, died intestate in 1882. Previous to her death, to wit, in December, 1852, being the owner of a certain tract of land, containing 208 acres, and described in the complaint, she executed a deed by which she conveyed all of her right, title, and interest in said land to one Stephen Pankey, in trust that he would permit her to enjoy the land during her natural life without rendering rent or hire, and after her death that the said trustee would convey the same to her children then living or to the children of such as might be dead, in equal shares, such child or children taking the share which its parents would have taken had such parent survived Lucy. Lucy

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left surviving her the plain*tiff, Harriet Huckabee, a daughter, and the numerous defendants named in the complaint as children

and grandchildren. The deed to Pankey as trustee was duly recorded, but the trustee predeceased the said Lucy, and no other trustee has been substituted. Stephen Pankey, the trustee, was the father of Lucy, and the land was conveyed to him with certain personal property, his heirs and assigns forever, in trust, as stated. The land is in the possession of the defendant, William T. Newton, and his family. William T. Newton is the husband of Mary, the widow of a deceased son of the said Lucy.

It is claimed in the complaint that on the death of Lucy, an undivided estate in the land vested in the remaindermen mentioned in the trust deed, and the action seeks partition of said land between the plaintiff and the other remaindermen. The defendants, William T. Newton, his wife Mary, and Rebecca Wright, demurred to the complaint on five grounds—the first and second on the ground of defect of parties in the omission of certain persons therein named; the third on the ground that ——— Pankey, the eldest son of Stephen Pankey, the deceased trustee, is not made a party; the fourth on the ground that the plaintiffs omit to state in their complaint whether they and the defendants have or own any other lands in common in the State of South Carolina besides the land described in the complaint; the fifth because the complaint does not state facts sufficient to constitute a cause of action.

His honor, Judge Witherspoon, who heard the cause, overruled all of the grounds except the third, which he sustained, holding that the eldest son of the trustee, or, if he be dead, the heirs of the trustee, should have been made parties; and he ordered that the plaintiffs have leave, within twenty days from notice of the filing of the order, to amend their complaint by making the eldest son or heirs of Stephen Pankey, the deceased trustee, parties, if they should be so advised. The plaintiffs have appealed on the ground that it was error on the part of the Circuit Judge to hold that the eldest son (or heirs) of Stephen Pankey was a necessary party in the case. This holding is alleged to be error for various reasons stated in the grounds of appeal, all of which will be considered in

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connection with the question as *to the necessity of making the eldest son of the trustee or the heirs of the trustee parties to the action. No exception has been taken by the defendants to the ruling of the Circuit Judge as to the other grounds in the demurrer, so that the only question before the court is that raised in the appeal of the plaintiffs above.

There can be no doubt that in contests over real estate where the fee is involved, that the holder of the legal title is a necessary party, otherwise the fee cannot be disposed of so as to be binding and effectual; and this applies as well to a trustee holding for

the benefit of others as to parties holding for themselves. Story Eq. Pl., § 207. And in cases where the fee is in a trustee and he be dead, if the estate be one of inheritance, the heirs or other proper representatives in the realty of the deceased should be made a party. *Ibid.*, § 211; *Leroy v. Charleston*, 20 S. C., 77.

This is not denied by the appellants. It is contended, however, that by virtue of the statute the trusts under the deed in question were executed, and that thereby the legal title to the land in dispute vested in the cestuis que trust upon the death of Lucy, all of whom are before the court. The case turns upon the soundness of this position. Did the statute execute the trust? It is familiar law upon this subject, that a trust is never executed so long as there is anything to be done by the trustee in the proper discharge of his duties as said trustee; or, as was said in *Bristow v. McCall* (16 S. C., 548), "where the trustee is charged with the performance of some duty in connection with the property, which cannot be performed except by the authority of the legal title vested in him, the statute has no application." In *McCaw v. Galbraith* (7 Rich., 74), where one W. made a will in which he devised certain lands to one M. in trust, to have and hold for the use and benefit of a brother of the testator, if alive at his death, then residing in Ireland, the legal title to remain in the said M. until such time as the said brother, then an alien, should become qualified according to the act of Congress to take and hold real estate, and when he became so qualified, the said M. was directed to execute to the said brother a valid conveyance in fee of said lands, the court, in discussing the question whether

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*this use was executed by the statute, said: "Not only is there a declaration that the legal estate shall be vested in the trustee, but there is the requirement of an act to be done by him, the conveyance of the estate in fee, which necessarily supposes the fee in him."

In the case before the court there is the requirement of a similar act to be done by the trustee after the death of Lucy, the life-tenant. He is required to convey land to her children then living, or to the children of such as may be dead, in equal shares and proportions, the child or children of such deceased child or children representing his, her, or their father or mother, or fathers or mothers, and taking the share or shares which such father or mother, or fathers or mothers, would have taken had they survived. Trusts in favor of married women, or to preserve contingent remainders, are never executed. *Jemey v. Laurens*, 1 Speers, 365. Here the remainders were contingent, and it was necessary that the legal title should remain in the trustee until the contingency should happen, which was to determine who should take; which being determined, the trustee

was directed to convey. This was an act to be done, and without which no title could pass. We do not think there was error in the Circuit Judge holding that this was not a passive trust, and that the use was not executed.

It is not necessary in a demurrer for defect of parties to give the names of those who should be joined. This, in many cases, would be utterly impossible. All that is necessary is to point out to the plaintiff the objection to his complaint in such manner as to enable him to amend by making proper parties. Story Eq. Pl., 543.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. *297

*ST. PHILIP'S CHURCH v. ZION PRESBYTERIAN CHURCH.

(April Term, 1885.)

[1. *Jury* ⚭13.]

An action (1) for the recovery of a lot of land, or, failing in this, (2) for an order limiting the use of such lot, involved in its first phase an issue of title to real estate, which could be tried only by a jury, a jury trial not having been waived.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 42; Dec. Dig. ⚭13.]

[2. *Corporations* ⚭438.]

It seems that upon the dissolution of a corporation (other than a moneyed, trading, or municipal corporation) by expiration of charter, all of its property not validly alienated before dissolution reverts to the grantors.

[Ed. Note.—Cited in *McAlhany v. Murray*, 89 S. C. 449, 71 S. E. 1025, 35 L. R. A. (N. S.) 895, Ann. Cas. 1913A, 1008.

For other cases, see *Corporations*, Cent. Dig. §§ 1769-1771; Dec. Dig. ⚭438.]

[3. *Corporations* ⚭444.]

Where a corporation, having no adopted seal, directed a conveyance to be made of a lot of land, and a deed was accordingly executed professing to be under the seal of the corporation, attested by the signature of its president, and was signed by such president, and a wafer was attached, which was intended to be the seal of the corporation. *Held*, that the wafer was the corporate seal to this deed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1779-1781; Dec. Dig. ⚭444.]

[4. *Corporations* ⚭37.]

The charter of a church, under act of the legislature, being about to expire, a petition was filed with the clerk for renewal, which petition, without fault of the petitioners, was not granted until two years afterwards. Meantime the legislative charter had expired. *Held*, that the clerk's charter was a renewal of the original charter, and related back to the filing of the petition, and prevented the property of the corporation from reverting to the grantors.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 105; Dec. Dig. ⚭37.]

[5. *Deeds* ⚭94.]

A lease for 99 years, perpetually renewable, having been made, with certain conditions attached, and subsequently a deed of conveyance of the same land executed between the same parties, for valuable consideration, reciting the lease, but without conditions. *Held*, that the

lease was merged in the conveyance, and that the grantees held the property freed of the conditions in the lease.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 266; Dec. Dig. ⚭94.]

Before Kershaw, J., Charleston, March, 1884.

This was an action by the Protestant Episcopal Church of the Parish of St. Philip, in Charleston, in the State of South Carolina, against the Zion Presbyterian Church of Charleston, of Charleston County, commenced September 30, 1882. The opinion of this court sufficiently states the case. The Circuit decree was as follows:

This action was tried by the court without a jury on the pleadings, the testimony taken before the master, and the argument of counsel. There were numerous objections made to the testimony, which I do not deem it necessary to consider severally. It is suffi-

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*cient to say that few of the matters objected to (if any) involved facts which in any way affect the result I have reached, and I do not consider any of them well taken.

It will be noticed that plaintiffs' title to the land is controverted by the answer. This raises an issue which can only be determined by a jury trial, unless waived by the defendants. It has not been so waived. *Dewalt v. Kinard*, 19 S. C., 291. In so far, therefore, as plaintiffs seek to recover possession of the premises, they cannot have that relief at the hands of the court without a jury. In this view of the case it would not be necessary for me to pass upon the question of legal title as presented by the pleadings and the evidence. Lest, however, a different view may prevail elsewhere, I will proceed to give my conclusions in regard thereto.

I will premise by saying that the plaintiffs have established a perfect title in them at the time that the lots in question were conveyed to the Glebe Street Presbyterian Church, nor do I entertain a doubt that the law contended for by the plaintiffs is correct; that lands granted to a corporation, other than a moneyed or trading company, revert to the grantor on its dissolution by the expiration of its charter, unless there be a valid alienation during its existence. The doctrine is well stated by Chancellor Kent (2 Com., *282), thus: "Corporations have a fee simple for the purposes of alienation, but they have a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the incorporators may defeat the possibility of a reverter." And again, he says: "According to the old settled law of the land, where there is no special statute provision to the contrary, upon the civil death of a corporation, all its real estate remaining unsold reverts back to the original grantor or his heirs." 2

Com., *307. Says Mr. Blackstone: "A body politic may be dissolved, which dissolution is the civil death of the corporation, and in this case the lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall

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have the land *again, because the cause of the grant faileth. The grant is, indeed, only during the life of the corporation, which may endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life." 1 Bl. Com., 484.

It is not denied that this was the common law rule, but it is contended that it has generally been rejected in this country as to private corporations. The text writers, Angell & Ames, Dillon, Fields, and others, and even Chancellor Kent himself, are cited to this effect. Chancellor Kent in a note (2 Com., 307) says: "The rule of the common law has, in fact, become obsolete. It has never been applied to insolvent moneyed corporations in England. The sound doctrine now is * * * that the capital and debts of banking and other moneyed corporations constitute a trust fund for the payment of creditors and stockholders." "The rule of the common law in relation to the effect of dissolution upon the property and debts of a corporation has, in fact, become obsolete and odious. * * * Indeed, at this day, it may well be doubted whether, in the view at least of a Court of Equity, it has any application to other than public and eleemosynary corporations, in which it had its origin." Angell & Ames Corp., § 779, a.

Mr. Dillon says: "Since this doctrine has, in this country, been generally rejected as to private corporations, organized for pecuniary profit, and rests upon no foundation in reason or justice, it may perhaps be safely affirmed that it would not, on full consideration, be applied to the dissolution of a municipal corporation, by an absolute and unconditional repeal of its charter, or (if that may be done) to the case where the charter of such corporations is forfeited by a judicial sentence." (Dillon Mun. Corp., § 113.) Mr. Field says on this: "If, in the case of municipal corporations, a Court of Chancery will treat the corporation's assets as a trust fund in case of the dissolution of a corporation by legislative action, and will assume the execution of the trust, or see that it is properly executed, as has been noticed, the same rule ought to prevail in cases of private corporations for pecuniary gain, and the tendency of recent opinions seems to support this view; and to

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sustain the doctrine that the surplus *assets, after the satisfaction of the claims of creditors, and the payment of expenses, even in the absence of statutory provisions on the sub-

ject, belong to the stockholders; that lands conveyed to such a corporation for full consideration in fee do not revert to the grantor, and the doctrine of the old common law in such cases as to reversion and forfeiture of the corporate property, if applicable at all, is not applicable to private corporations for pecuniary emolument." Field Corp., § 491.

A number of cases is cited to sustain the doctrine so laid down, the most authoritative of which, perhaps, is that of *Bacon v. Robertson*, 18 How., 480 [15 L. Ed. 499], in which Judge Campbell says: "Modern legislation has modified the odious rule of the common law, that upon the dissolution of a corporation its remaining real estate unsold reverts to the grantor and his heirs, and the courts, in a similar spirit, hold that where a corporation is authorized to acquire a fee simple to lands belonging to private persons for public use, and such acquisition is had, and compensation accepted, no reversionary estate remains, but the property may be used for any purpose, or may be disposed of by the corporation." That was the case of a municipal corporation dissolved by a decree of the court, and there seems to be no doubt that upon the dissolution of the charter of a private moneyed corporation, or of a municipal corporation, by an act of legislature or judicial decree, the assets of such corporation will be applied to the payment of the debts of the corporation, and the remainder be divided among the stockholders.

Mr. Field says (§ 492): "This right of creditors and stockholders is based not only upon natural justice and manifest equity, but it has recently been held that it is protected by the provisions of the constitution of the United States." The principal case referred to there is that of *Curran v. Arkansas* (15 How., 305 [14 L. Ed. 705]), which is a very instructive authority on this point reviewing the previous cases. *Curtis, J.*, delivering the opinion of the court, quotes from *Mumma v. Potomac Company* (8 Pet., 281 [8 L. Ed. 945]), where it is said, "The obligation of these contracts survives, and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of bona fide purchasers, but is still held in trust for the com-

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pany, *or for the stockholders thereof, at the time of its dissolution in any mode permitted by the local laws." The learned judge then proceeds: "Indeed, if it be once admitted that the property of an insolvent trading corporation, while under the management of its officers, is a trust fund in their hands for the benefit of creditors, it follows that a Court of Equity, which never allows a trust to fail for want of a trustee, would see to the execution of that trust, although by a dissolution of the corporation the legal title to its property had been changed." *Id.*, 311.

These citations are sufficient to show what the common law rule is, and how far, and

upon what principles, it has been modified. It has been seen that at common law every grant of land to a corporation was a grant for the life of the body politic. That it conferred a power of alienation, but was also coupled with a reservation of the reversion, if the land should not be aliened during the life of the corporation. A reversion is not a new estate, arising at the termination of the grant, but a remnant of the estate not granted. It is "the residue of an estate left in the grantor to commence in possession after the determination of some particular estate granted by him." 2 Bl. Com., 175. Whenever, under this law, there was a grant in fee of land from an individual to a corporation, there was left in the grantor this residuum of the estate, subject to be divested by an alienation during the existence of the corporation.

By an act of the colonial legislature, 1712 (2 Stat., 413, § 5): "All and every part of the common law of England," where the same was not altered by the English statutes therein made of force, or "inconsistent with the particular constitution and laws of this province" (with certain other specified exceptions), was made and declared to be "in as full force and virtue within this province as the same is, or ought to be, within the said kingdom of England." In the general statutes of 1872 (p. 767, § 10) and in the general statutes of 1882 (§ 2738) the same common law was continued of force. By this legislation the common law, as it existed in 1712, not inconsistent with the constitution, usages, and customs of the then province, and not since changed by statute, is made the law of South Carolina. By that law the reversion of lands conveyed in fee to a corporation re-

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mained in *the grantor—an estate vested and transmissible to his heirs by descent.

That this has continued the law in South Carolina has been recognized in several cases. *Elliott v. Morris*, Harp. Eq., 281; *Attorney General v. Society for the Relief of Elderly and Disabled Ministers*, 10 Rich. Eq., 605. In the last case the opinion of the Court of Errors was delivered by Ch. Dunkin for all the judges. Supposing a case where a corporation would cease to exist, he says: "The real estate, if any, of the corporation would revert to the grantor."

I am now considering a question of the legal right to an estate. This estate is shown to be in the grantor upon the dissolution of a corporation holding lands. How, then, can I notice the questions of trust relied on to prevent the operation of the legal results in this case? Is there any power in a court of law to divest a vested legal estate in land in order to enforce an equity? I can find none. If the law in question is odious, as has been said, the legislature and not the courts should alter it. Until so altered it is the duty of a court of law to declare and enforce it. I admit that courts of law are called upon to

apply the maxims of the common law so modified and varied as to meet the novel exigencies of modern society; but where the common law recognizes the legal right to an estate to be in a particular person, under a particular state of circumstances, and that common law has been perpetuated by repeated and the latest statutory enactments, and recognized by the dicta of some of the ablest of our modern judges, I can find nothing to justify me in attempting to change the law in order to meet the requirements of a supposed necessity or expediency.

In saying this, I do not mean to intimate an opinion that in equity the rights of creditors and stockholders, if there were any, of a defunct corporation would not be enforced whenever brought properly before a court administering equity. I agree entirely that they would be, and believe that the cases cited fully sustain the equity doctrine in favor of creditors and stockholders, both here and in England. Such a doctrine is entirely consistent with the right of the grantor to the legal estate of reverter. To enforce such trusts, equity would follow the legal estate

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in the *hands of the grantor after he had recovered it at law. This is what is meant by the passage cited from *Curran v. Arkansas*, to the effect that a Court of Equity would see to the execution of the trust, "although, by a dissolution of the corporation, the legal title to its property had been changed." What "change of legal title," affected by a dissolution, can here be meant but the reverter to the grantor?

I think, however, that this doctrine of equity would not go beyond securing the creditor and stockholders of a trading or moneyed corporation. So far as I am aware, it has never been extended further than this except in the case of a municipal corporation. There are no stockholders in a religious or charitable corporation, and here the equitable relief in such cases would seem to be confined to the case of creditors of necessity. How could equity administer the assets of a corporation like this, after it was dissolved, for the benefit of the individuals composing the congregation? No such instance has been brought to the notice of the court, and it seems to me that the authorities relied upon to maintain the doctrine are all cases of corporations connected with trades, except alone the case of a municipal corporation when it had been decreed forfeited by the courts.

Much more might be said in support of the views I have here expressed, but I think what I have already said sufficient to indicate my reasons for the opinion I have formed.

While, however, I am with the plaintiffs on this point of law, I am of opinion that it cannot avail them here, because the premises in question were duly conveyed by the Glebe Street Presbyterian Church to the Zion Pres-

byterian Church, by the deed of conveyance of May 10, 1866; and the charter rights of Zion Presbyterian Church were continued by their recharter on September 4, 1880, under the act of 1874. The sufficiency of the deed of alienation has been questioned, on the ground that the seal thereto was not duly proven to be the seal of the corporation. A wafer was used for a seal, but that is a sufficient seal, if so intended. *Relph & Co. v. Gist*, 4 McCord, 267. That it was so intended in this case is to be derived from the circumstances that the corporation authorized the deed to be made by the president; that there

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was no regular corporation seal, and *that this wafer was affixed to the deed, signed by the president, and tested by the words "witness the seal of the said Glebe Street Presbyterian Church," attested by the signature of its president, &c.

Says Mr. Fields: "On general principles, any mode of impression which would answer for private seals, in the absence of other statutory regulations, would be good in the case of corporation seals." § 283. "It may appoint an agent to convey by resolution not under seal." §§ 283, 285. And "the common seal of a corporation affixed to an instrument purporting to be executed by the proper agent, makes it a specialty where such an instrument is required, and has the same effect as if executed in a like case by a natural person." *Ibid.* It is immaterial what is used as a seal when an impression is required, "provided it is something adopted by the corporation, or by its authorized agent, and is placed upon the instrument by the proper agent, or even by his directions." *Ibid.*, § 287. "When executed by the proper agent or officer of the corporation, and sealed, though by the impression of the common desk seal of a merchant, it will be presumed to be the seal of the corporation until rebutted by competent evidence." *Ibid.*

It is said in *Angell & Ames on Corporations*, § 218: "We see no reason, unless the act of incorporation expressly provides what the common seal shall be, why the substitute allowed for the private seal of an individual should not be allowed for the seal of a corporation." "In a note to section 288 of Mr. Fields' work it is said, a vote authorizing a committee to sell land empowers them to make the necessary deeds in the name of the corporation, and if the committee consists of several, who all sign their names, only one seal is necessary." *Decker v. Freeman*, 3 Greenl. [Me.] 338. Authority to make a deed would imply power to adopt a seal where no regular corporate seal has been shown to have been adopted by the body.

I therefore think the deed sufficient on this ground. But after possession for so long a time under the deed, without any disaffirmance on the part of the corporation, the act of the agent would be considered as having

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been affirmed and the corporation *would be bound. If the deed was good as against them, it would bind all other persons.

As to the effect of the renewal of the charter of the Zion Presbyterian Church, of Charleston, I will assign a few reasons why I have held it sufficient to continue the chartered rights of the defendants. In regard to corporations of this class, the act of 1874 delegated to the clerk full power to grant charters in the mode therein prescribed. It is conceded that, on the creation of a new corporation, upon the dissolution of an old one, the title to the lands belonging to the old corporation does not revive in the new, except as against the State. "In England it would require an act of parliament to revive the title as against the original grantor, or his heirs, but it would be at least questionable whether any statute with us could work such an entire renovation, because vested rights cannot be divested by statute." 2 Kent, *309. I think this cannot be questioned.

The point under consideration, therefore, depends upon whether there was a renovation of the Zion Presbyterian Church, of Charleston, or was it the creation of a new company after the dissolution of the old? The petition was signed by the president and secretary and eight other members of the corporation, and asked for a charter for the Zion Presbyterian Church, of Charleston, under the provisions of the act of 1874. Notice was published in the *News and Courier*, a gazette published in Charleston, December 9, 1878, that a petition had been filed with the clerk of the court for Charleston County for the renewal of the charter of the Zion Presbyterian Church, of Charleston, S. C., pursuant to act of assembly approved February 20, 1874. This proceeding to obtain a recharter under the act of 1874 was commenced before the expiration of the former charter. The clerk was not authorized by the act to renew, but to grant charters, yet the granting of a charter to a corporation by the same name, and with the same powers, before the expiration of the former charter would be but a renewal of the charter in effect. I think, therefore, that nothing can be gained by the contention that this is not a renewal, but a new charter. A corporation may lay down its old charter and take a new one without discontinuing the corporate life or the corporate

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privileges, even though the *funds be appropriated to other and different objects under the new charter. *Attorney General v. Clergy Society*, 10 Rich. Eq., 604.

The charter here expired before the actual issue of the new charter by the clerk. The act required the notice to be published thirty days before the time of the application, and if no objection should be made within ten days thereafter, the clerk was required to grant the charter. Under the notice given

here, if no objection was made on or before January 19, 1879, the petitioners were entitled to have their charter. It was the duty of the clerk to issue the charter on January 20, 1879. It was not, in fact, issued until September 4, 1880, after the old charter had expired by its own limitation. If the clerk had done his duty under the act, the rights of the corporation would have been preserved. Are they to be defeated by his omission of duty? I think not. The new charter, in my opinion, relates back, and will be treated as taking effect from the day when the corporation was entitled to have the charter issued under the act, and it operated, therefore, to continue the corporation with all its previous powers, as in the case of a sheriff's deed, which relates back to the sale so as to protect the possession of the purchaser. *McCall v. Campbell*, MSS, Dec.; *Kingman v. Glover*, 3 Rich., 27 [45 Am. Dec. 756]; *Bank v. Manufacturing Co.*, 3 Stroh., 192 [49 Am. Dec. 640]. Upon the same principle, the charter here should protect the corporation from the forfeitures consequent upon a dissolution under the circumstances.

There can be no doubt of the intention of the corporation to renew and continue their corporate powers by the new charter, and it is said always to be a question of intention where a corporation takes a new charter. *Angell & Ames on Corporations*, § 780. Nor do I think it material that the clerk added to the name of the corporation the words "of Charleston County." See *Fields on Corporations*, § 24. I conclude, therefore, that plaintiffs have not established a legal right to recover possession of the premises.

It remains to consider the right of the plaintiffs to the equitable relief demanded, to wit, a restraining order to confine the defendants to the use of the property, in accordance with

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the trusts and conditions contained in the original lease of the same to Caldwell and others. It is only upon this ground that plaintiffs seek to restrain the defendants, and not because the proposed use of the premises injure them as owners of adjacent lots and tenements.

I fail to see how the trusts of the lease attach to the deed of release. I am of opinion that the effect of the conveyance to Glebe Street Church of the fee of the land destroyed the previous estate held by them as lessees; that the two estates merged, and that the conditions annexed to the lease were extinguished. Where two estates meet in the same person, without any intermediate estate, the less is merged in the greater. 2 Bl. Com., 177; 4 Kent, 100; *Mangum v. Piester*, 16 S. C., 330. If the feoffor or lessor release to feoffee or lessee all conditions or all demands in the land or confirm the estate of the feoffee, without condition by either of these means, the condition is destroyed forever. *Shep. Touch.*, 158. Though all

conditions are extinguished by merger of the particular estate with the reversion at law, in equity trusts are preserved. 4 Kent, 102. But if the trust estate and the legal estate unite in the same person, the trust is extinguished. 2 Wash. Real. Prop., 470. The equitable estate is merged in the legal. *Ibid.* For no man can be a trustee to himself. *Hill Trust.*, 25; *Lewin Trusts*, 16.

Here the plaintiffs claim that there was a trust or a condition as to the user of the land which they had an equitable right to have enforced by injunction. Such a trust or condition was annexed to the lease, but when they conveyed the fee to the lessees the trust was at an end, because the conveyance was without qualification or condition, and accompanied by the usual warranties. The recital does not qualify the deed in any particular. Its office was only to trace the history of the transaction, and to describe the relations of the parties in regard to the property and to each other, leading up to the grant, which was absolute in its terms. Deeds are to be taken most strongly against the grantors, and if the form of the conveyance is absolute, as here, nothing is to be taken as intended that is not plainly expressed in the deed.

Holding these views, I am led to the con-

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clusion that plaintiffs have no right of action upon any of the grounds claimed. It is needless to consider any other questions made in the case, since the result would not be changed thereby.

It is therefore ordered, adjudged, and decreed, that the complaint be dismissed, and that the plaintiffs pay the costs herein.

Both the plaintiffs and defendants appeal from the foregoing decree, upon the following exceptions:

Plaintiffs' Exceptions.

1. Because his honor erred in holding as follows: "It will be noticed that plaintiffs' title to the land is controverted by the answer. This raises an issue which can only be determined by a jury trial, unless waived by the defendants. It has not been so waived. In so far, therefore, as plaintiffs seek to recover possession of the premises, they cannot have that relief at the hands of the court without a jury."

2. Because his honor erred in holding that "the premises in question were duly conveyed by the Glebe Street Presbyterian Church to the Zion Presbyterian Church by the deed of conveyance of May 10, 1866," and that the same was an alienation. And that "the charter rights of Zion Presbyterian Church were continued by their recharter on September 4, 1880, under the act of 1874."

3. Because his honor erred in holding the said deed of May 10, 1866, to be the deed of the corporation and sufficient as such.

4. Because his honor erred in holding as

follows: "But after possession for so long a time under the deed, without any disavowance on the part of the corporation, the act of the agent would be considered as having been affirmed, and the corporation would be bound. If the deed was good as against them, it would bind all other persons."

5. Because his honor erred in holding that the charter granted by the clerk of the court on September 4, 1880, to the defendants, "The Zion Presbyterian Church, of Charleston, of Charleston County," did not create a new corporation, but was a renovation or a renewal or a continuance of the corporation

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known as "the "Zion Presbyterian Church, of Charleston," with all its previous powers and rights.

6. Because his honor erred in holding that "plaintiffs have not established a legal right to recover possession of the premises."

7. Because his honor erred in holding that the trusts of the lease from the plaintiffs to John Caldwell and others did not attach to the deed of release, but that the conditions annexed to the lease were extinguished and the trust at an end, and that the recital does not qualify the deed in any particular.

8. Because his honor erred in concluding that "plaintiffs have no right of action upon any of the grounds claimed," and in dismissing the complaint.

Defendants' Exceptions.

That the court erred in holding that "lands granted to a corporation other than a moneyed or trading company revert to the grantor on its dissolution by the expiration of its charter, unless," &c. This ancient right of reverter, it is submitted, is in this State "obsolete and odious"; or, if existing at all, exists only as to corporations purely public or eleemosynary, and churches or religious corporations are neither.

Messrs. McCrady, Sons & Bacot and C. R. Miles, for plaintiffs.

Messrs. Buist & Buist, A. G. Magrath, and H. E. Young, for defendants.

July 22, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The contest in this case is in reference to a certain lot of land with a church edifice thereon, located in the city of Charleston. It is admitted that the land originally belonged to the plaintiff, and the present contest has grown out of the following facts and circumstances.

The plaintiff is, and has been for years, a body politic and corporate, under the laws of this State. In May, 1847, it conveyed the land in dispute, by indenture of lease, to John Caldwell and others, the survivor or survivors of them, and their assigns for a term of ninety-nine years, with the privilege

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of a renewal of the "same for a like period,"

and so on from time to time forever, the same being made upon the consideration and agreement therein set forth, that the grantees or their assigns should, within a reasonable time after the execution of said indenture, erect upon the premises granted a Presbyterian church, and that the said lots shall be used for no other purpose whatever other than for the erection of the said Presbyterian church, and that in case of any attempt on the part of the said grantees or their assigns to convert the said lots granted to any purpose whatever other than those therein declared, then and thereafter it should be lawful for the grantor to re-enter and the same to have again and re-possess, as in their first and former estate, right, and title; and further, that said grantee or assigns should apply to the legislature of the State at its next session for an act of incorporation, creating the said grantees, and such other persons as they should admit, a body politic and corporate under the name of the "Glebe Street Presbyterian Church * * * upon the creation of which, the said grantees should assign and set over the said lease unto the said 'Glebe Street Presbyterian Church.'"

In pursuance of this agreement application was made to the legislature, and by act of 1847, the free white persons who were then, or who might thereafter become, members of the Glebe Street Presbyterian Church of the city of Charleston, were duly incorporated under the name and style aforesaid, for the term of fourteen years, and thereupon the grantees aforesaid, to wit, Caldwell and others, in consideration of the agreement contained in the indenture aforesaid, did, on December —, 1847, convey and assign the said indenture of lease, and their rights thereunder to the said Glebe Street Presbyterian Church. Afterwards, to wit, in 1856, the plaintiffs, who still held the fee in said premises, for and in consideration of \$2,400 paid by the said Glebe Street Presbyterian Church to the plaintiffs, by deed, setting forth the indenture, and the assignment thereof, bargained, sold, and released the said premises unto the said Glebe Street Church and their assigns forever, warranting and defending the same against all persons whatsoever.

In 1858, the Zion Presbyterian Church of Charleston, defendant, was constituted a body politic and corporate for a period of

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*twenty-one years. This charter expired in 1879. In 1878, however, public notice having been given of their purpose to apply for a renewal of charter, the president, secretary, and other members of said church petitioned the clerk of the court for Charleston County for a charter, under the act of 1874. This petition, though filed before the expiration of the previous charter, was not acted upon until in September, 1880, when a charter was granted.

In 1866, the Glebe Street Church, its first charter having expired in 1859, at which time it had been renewed for a period of fourteen years, conveyed by deed, dated May 10, 1866, the said premises to the said Zion Presbyterian Church, reciting therein that the congregation heretofore worshipping in the said Glebe Street Church had united with the congregation of white persons worshipping in the Zion Presbyterian Church, and that the two had agreed to form one congregation, and that all church property standing in the name of the Glebe Street Church should belong to the Zion Church, the said Zion Presbyterian Church having assumed the payment and discharge of the liens upon said land. The Zion Presbyterian Church took possession, under this deed, and continued in possession from its date until the ——— day of ———, when it contracted to sell the same to certain trustees of the African Methodist Episcopal Church, known as the Mount Zion African Methodist Episcopal Church, and to execute a conveyance thereof on the payment of the purchase money, in pursuance of which contract the said trustees were duly let into possession.

Under these circumstances the action below was commenced. First, for the recovery of the premises, but in the event that such recovery could not be had, then that the defendant be enjoined from executing a conveyance of said premises to the said African Methodist Episcopal Church, or to any one else, contrary to the alleged conditions upon which the defendants held the property. This action was founded upon the following propositions contended for by the plaintiffs: 1. That the lease by plaintiff Caldwell and others, and the subsequent conveyance by the plaintiff to the Glebe Street Church, should be construed together, and that when thus construed, the conditions in the lease should

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*attach to the conveyance, thereby preventing said Glebe Street Church from conveying the property to any other use than for a Presbyterian church, on pain of forfeiture and reversion to the plaintiff. 2. That the Glebe Street Presbyterian Church made no alienation during its corporate existence of the property in question, and its charter having expired in 1873, and not being a moneyed or trading corporation, said property reverted to the plaintiff, the original grantor. 3. Admitting that the deed to the Zion Church, in 1866, was properly executed, and having been executed before the expiration of the charter of the Glebe Street Church, thereby prevented a reversion of said expiration, then it is claimed that the charter of the Zion Presbyterian Church has expired without and before alienation, and on that account a reversion has taken place.

The case was heard by his honor, Judge Kershaw, without a jury, upon testimony taken before the master, and reported to the

court. His honor held, first, that inasmuch as the action in one of its phases involved title to land, an issue was raised thereby which could be tried by a jury only, unless a jury trial had been waived; and there being no waiver, he could not hear that portion of the case. He, however, discussed the questions involving the title and then proceeded to the consideration of the right of plaintiff to the equitable relief demanded, to wit, a restraining order intended to confine the defendants to the use of the property, according to the trusts and conditions contained in the original lease to Caldwell and others.

On the question of the right of reversion to the plaintiff, he held that the Glebe Street Church, to whom the plaintiff had conveyed, being a corporation other than a moneyed or trading corporation, that reversion would take place to the plaintiff on the dissolution of the said Glebe Street Church by expiration of its charter, unless before that time a valid alienation of the land had been made by said Glebe Street Church corporation, holding it to be a general principle of law, that upon the expiration of the charters of all corporations, causing their dissolution, other than moneyed, trading, or municipal corporations, the property thereof reverts to

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the grantor, unless before the dissolution a valid alienation has been made, subject, however, to the rights of creditors and stockholders, if any.

He held, further, that a valid alienation of the property in question had been made by the Glebe Street Church during its corporate existence to the defendant, the Zion Presbyterian Church, to wit, by deed in 1866; and therefore notwithstanding the subsequent dissolution of the Glebe Street Church corporation by expiration of its charter in 1873, no reversion could be claimed, alienation having been made before that event. He held, further, that there had been no such dissolution of the Zion Presbyterian Church by expiration of its charter as to entitle the plaintiff to a reversion on that ground. And holding, further, that the original lease to Caldwell and others, which had been assigned to the Glebe Street Church, had become merged in the fee simple, which said church afterwards obtained from the plaintiff, thereby vacating and annulling the conditions of said lease, he dismissed the complaint with costs.

Both parties have appealed, the plaintiff assigning error to all of the rulings above, except the second, and the defendant contesting the second, claiming that the ancient right of reverter in this State "is obsolete and odious," or, if existing at all, it exists only as to corporations purely public and eleemosynary.

We concur with the Circuit Judge in all of his rulings, and he has so fully and ably discussed the principles upon which these rulings were based, sustaining them, as he does,

by the authorities cited in the decree, that we might content ourselves with simply referring to and adopting the decree as our own, which we would do, except for the fact it would be best, perhaps, that at least the distinct points made and decided should appear in this opinion.

The action below was intended to accomplish one of two purposes, to wit, first, the recovery of the land in dispute, and, second, failing in the first, a restraining order as demanded in the complaint. The first was a case at law, involving an issue of title to real estate, and nothing more. This was a jury case, and the Circuit Judge was certainly right in holding that, in the absence of waiver, he could not try it, and he distinctly states that there was no waiver. *De Walt v. Kinard*, 19 S. C., 291.

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*As to the second, to wit, the right of reverter in a case of this kind. While the view which we have taken as to the third ground of appeal removes this question from the case to a great extent, and therefore renders its adjudication unnecessary here, yet without committing the court to a final conclusion, we will say that we think the authorities referred to by the Circuit Judge fully sustain his decree thereon, and we need not do more, therefore, than simply cite these authorities. See 2 Kent, 282, 307; 1 Bl. Com., 484; *Angell & Ames Corp.*, § 779n; *Dill. Mun. Corp.*, § 113; *Field, Corp.*, § 491; *Bacon v. Robertson*, 18 How., 480 [15 L. Ed. 499]; *Elliott v. Morris*, Harp. Eq., 281.

The judge, however, held that the plaintiffs could not avail themselves of this doctrine in this case, because the Glebe Street Church, before the expiration of its charter, had conveyed to the defendant. It is not denied that if this be true, it would defeat the reversion, but it is denied that a valid deed had been executed by the Glebe Street Church to the defendant. So that the only point in this question is, was there a valid deed executed by the Glebe Street Church in 1866 to the defendant? There is no doubt that a paper purporting to be a deed between these parties and conveying this land was executed and delivered at the time stated, the date of the execution being years before the expiration of the charter of the Glebe Street Church. The deed was drawn by a distinguished attorney of Charleston, who also witnessed it. It was recorded, was regular in form and execution in every respect, except that instead of having an established corporation seal impressed, the seal used consisted of a wafer attached. The judge held that this seal was sufficient, if so intended, citing *Rolph & Co. v. Gist*, 4 McCord, 267; *Angell & Ames Corp.*, § 218; *Decker v. Freeman*, 3 Greenl. [Me.] 338. Whether it was so intended was a question of fact which the judge, upon the evidence,

solved in favor of the deed. We think the testimony sustains his conclusion.

Next, The plaintiff contends that defendant's charter having expired since its purchase of the land, with no alienation before said expiration, that reverter has taken place on that account, and therefore their action should have been sustained. The Circuit Judge overruled this position, and we think,

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upon the facts, *that he was right. The defendant's original charter was obtained in 1858 for a term of twenty-one years. In 1878, the year before the expiration of this charter by its own terms, the church, through its officers and other members, gave notice of its purpose to apply to the clerk of the court, under the act of 1874, for a renewal of its charter, and filed a petition to that end. This petition, though thus early filed, was not acted upon by the clerk until 1880. Why this delay, is not stated, but it does not seem to have been the fault of the church, nor does it appear that the church had abandoned its right to the renewal of which notice had been given. The clerk, however, acted in 1880, and granted a charter. We think with the Circuit Judge, that under the circumstances, and in analogy to the execution of a sheriff's deed relating back to the sale when executed after the sale, and protecting a defendant in possession, that this charter should relate back to the notice and petition. *McCall v. Campbell*, MSS, Dec.; *Kingman v. Glover*, 3 Rich., 27 [45 Am. Dec. 756]; *Bank v. Manufacturing Co.*, 3 Stroh., 192 [49 Am. Dec. 640]. The granting of this new charter was held by the Circuit Judge to be in effect a renewal of the old, and therefore the property of the old was still preserved and retained. See *Attorney General v. Clergy Society*, 10 Rich. Eq., 604; *Ang. & Ames Corp.*, § 780.

Lastly, Did the Circuit Judge err in holding that the conditions of the lease did not attach to the subsequent deed conveying the land in fee to the Glebe Street Church? We think not. That deed was absolute on its face and in its terms. No such conditions as those appearing in the lease were incorporated in the deed. It was executed upon a further and valuable money consideration, the sum of \$2,400, which was paid. It conveyed the fee, and we can see no reason why, under the doctrine of merger, the lease was not "drowned" in the higher estate the moment the Glebe Street Church received the deed and took possession thereunder. It was said in *Mangum v. Piester* (16 S. C., 330), sustained by *Blackstone and Kent*, that where two estates meet in the same person, without any intermediate estate, the less is merged in the greater. Here these facts occurred, and merger must have been the result.

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*It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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ROLLINGS v. EVANS.

(April Term, 1885.)

[1. *Homestead* ¶159.]

Judgment was obtained against a married man, after which his wife died, leaving no one residing with him except an adult married son, whose wife was living apart from her husband. Levy was then made, and a homestead and chattel exemption laid off, to both of which exceptions were taken by the creditors. Pending these exceptions, the debtor again married. *Held*, that the defendant was "the head of a family" at the date of the levy and was therefore entitled to both homestead and chattel exemption.

[Ed. Note.—Cited in *Moyer v. Drummond*, 32 S. C. 168, 10 S. E. 952, 7 L. R. A. 747, 17 Am. St. Rep. 850; *Gray, Sullivan & Gray v. Putnam*, 51 S. C. 101, 28 S. E. 149; *Ex Parte Goldsmith*, 68 S. C. 538, 47 S. E. 984.

For other cases, see *Homestead*, Cent. Dig. § 311; Dec. Dig. ¶159.]

[2. *Homestead* ¶95.]

Moreover, the debtor, at the hearing below, was entitled to his homestead as the head of a family by virtue of his second marriage before sale had, even if not such head at the time of the levy previously made.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 144; Dec. Dig. ¶95.]

[3. *Homestead* ¶66.]

The finding of the Circuit Judge, that the homestead laid off was not excessive, affirmed.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 93, 96, 97; Dec. Dig. ¶66.]

Before Kershaw, J., Sumter, October, 1884.

The case is fully stated in the Circuit decree, which was as follows:

This case was heard upon exceptions taken by the plaintiff to the return of the commissioners setting apart the homestead of the defendant.

At the October term, 1883, the plaintiff obtained his judgment; in December thereafter the defendant's wife died, leaving the defendant and an adult son, who had always resided in the family, occupying the homestead. On January 30, 1884, the plaintiff lodged and levied an execution on the land upon which was situated the family homestead. On February 12 thereafter the defendant applied for the homestead, and the same was set aside for him by commissioners duly appointed for that purpose on February 16. On May 1, 1884, the defendant married a second time, and continued to reside upon the homestead with his wife and adult son as before.

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*The plaintiff excepted to the assignment of the homestead on two grounds: First. Because the defendant was not a married man, or the head of a family, at the time of the aforesaid levy of the homestead. Second. Because the assignment was excessive, in that the land assigned was worth more than one thousand dollars. I shall consider these objections in their order.

1. Was the defendant the head of a family at the time of the levy of plaintiff's exe-

cution? He was not then a married man, but a widower, residing on the homestead with an adult son, who had always resided with him as a part of his family. When the judgment of plaintiff was obtained and entered, he was the head of a family and entitled to the homestead. If he continued to be the head of a family after the death of his then wife, by reason of his son continuing to reside with him as before, he continued to be entitled to a homestead up to the time of the levy and assignment.

In the first place, I premise by saying that I cannot agree with the remark of Chief Justice Moses, in *Garaty v. Du Bose* (5 S. C., 500), that the maxim that statutes in derogation of the common law are to be strictly construed, is to be applied to a constitutional provision like this, though the observation may have been well enough, qualified as it was. Mr. Cooley says, "There can seldom be either propriety or safety in applying this maxim to constitutions." *Con. Lim.*, 74. I may also remark that the policy of the people of this State has been demonstrated to be a liberal one in this regard, for when the courts have limited it by construction, the constitution or the statutes have been amended to establish the right so questioned.

In the case just cited, it is said "that the exemption was intended not alone as a benefit to the head of the family, but to those whose relations to the head of the family demand, on the one hand, support and protection, and on the other require a contribution by the aid of their labor to the maintenance and conduct of the general establishment to which they belong. This would naturally be the case between parent and minor children, who, in terms, are embraced within the exemption. It would not follow that, although the head of a family might not be a parent, the one substituted as a head would lose the

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favor of the *provision, for it would extend to one having under his roof those so connected with him by the ties of residence and association as to become part and parcel of his household, changing their domicile with him, and having no residence but that which they enjoy under his favor. It is not necessary to constitute a family that the relation of parent and child must exist."

The definition of family, as given by Mr. Webster, is quoted there as follows: "The collective body of persons who live in one house and under one head or manager." In *Bradley v. Rodelsperger* (3 S. C., 226), it was held that a childless widow might be the head of a family, the court saying, "There is no ground for holding that a person without children cannot occupy the position of head of a family." In *Moore v. Parker* (13 S. C., 487), it is said, "An unmarried man is not the head of a family, unless made so by having children, or perhaps other members of a

household, around him constituting a family." This was a remark of the Circuit Judge, which the Supreme Court affirms, saying, "The petitioner, though childless, might nevertheless have been the head of a family." This, of course could only mean that a family may consist of other persons than a wife or child, if dwelling together as members of the same household and under the protection of the same head.

It is the family relation, therefore, which constitutes the family, and the mere attainment of his majority by a child who continues under the protection and control, and resides under his roof, laboring for the father, as he did during his minority, does not, in my opinion, change the family relation between them. Says Chancellor Kent (2 Com., 190): "A father's house is always open to his children. The best feelings of our nature establish and consecrate this asylum. Under the thousand pains and perils of human life, the home of the parents is to the children a sure refuge from evil and a consolation in distress. In the intenseness, the lively touches, and unsubdued nature of parental affection, we discern the wisdom and goodness of the great Author of our being and Father of mercies." It is this principle of nature, nourished by religion, which constitutes home, the best foundation for human society, social and political; the unit of the State; the

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soundest basis upon which it can rest; *the strongest safeguard against anarchy, agrarianism, and revolution.

To preserve this sacred institution for the good of the State is the true object of these exemptions—to prevent the dispersion of families and the severance of those sacred ties which make the home the great conservative feature of a republican state. The framers of the constitution never could have contemplated the destruction of the family as soon as the children became of age, and the father bereft of the comfort and solace and support of the wife of his love and mother of his children, and leave him desolate and a wanderer in his old age. The principles involved in these questions are higher and more important than those affecting merely the rights of property. They cannot be safely settled by analogies derived alone from the business relations of men. They are to be construed in no narrow, technical spirit, but upon broad, liberal, and humane principles.

Hence it is that it has been decided that a homestead, once duly acquired by a man, the head of a family, is not lost by the subsequent death, marriage, and removal of all the family but himself. *Kessler v. Draub*, 52 Tex., 575 [36 Am. Rep. 727]. In *Silloway v. Brown* (12 Allen [Mass.] 34), the husband was held entitled to the homestead when the wife died and the children moved away. *Doyle v. Coburn* (6 Allen [Mass.] 71) and *Woods v. Davis* (34 Iowa, 264), are cases

where the wife was divorced and given the custody of the children, yet the husband was held entitled to the homestead. In the latter case the court said: "Although a homestead estate cannot be acquired except by the head of a family, yet when once acquired and still occupied by him, it has been held not to be defeated or lost by the death or absence of his wife and children." This was under a statute which limited the exemption to a "householder" "having a family." *Thomp. Homest.* § 72.

It is there said that in a late case in Georgia the opinion is expressed by Jackson, J., that it was not the intention of the framers of the constitution of that State, in establishing the provision guaranteeing the homestead exemption, to break up a man's family just as soon as his wife died and his children became of age. If they had all left him,

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their voluntary departure would have *broken it up; if they remained with him, especially daughters, dependent upon him as much when twenty-one as when twenty, they would still be in the sense of the constitution, a legitimate and component part of his family, and he would be entitled in law to a home for himself as their head, and for them as his household. *Blackwell v. Broughton*, 56 Ga., 392. See, also, *Taylor v. Boulware*, 17 Tex., 74 [67 Am. Dec. 642].

There are conflicting decisions, and the statutes are not all alike, but the decisions cited are all more or less applicable to the case at bar. Upon the whole, therefore, I conclude that the defendant did not lose the right of homestead at the death of his wife. I have not noticed the fact that the son of the defendant who resides with him is a married man, and that his wife does not live with him, because I do not consider that this circumstance can affect the view I have taken unfavorably. If the son's wife lived with him as a part of the defendant's family, and especially if they had children, there would no longer be a doubt that the defendant would be entitled to the homestead as the head of the family. The wife may at any moment return to the house where the husband resides, and if she has children, bring them with her. In this case it does not appear that the son has no children.

II. If, however, I am in error in the view I have taken above, and the defendant was not entitled to the homestead at the time of the levy, is he now entitled? The case of *Pender v. Lancaster* (14 S. C., 25 [37 Am. Rep. 720]) is relied on by the plaintiff as authority to support the negative. In that case it was held that where an execution debtor marries after a levy upon his personal property, but before a sale thereof, he does not thereby become entitled to the homestead exemption. The decision there is placed upon the ground that the levy gave the plaintiff a lien or special property in the chattel levied

and seized upon, which was prior in time to the accrual of the right of homestead, and according to the maxim, *qui prior est in tempore, prior est de jure*, the right of homestead arising subsequently could not divest the prior right of the plaintiff. The learned judge cites no authority for the view taken by the court, but rests it simply upon the ground stated.

It is stated in the opinion that there is no

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difference in the nature of the liens acquired by the levy of an execution of personal property, and that acquired upon real property by the entry of judgment, inasmuch as both are amenable to the rule that rights must be determined according to their respective priorities. This observation of Justice Willard is only a part of the reasoning adopted, and not a point decided, and, therefore, may, without presumption, be inquired into by a Circuit Judge. With all deference, I think there is a material difference between the effect of a levy of execution upon personal property, and an entry of judgment, creating a lien on real property.

The levy of an execution on personalty conveys a special property in the chattel seized, and transfers the possession to the sheriff. He may have an action to recover the possession, even against the owner, if he detains it after levy. The property of the owner is divested, and the sheriff may sell the chattels at any time, even after he has gone out of office, if not restrained by statute. *Gibbes v. Mitchell*, 2 Bay, 122. "When a sheriff levies upon personal property, it becomes his own for all legal purposes. He can maintain an action for it, even against the debtor himself, at any time till it is sold." *McClintock v. Graham*, 3 McCord, 243. Goods left in the hands of the defendant after levy is a continuance of the possession of the sheriff. *Moss v. Moore*, 3 Hill, 278. "Though it is clear that the seizing and levying of goods and chattels, by operation of law, vests the property in the sheriff, yet it is very different with respect to real estate. It shall remain the property of the defendant in the suit till actually sold." *Sims v. Randall*, 2 Bay, 524; see, also, *Bank v. Manufacturing Company*, 3 Strobb., 191 [49 Am. Dec. 640].

The remark of Judge Willard would seem to intimate an opinion that the lien of a judgment attached to land at a time when the defendant was unmarried, would prevail against the claim of a homestead where the defendant afterwards married before any steps were taken to enforce the judgment. That proposition would not now be maintained, since it has been decided otherwise in the case of *Chafee & Co. v. Rainey*, 21 S. C., 11. In that case the defendant was a married man when the judgment was entered, but became a widower and married again before the levy. He was held entitled to the home-

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stead. Here there was a levy made while

the defendant was still a widower, but he married again after the levy and before the sale. As has been said, a levy on lands under an execution does not transfer any right of property in the land. The title remains in the defendant just as before. The only effect of the levy was to give the sheriff a power of sale. The plaintiff acquired no new rights in regard to the land. The circumstance, therefore, of a levy having been made before the marriage in this case does not distinguish it in principle from the case last cited, where the levy was made after the second marriage of the defendant.

The exemption allowed by the constitution is from attachment, levy, or sale of the homestead. The protection is against a sale, as much as against a levy, or an attachment. If, at the time of the levy, there was no right of homestead, the levy would be good; but if, after a valid levy, there arose the circumstances which would entitle the defendant, as the head of a family, to the homestead, the sale would be invalid. The sheriff is required, before selling the real estate of any head of a family resident in this State, to cause a homestead to be set off in the manner that is prescribed by law. Gen. Stat., § 1994. It is made his duty, "before selling," to ascertain whether there be the head of a family entitled to the homestead on the property levied on. The statute then proceeds thus: "Should any officer sell any real estate in violation of the provisions of this chapter, and of section 32, article II., of the constitution of the State of South Carolina, he shall be guilty of a misdemeanor, and shall be liable in damages to the party injured for all injuries by reason of his wrongful levy or sale." § 2003.

It cannot be denied that here is a debtor, resident on the land levied, who is also the head of a family at this time; how, then, can the sheriff proceed to sell the homestead, in view of the statute cited? The court has no power to repeal or modify the statute by refusing the claim of the defendant and directing the sale to proceed. Such a sale would be unlawful and therefore void. "If a statute inflicts a penalty for doing an act, the penalty implies a prohibition, and the thing is unlawful, though there be no prohibitory words in the statute." 1 Kent, 467. The sale of the homestead of a head of a family

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is as much prohibited as if the statute had expressly forbidden it, and the courts cannot give validity to such a plain violation of the statute law.

I therefore conclude that the defendant is, in any aspect of the case, entitled to his homestead.

III. But the assignment in this case appears to the minds of many witnesses to be excessive. There is a great conflict of opinion on the subject, and I find myself unable to decide the question of value. For the plaintiff, six witnesses, apparently disinter-

ested, testify that in their opinion the land and buildings assigned for homestead are worth from two to three thousand dollars, and one of them values it at three thousand five hundred dollars. The plaintiff, on oath, says he will give for the land assigned one thousand dollars and release his judgment against the defendant.

On the other hand, the defendant produces more than twenty witnesses, equally disinterested seemingly, residing in the neighborhood, who swear that the value of the property is from about seven hundred to a thousand dollars. The commissioners valued it at nine hundred dollars. The auditor, Captain Delgar, another witness, testified that it was assessed by the board of equalization at two dollars and fifty cents per acre, which is regarded as the value of lands in that neighborhood, and supposes, with buildings and improvements, it is worth from three to four dollars per acre. Col. Wm. J. Reynolds testifies that in the year 1880 the defendant offered to sell him the same land, with two hundred acres additional, for twelve hundred dollars, and he refused to buy, because he did not think it worth that amount; that he himself sold to defendant fifty acres of the land assigned as a homestead, for two dollars per acre; and he has lived within a mile of the place for fifty years, and that it is worth only nine hundred dollars. L. M. Smith, an intelligent and successful merchant and farmer, long residing in the neighborhood, testified that the defendant, in the year 1880, offered to sell him three hundred and seventy-four acres of the land, including the homestead, for twelve hundred dollars, one-half cash, and he refused to purchase, because he did not think the land worth the money.

What, then, is the duty of the court under

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these circumstances? *The commissioners are required by the statute to be sworn "to impartially appraise and set off by metes and bounds a homestead, not exceeding one thousand dollars in value." Upon exceptions filed to their return, as prescribed by the statute, "the court may, upon good cause being shown," order a reappraisement. If the evidence was such as to satisfy me that the homestead assigned exceeds in value the amount allowed by law, there would be good cause to set it aside. But the case presented is not that. It is a case of some uncertainty as to the value, but it is not shown that the commissioners erred in their estimate. Is that enough to justify the court in ordering a reappraisement? At first I inclined to that opinion but upon further consideration, I am forced to the conclusion that the mere difference of opinion as to the value, making a case of some doubt, is not enough to authorize me to set aside the return of the commissioners. It appears to me that in such a case the return must prevail.

In Alabama the principle is laid down that

"even if the freeholders appointed to allot the debtor's homestead by the statute of that State are to be regarded as officers of the court and subject to its supervision, which the court does not decide, their action should not be disturbed except in case of fraud, corruption, or irregularities seriously affecting the rights of one or both of the parties." *Thomp. Homest.*, § 666.

The case is analogous to that of commissioners in partition, of whom it was said by Chancellor Desaussure, in *Geer v. Winds* (4 Desaus., 86), that the partition of lands by the commissioners, residing on the spot, and possessing local knowledge of the property, was instituted for the benefit of the citizens. It was a species of domestic tribunal, similar in some respects to arbitration, and that their acts ought to be supported unless shown to be clearly erroneous and unjust; that the division made by the commissioners in the present case did not appear to be so erroneous as to induce the court to set it aside. Several of the witnesses certainly had stated that they thought it an unequal division; but one of them said he did not know that a better division could be made, and some of the witnesses acknowledged themselves incompetent judges; none of them were acting under the obligation of an oath when they examined

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the land, nor was their *attention drawn thereto particularly by any duty; whereas the commissioners were men of the highest character for general integrity, and they had a particular knowledge of the land in question. They were acting under the sanction of an oath, and made a very particular examination of the land; and Mr. Chapman swore he believed as fair a division of the land was made as could be made.

These remarks apply with equal force to the case now under consideration. The commissioners constitute a body created by law for the discharge of the particular duty which they have discharged under the solemn sanction of an oath. Their return is a finding of fact by a body charged by law with the performance of a certain duty which involves their ascertainment of the fact which they have found. Their finding, like that of a jury, must stand until it is overthrown by a preponderance of testimony. Here the preponderance is really on the side of the return. Of what avail would it be to commit the question to new commissioners? If, on a reappointment, the commissioners should vary in their finding as to the value from that found by the present commissioners, would not the same conflict of opinion be shown to set aside that return as has been brought here either to attack or sustain this return? The question is one of opinion, and can never be settled with mathematical certainty.

For these reasons, it is ordered and adjudged, that the exceptions be overruled and the return of the commissioners be confirm-

ed: and that the plaintiff pay the costs and disbursements herein, to be adjusted by the clerk.

The plaintiff in the execution appealed upon the following exceptions:

I. That his honor erred in adjudging that the defendant was entitled to a homestead exemption, said defendant not being the head of a family, having no one dependent on him for support, and his son, who lived with him, being an adult, and having property of his own, conducting his own business, and not dependent on, or under the control of, his father.

II. That his honor erred in adjudging that the marriage of defendant, after levy made

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and the plaintiff had exhausted all *legal means to collect his debt while no exemption existed, entitles him to a homestead exemption.

III. That his honor erred in refusing to order a reassignment of the homestead.

Messrs. H. F. Wilson and J. T. Hay, for appellant.

Mr. Jos. H. Earle, contra.

July 27, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. (Omitting the statement of facts.) The appeal involves the two questions decided below, which we will consider in their order above.

First. Was the defendant the head of a family, in a homestead sense, when the property in question was levied upon by the plaintiff? The meaning of the term family, as taken from the best lexicographers, is: "The collective body of persons who live in one house, and under one head or manager, a household, including parents, children, and servants, and, as the case may be, lodgers or boarders." Webster. If this is the true meaning of the term family, and if it was used in the constitution in this sense, there certainly could be no doubt that the defendant was the head of a family at the date of the levy. Because it is admitted that his son was a part of his household, living with him in the same house, under his control and employment, he being the head and the manager.

Have we any reason to conclude that this term was used in the constitution in some curtailed and limited sense, and not in this general sense? In *Garaty v. Dubose* (5 S. C., 500), the court held that a bachelor, having no person dependent upon him, and none residing with him except servants and employes, is not the "head of a family" in the constitutional sense; and Chief Justice Moses, in delivering the opinion of the court, did intimate that inasmuch as the homestead exemption was in derogation of the rights of creditors at common law, it was not entitled to such liberal construction as would extend it to those who are not within the spirit and policy of the provision. Even admitting this

to be true, yet he laid down no rule which

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would authorize *the court to resort to anything else but the general meaning of the term "family," when called upon to determine whether a certain party was the head of the family. In the case of *Garaty v. Dubose* the court held that Dubose was not entitled to the homestead. The facts of that case, however, will show that in excluding Dubose the court did not fall back on any limited or restricted sense of the term "family" in order to reach its conclusion, but applied the ordinary meaning to that term. Dubose was a bachelor, a farmer, with hired laborers and employes, carrying on his farming operations. But it did not appear that any one was living with him under the same roof and a part of the same household. He, then, was not entitled to a homestead under the most liberal construction of the term family, as he was in no sense the "head of a family."

Has the term "family" been limited in its general and ordinary meaning as defined in Webster by any of our cases on the subject of homestead? We have found no such case. On the contrary, the case of *Bradley v. Rodelsperger* (3 S. C., 227) holds expressly that this term, as used in the constitution, must be taken in its ordinary sense. And in that case the court below having held that a childless widow could not be the head of a family in the sense of the constitution, this court reversed the judgment below, and in remanding the case said: "The constitution has not given any definition of the term family, nor indicated any of its necessary ingredients; the term must, therefore, be taken in its ordinary sense. In this sense it is not essential that it should include children."

Taking the term "family," then, in its ordinary sense, which includes persons living in one house, and under one head or manager, we think the Circuit Judge was right in holding below that the defendant was the "head of a family." His son was living with him as a part of his family, and his son being a married man, no doubt entitled to have his wife and children with him, if he had any children, certainly this constituted a family, of which the defendant was the head.

But, independent of this, we think the defendant was entitled to the homestead under the principle of the case of *Chafee & Co. v. Rainey*, 21 S. C., 11. In that case the de-

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fendant was a married man when the judgment was entered, but became a widower and was married again when the levy was made. The homestead was resisted on the ground that a lien attached during the time the defendant was a widower, which his subsequent marriage could not divest. This court held that the question in such cases is not one of divesting liens, but is whether a state of facts constituting a right of homestead exists at the time that the sale is attempted to be en-

forced; in other words, whether at that time the defendant is the "head of a family," and whether the property claimed to be exempted is the family homestead. This principle may not apply to the personal property herein under the case of *Pender v. Lancaster* (14 S. C., 25 [37 Am. Dec. 720]), that property having been levied upon while the defendant was a widower. But the homestead in that, as well as in the real estate, we think was exempt, as held above.

On the second question the Circuit Judge upon full testimony having determined that the homestead allowed was not excessive, we see nothing in that testimony authorizing this court to overrule his finding on that subject.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

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DUNSFORD v. BROWN.

(April Term, 1885.)

[*Guardian and Ward* ⇐159.]

The decision of the court in *Dunsford v. Brown*, 19 S. C., 560, stated: and a second action by the same plaintiff against the same defendants for an accounting, as before, but now, for the first time, directly assailing in the complaint a receipt and discharge given by plaintiff to the principal defendant, *held* to be res judicata. Mr. Justice McGowan concurring in the result upon another ground.

[Ed. Note.—Cited in *Dunham v. Carson*, 37 S. C. 284, 15 S. E. 960; *Sovereign Camp of the Woodmen of the World v. Means*, 87 S. C. 133, 69 S. E. 85.

For other cases, see *Guardian and Ward*, Cent. Dig. § 517; Dec. Dig. ⇐159.]

Before Cothran, J., Richland, July, 1884.

The decision of this court in the former action of *Dunsford v. Brown* (19 S. C., 560), and the statements in the Circuit decree, fully state this case.

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*By agreement of counsel the following questions were submitted to his honor for decision:

First. Is the plaintiff estopped from bringing the present action by the judgment in the former case?

Second. If not, does the judgment in the former action so conclusively establish the existence of a judgment of the Probate Court discharging the defendant, Brown, as to estop the plaintiff from averring against its existence in the present action?

Third. If so, are the allegations of the complaint in the present action sufficient to attack or set aside such a judgment or order of discharge of the Probate Court, on the ground of fraud and imposition?

The Circuit decree was as follows:

The determination of this case must depend upon the true meaning and effect of the decision of the Supreme Court of a former case between the same parties, having

in view the same objective points, and which is to be found in 19 S. C., 560.

* * * * *

The Supreme Court held this (an amendment making the allegata conform to the probata) to be erroneous—that such amendment was allowable. If the deliverance of the Supreme Court had not gone beyond this, the point under consideration now would have been plainly presented, but I am embarrassed by the fact that the Supreme Court have, to some extent at least, considered the case upon its merits, and have found that the plaintiff had no cause to complain of the conduct of his guardian, the defendant Brown. Nor would I otherwise venture to make (which I do with great deference) some observations upon the pleadings in the former case.

When the plaintiff determined to begin his suit his counsel had free access to the records of the probate office. Knowledge of these was indispensable in the preparation of his case. He must have seen his client's receipt in full of file there. It was a lion in his path. He passed on, however, without regarding it. Surely, if not seen by him, its roar was heard when the answers came in. It was unheeded still. Whether an amendment of the complaint was necessary upon the coming in of the answers, depends entirely upon the true character and effect of

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the trans*action of May 21 in the probate office. If that was a judgment of the Probate Court—a court having jurisdiction of the subject-matter—it should have been assailed directly, not collaterally, and that by way of amending the complaint before trial. If, upon the other hand, it was merely a matter of payment, no amendment of the complaint was necessary.

To the new matter set up in the answer the plaintiff had no right to reply. The reply is only allowed under the code in two possible cases—the one to a counter claim, the other upon requirement of the defendant, upon his motion, and in the discretion of the court. Every "allegation of new matter in the answer not relating to a counter-claim is to be deemed contradicted by the adverse party, as upon a direct denial." Code, § 189. A familiar illustration may be given: Plaintiff sues upon a note (simple money demand) for \$500. Defendant answers, averring payment of \$200, for which he holds plaintiff's receipt; this amount is sufficiently controverted by the terms of the complaint to make the issue upon it. Defendant at the trial produces the receipt, and the plaintiff, without amending his complaint or by reply (unless the latter be demanded by the defendant and ordered by the court) would be allowed to prove, if he could, that the signature to the receipt was not genuine, a forgery, or that it had been obtained by duress. Such proof would

go to cut down and destroy the defendant's defence, and is admissible under the rule of pleading cited. The objective point at which the plaintiff is aiming is the recovery of the \$500—not the forgery, nor the duress. Of the former he might be entirely ignorant; of the latter, however, he would have knowledge, as well of the circumstances attending the act of duress as of the existence of the receipt for \$200 with his genuine signature to it.

And so here the plaintiff must be held to have known of the existence of his receipt for \$1,496.78 in full of all claims against his guardian. True, the objective point of this suit happens not to be, as in the case of the \$500 note supposed, a liquidated demand, but that cannot so alter the case as to destroy the analogy. His demand is for an accounting, for making certain that which can be made as certain as if it were a liquidated sum. He is not driving at the fraud; he is

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demanding an accounting, *and proposes to drive through the fraud, if fraud there be, to reach by this action, as by the other already tried, the objective point, which is the accounting. If the proceedings in the probate office did not rise to the dignity of a judgment or decree of that court, it was not necessary to change the actual, substantial cause of action, in order to break down the defence of the defendant. An accounting was sought in the former action, and so also in this.

Mr. Pomeroy, after defining the term, "a cause of action," and distinguishing that from "the object of the action" (see sections 452, et seq.), with great force and clearness in section 455 warns the pleader "against the mistake of supposing that a distinct cause of action will arise from each special subordinate right included in the general primary right held by the plaintiff, or from each particular act of wrong, which, in connection with others, may make up the composite but single delict complained of." Pom. Rem. The facts which make up the plaintiff's primary right here are (1) the receipt by the guardian of the ward's estate, and (2) the liability of the guardian upon the ward's attaining his majority to pay the same to him. The defendant's delict is the neglect or refusal so to pay, alleging as a reason for not doing so, that he has in fact already done so. If this reason, on the contrary, was shown to have been "a particular act of wrong," to wit, of imposition by the guardian upon the ward, the right of the plaintiff to show this is subordinate to his general primary right to the accounting, and is not another cause of action.

It cannot be denied—it must in fact be conceded—that if the merits of this controversy have been heretofore passed upon, the litigation must cease. "Interest rei publice finis sit litium." In view of the order of ref-

erence to the master, the testimony taken, his report, the exceptions thereto heard by the Circuit Judge, his decree, the grounds of appeal to the Supreme Court, the arguments of counsel thereon, the opinion of the Supreme Court, the petition for a rehearing, and the refusal thereof, with the reasons stated, can it be successfully maintained that the merits of this case have not been con-

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sidered? [Here follow *quotations from the Circuit decree of Judge Kershaw and from the opinion of this court.]

On January 24, 1884, the present action was begun; the parties to both suits are the same persons. The complaint, after setting forth the appointment of the guardian, the execution of the bond, &c., charges the defendant Brown with having received as the corpus of the plaintiff's estate the sum of \$3,146.92, "besides interest which accrued thereon;" that said defendant filed annual returns in the probate office, "all of which, subsequent to the first, commenced with the balance of the preceding returns, and in such returns failed to credit the plaintiff with large sums of money received by him as interest on the funds of plaintiff's estate which had been invested, and with interest on such sums as were held by him uninvested, but charged the plaintiff with large sums which were not properly chargeable to him;" that plaintiff was raised upon a farm, with little education and no experience in business; had just attained his majority, and was greatly under the influence of his said guardian, and was thus induced to accept, in settlement of his claims against his guardian, a less sum than that to which he was actually and justly entitled, and prays that the pretended settlement and discharge be set aside, and that he have judgment for such amount as upon an accounting may be found due to him, &c.

The defendant Brown especially, the others being his sureties, denies that he received any other funds of the plaintiff except those with which he was charged in his annual returns; denies the charge of imposition and undue influence; and insists, as a defence to the action, upon the settlement of May 21, 1880, in the probate office, when he paid over the whole balance due to the plaintiff, and for which his receipt in writing was given and filed in the office of the probate judge; and, further, that all matters touching said guardianship have been heretofore made the subject of judicial investigation and determination, and that the plaintiff has no right to vex him and his sureties again in this behalf.

By comparison of the two complaints, it will be seen that, except as to the allegations

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in the latter assailing the bona fides *of the transaction of May 21, there is but little difference between them; the parties are the same persons and the object of each action is

the same, to wit, an accounting. Besides, even in the latter complaint, under the rules of pleading which regulate the practice as well for setting aside a settlement for fraud as for surcharging and falsifying a stated account, and more especially in the case of a settled account, there is a conspicuous and fatal omission to state, with the requisite particularity, the facts and circumstances relied upon as characterizing the fraud. The authorities upon this point are innumerable and the current is unbroken. 1 Dan. Ch. P. & P., 324, and note; 2 *Ibid.*, 1585; Kerr Fr. & M., 365; Porter v. Cain, McMull. Eq., 84; Fraser v. Hext, 2 Stroh. Eq., 250. Also McDow v. Brown, 2 S. C., 95, where the cases are collated carefully and the whole subject is exhaustively reviewed. The facts of the case under consideration and the authorities cited, with the argument based even upon contrary suppositions, must be equally conclusive of the plaintiff's case. And this the logicians call a dilemma.

Take another horn of it. If the transaction of May 21, 1880, was not a decree or judgment of the Probate Court, no amendment was necessary, and the case has been disposed of. If it was a judgment or decree, it should have been assailed as such by complaint, original or amended. That the duties of life are more than life is nowhere better exemplified than in the crowded courts of justice. Every suitor is entitled to his day in court—but only to his day. When in such serious conflict the lists are set, the forces must not be brought up in detail, singulatum, but in full array; and, to drop the metaphor, a plaintiff is not allowed to present his case by piecemeal. Time, convenience, good faith, and fair dealing forbid, and these latter should be as conspicuous in pleading as elsewhere.

The Supreme Court has so frequently discussed the matter of res adjudicata (see the cases of Hart v. Bates [17 S. C. 35], Fraser & Dill v. Charleston [19 S. C. 384], and others, too recent to be unfamiliar) that it hardly seems necessary to prolong this decree by any observations of my own upon this subject, and I forbear to do so.

There are perhaps two other points in the case to which allusion should be made brief-

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ly and in conclusion. In refusing the petition for a rehearing, the Supreme Court distinctly say, touching the discharge of Brown, the guardian, by the probate judge, that "the judgment of this court is not based upon that assumption," but "that the judgment of this" (that) "court was rested on the settlement between the parties pleaded in bar," &c. The judgment is, "that the complaint be dismissed." It has been settled by very high authority that "the decree dismissing the bill in the former suit in the Circuit Court of the United States, being absolute in its terms, was an adjudication of the controversy, and

constitutes a bar to any further litigation of the same kind between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground, which does not go to the merits, is a final determination. Where words of qualification such as 'without prejudice,' or other terms indicating a right or privilege to take further legal proceedings on the subject do not accompany the decree, it is presumed to be rendered on the merits. Accordingly it is the general practice in this country and in England when a bill in equity is dismissed without a consideration of the merits, for the court to express in its decree that the dismissal is without prejudice; the omission of the qualification in a proper case will be corrected by this court on appeal." Durant v. Essex Company, 7 Wall., 109 [19 L. Ed. 154].

It must therefore follow from this: (1) that if the complaint has been dismissed without words of qualification; (2) if it was not dismissed on account of a decree or judgment of the Probate Court which could not be collaterally attacked; but (3) on account of a settlement between the parties, which was subordinate to the general primary right of action and assailable without amendment; and (4) that the merits of that settlement have been passed upon—the bar to any further litigation of the same subject between these, the same, parties is effectual and complete.

The other point is, that the defendants may with propriety claim the protection of article IV., section 8, of the constitution: "When a judgment or decree is reversed or affirmed by the Supreme Court, every point made and distinctly stated in writing in the cause, and fairly arising upon the record of

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the case, shall *be considered and decided," &c. Applying this provision of the constitution to the exceptions contained in the Brief on appeal to the Supreme Court, and to the decision made by the Supreme Court, it is manifest that the matters sought by the plaintiff in this action to be drawn again into controversy, were "made and distinctly stated in writing," and have been determined, and the evidence of such determination "preserved with the records of the case."

Wherefore it is ordered, adjudged, and decreed, that the complaint be dismissed, and that the defendants have judgment against the plaintiff for their costs.

Plaintiff appealed upon the following exceptions:

1. Because his honor held that the accounting sought in this action could have been had in the former action between this plaintiff and the above named defendants without amendment, notwithstanding the plea of settlement, and that the decree in said cause was an adjudication of the claim set up in this action.

II. Because his honor held that plaintiff's right to set aside the alleged settlement for fraud and imposition was subordinate to his general right to an accounting.

III. Because his honor held that the same rules should govern the pleadings in this action as are applicable to an action to surcharge or falsify an account stated.

IV. Because his honor held that the complaint in this action does not "state with requisite particularity the facts and circumstances relied upon as characterizing the fraud," and that the facts alleged are insufficient to constitute a cause of action.

V. Because his honor held the judgment in the former action a bar to this action, and dismissed the complaint herein.

Mr. W. H. Lyles, for appellant.
Messrs. Abney & Abney, contra.

July 30, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was brought by the plaintiff, appellant,

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against the defendant Brown (guardian of appellant), and the other defendants, his sureties, to set aside an alleged pretended settlement, receipt, and discharge claimed by the defendant Brown, and also for an accounting by Brown for his actings and doings as said guardian. The main defence interposed was res adjudicata, growing out of a previous action in which, as averred in the answer, the matters herein were considered and adjudged, first in the Circuit Court, and on appeal by this court, where the complaint was finally dismissed.

The case was heard by his honor, Judge Cothran, who, sustaining the plea of res adjudicata, dismissed the complaint. His honor further held that, independent of the plea of res adjudicata, there was a conspicuous and fatal omission in the complaint in that the facts and circumstances of fraud relied on by the plaintiff to vacate the settlement and discharge were not stated with sufficient particularity, the judge holding that in such cases the rules of pleading and practice which obtain in surcharging and falsifying a stated account, and more especially a settled account, should apply, which he held were not observed here. The appeal questions the two rulings above.

First, as to the plea of res adjudicata. It appears that the plaintiff attained his majority on May 20, 1880. On the next day he appeared with his guardian, the defendant, in the probate judge's office for Richland County, and received the amount due him as ascertained by a previous statement of the guardian's accounts made in said office, the amount being \$1,496.78, which was then paid over to him by the probate judge, with whom it had been deposited by the guardian, he, the plaintiff, giving a receipt in full payment of all claim against said guardian, which re-

ceipt was filed in the probate judge's office. In 1882 the plaintiff, without reference to this transaction in any way, commenced action against the present defendants, the guardian and his sureties, demanding an accounting, embracing in the demand not only what Brown had received since he became guardian, but also what a former guardian, one Weston, had received, and which the plaintiff claimed Brown ought to have collected from Weston. To this suit the defendants set up the defence of payment as a bar. An order of reference was made, directing the master "to take testimony upon all the

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matters of fact arising on the pleadings, to state the accounts between the parties, and to report the same, with all findings of fact."

Upon this reference the case was fully developed, and notwithstanding the plea in bar, all the facts in connection with the settlement in the probate judge's office, the discharge, &c., of May 21, referred to above, were brought out and reported. Judge Kershaw heard the case upon this report and the exceptions thereto. He sustained the master in holding that Brown was not liable for the amount received by Weston, but not paid over to him. He held, further, that although the transaction of May 21 had not been put in issue by the pleadings, and could not be attacked as a general rule by a collateral proceeding like that before him, yet the master having heard testimony upon this subject, he would regard that matter as embraced in the case, and to that end ordered an amendment so as to conform the pleadings to the proof, and he proceeded to pronounce judgment upon the whole case, setting aside the settlement and discharge of the probate judge and also the receipt of the plaintiff, and ordered Brown to account de novo, but, as we have said, exempting him from responsibility for the alleged errors in the accounting of his predecessor, Weston.

Upon appeal by defendant, this court held that it was error in the Circuit Judge to order and allow the amendment mentioned, or to determine the question of settlement and discharge, and upon full hearing this court dismissed the complaint. The plaintiff then filed a petition for rehearing, basing it upon several grounds, which were considered, and the petition was dismissed. 19 S. C., 560-571.

The plaintiff thereupon commenced the action below, in which the settlement and discharge claimed by defendant Brown were directly assailed and sought to be set aside, which resulted as already stated in the decree of Judge Cothran, dismissing the complaint for the reasons given.

The appellant contends that this court, finding error in the action of the Circuit Judge in the former case, in that he considered and passed judgment upon the settlement and discharge of the guardian, when said settlement and discharge were not in issue therein, in that he went behind this

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settlement and discharge before it had been assailed and vacated by a direct and proper proceeding, dismissed the complaint upon that ground, and upon that ground alone, thereby leaving the validity of said settlement and discharge an open question; and that such being the fact, the plea of res adjudicata ought not to have availed the defendant below in an action brought by the plaintiff this time directly to assail said settlement and discharge. It is true that this court did, in the former appeal, hold that the action below having been brought simply for an accounting, altogether ignoring a settlement had between the parties, and making no allegation of fraud or imposition therein, the settlement and receipt given was a bar to said action, and that no accounting could be claimed until said settlement was set aside by a direct proceeding to that end. And if the court had held nothing more in that appeal but this, the position of appellant would be correct.

But the court went further. On page 567 of the opinion (19 S. C.) Mr. Justice McGowan, who delivered the opinion, used the following language: "But if the action had been brought directly for the purpose of setting aside the settlement and discharge, we do not see the evidence to sustain the judgment. There can be no doubt that a settlement was made with the ward after he came of age, who received the money, gave his receipt in full, and the guardian was discharged by the probate judge. We suppose that the settlement and discharge were not prima facie invalid, and what evidence is there to impeach the transaction? The only circumstance tending in that direction is the fact that the settlement was made soon after the ward came of age, but that alone was not sufficient to overthrow it, if there was on the part of the guardian, Brown, no concealment, misrepresentation, imposition, or fraud." The opinion then goes on to discuss the law involving settlements of guardian's accounts with the ward shortly after he arrives at age, holding, finally, that there was nothing in this case to impeach the settlement.

All this was based upon the fact that notwithstanding the case might have been dismissed below on the settlement as a plea in bar, yet Judge Kershaw amended the complaint so as to bring in the question of the validity of the settlement and discharge, and passed judgment upon that question by set-

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ting aside said settlement and ordering an account de novo. The court regarding it in that way as involved in the appeal, the judgment below was reversed and the complaint dismissed upon both the grounds. We think, therefore, that Judge Cothran was right in sustaining the plea of res adjudicata below.

With these views it is unnecessary to discuss the other question raised in the appeal.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN. I concur in the result; but the court having held in the former case that the proceeding was not directly to vacate the settlement, and if it had been, the defence and evidence might have been different, I would prefer to rest the judgment on the other ground, and not hold the matter as finally adjudicated.

23 S. C. 339

UNION NATIONAL BANK v. ROWAN.

(April Term, 1885.)

[1. *Carriers* ⚡58.]

A draft for a sum stated, drawn by a seller against a buyer in favor of a national bank, by whom it is discounted or purchased, with the bill of lading attached, passes title to the goods therein mentioned to the bank; and the bank may recover them, upon dishonor of the draft, from a sheriff who had seized the goods as the property of the seller under attachment subsequent to the purchase by the bank.

[Ed. Note.—Cited in *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 453, 52 S. E. 191, 2 L. R. A. (N. S.) 79, 110 Am. St. Rep. 627.

For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. ⚡58.]

[2. *Banks and Banking* ⚡234, 260, 271.]

A draft so drawn is a bill of exchange, and its purchase by a national bank is not beyond the powers conferred by acts of Congress upon national banks.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. § 978; Dec. Dig. ⚡234, 260, 271.]

Before Cothran, J., Richland, July, 1884.

The opinion states the case.

Mr. W. S. Monteith, for appellants,
Messrs. Clark & Muller, contra.

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*August 1, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case, so far as necessary to a proper understanding of the points raised by this appeal, are substantially as follows: The defendants, Lorick & Lowrance, merchants, doing business in Columbia, ordered from Hord Bros. & Co., dealers in grain and provisions in Chicago, a lot of bran and oats. At the time of the shipment of these articles Hord Bros. & Co. drew drafts on Lorick & Lowrance for the price thereof, which were either discounted or sold to the plaintiff, upon the security of the bills of lading which, at the same time, were endorsed by Hord Bros. & Co., and delivered to plaintiff. These drafts were sent by the plaintiff, with the bills of lading attached, to its agent in Columbia, the Carolina National Bank, to be presented to the drawees for acceptance, and when so presented were

not accepted. When the bran and oats reached Columbia they were seized by the defendant, Rowan, as sheriff, under a warrant of attachment sued out by the defendants, Lorick & Lowrance, on a claim which they alleged was due them by Hord Bros. & Co., growing out of some previous transactions. Thereupon this action was brought by the plaintiff to recover possession of the bran and oats.

It is not denied that the endorsement and delivery of the bills of lading to the plaintiff passed the title and right to the possession of the articles mentioned therein to the plaintiff, provided the transaction was valid and legal, and this having been done prior to the seizure under the warrant of attachment, the plaintiff would have a right to recover. It is contended, however, by the appellants that under the national banking law of the United States, the plaintiff had no authority to purchase the drafts with the bills of lading attached, and that, therefore, the transaction was ultra vires, illegal, and passed no title to the plaintiff. Accordingly the Circuit Judge was requested by the defendants to instruct the jury, "that it was for the jury to decide whether plaintiff purchased or discounted the drafts, and that if they came to the conclusion that the plaintiff purchased the drafts with the bills of lading, then the transaction was ultra vires, and the plaintiff could not recover." To the refusal of this request defendants duly ex-

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cepted, and by their exceptions, the first *having been abandoned, practically raise two questions of law: 1st. Whether the purchase of the draft, with the bills of lading attached, by the plaintiff was ultra vires. 2d. If it was, does that defeat the plaintiff's right to recover?

It seems to us that as to the first question there can be no doubt. These papers, though called drafts, are in fact bills of exchange, as they fill any definition given of that species of instrument. That learned commentator, Mr. Chitty, commences his treatise on bills of exchange with these words: "A bill of exchange is defined by Mr. Justice Blackstone to be an open letter of request, or an order from one person to another, desiring him to pay on his account a sum of money therein mentioned to a third person." These papers certainly are open letters of request or orders from Hord Bros. & Co. to Lorick & Lowrance, desiring them to pay on their account the sums of money therein mentioned to a third person, as is manifest from their form, which is as follows:

"\$270.00. Chicago, Dec. 3, 1883.

"At sight, N. Y. Exchange, pay to the order of Jno. J. P. Odell, cashier, two hundred and seventy 66-100 dollars, value received, and charge to account of Lorick & Lowrance, Columbia, S. C. Hord Bros. & Co."

Now, as a national bank is expressly authorized by the act of Congress to buy and sell exchange, there cannot be a doubt that the plaintiff had a right to purchase these papers, called drafts, as they were in fact bills of exchange, and hence it was wholly immaterial to inquire whether the plaintiff bought or discounted these papers. Indeed, it seems to us that any other view would, to some extent at least, defeat the very object for which a bank is established. As we understand it, one of the main purposes of these institutions is to afford the means of moving the produce of the country by facilitating exchanges, and such transactions as the one now in question are just what would most likely effect these ends. We think, therefore, that the plaintiff bank, in buying these bills of exchange, even if it did buy them, was not only not going beyond the authority vested in it by the act of Congress, but, on the contrary, was

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simply doing one of the things *for which it was constituted. It is apparent, therefore, that the authorities cited by the counsel for appellants, tending to show that a national bank has no authority under the act of Congress to buy promissory notes, have no application to this case, and need not therefore be considered.

Under this view, the second question raised by this appeal cannot arise, though we may say that this question also has been determined adversely to the view of the appellants by at least two cases (*National Bank v. Matthews*, 98 U. S., 621 [25 L. Ed. 188], and *National Bank v. Whitney*, 103 U. S., 99 [26 L. Ed. 443]), decided by the Supreme Court of the United States, the tribunal invested with jurisdiction to determine finally the proper construction of an act of Congress.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 342

McSWEEN v. McCOWN.

(April Term, 1885.)

[1. *Fraudulent Conveyances* ⇨269.]

In action assailing a deed as fraudulent, the answer denied that the deed was without consideration, and made no reference to any other deed, but it appeared in evidence that the deed described in the complaint was executed in the place of another and prior deed that had been burnt. *Held*, that the Circuit Judge properly refused to rule that, at the date of the deed assailed, the defendants owned the right, title, and interest in the land under a conveyance not impeached in this action.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 789-795; Dec. Dig. ⇨269.]

[2. *Pleading* ⇨237.]

It was not error in the Circuit Judge to refuse at the trial to permit an amendment of the answer alleging matters of fact which he did not think had been proved.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 603-619; Dec. Dig. ⇨237.]

[3. *Evidence* ⚡273.]

The question being whether a deed was fraudulent or not, the declarations of the grantee, now deceased, made in his own favor subsequent to his deed, cannot be regarded as a part of the *res gestæ*.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1113; Dec. Dig. ⚡273.]

[4. *Limitation of Actions* ⚡100.]

Where a party in 1868 took a conveyance of land in his own name for the purpose of defeating a creditor of the grantor, and with a secret trust for the use of the grantor, and afterwards died intestate, action to vacate this deed instituted in 1882, by a subsequent creditor, who had obtained his judgment in 1880, and who alleged and proved his ignorance of the fraud until within six years preceding the commencement of this action, was not barred by the statute of limitations.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 323, 480-493; Dec. Dig. ⚡100.]

[5. *Adverse Possession* ⚡60.]

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*And the defendants having gone into possession, claiming the land as heirs of their ancestor, they were bound by the secret trust attached to their ancestor's deed, and could not now assert a claim to have held by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 297; Dec. Dig. ⚡60.]

[6. *Fraudulent Conveyances* ⚡74.]

This deed having been executed and received with a fraudulent purpose, and coupled with a secret trust for the grantor, it could not be validated by subsequent payment for the land by the grantee to the grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 190; Dec. Dig. ⚡74.]

[7. *Appeal and Error* ⚡1010; *Fraudulent Conveyances* ⚡21.]

A finding of fact by the Circuit Judge from written testimony reported to him—that a deed was executed for the purpose of defeating creditors—approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3379; Dec. Dig. ⚡1010; *Fraudulent Conveyances*, Cent. Dig. § 27; Dec. Dig. ⚡21.]

Before Witherspoon, J., Darlington, October, 1884.

The plaintiff, John McSween, having obtained judgment on March 22, 1880, against Samuel O. McCown, upon a sealed note bearing date June 3, 1875, and an execution thereon being returned wholly unsatisfied, commenced this action April 27, 1882, against Samuel O. McCown, and the widow and children of Reese A. McCown, deceased. The opinion sufficiently states the case. The Circuit decree (omitting its statement) was as follows:

As fraud will never be presumed, the burden of proof rests upon the plaintiff, who must sustain the allegations of fraud by satisfactory proofs. Frauds are committed in secret, and are usually hedged in and surrounded by safeguards to prevent discovery. It is, therefore, usually established by circumstantial evidence. A wide latitude of evidence is allowed that fraud may be detected and exposed. It is incumbent upon the

plaintiff to prove, not only that Samuel O. McCown conveyed the land in dispute to hinder, delay, and defraud his creditors, but, also, that Reese A. McCown, the grantee, had notice of the fraudulent intention and participated in it.

The material question is as to the intent of the parties at the time of the execution of the deed, May 2, 1868. If at that time a wrong was intended as to rights of creditors, the fraud is positive and attaches to the act at that moment. *Suber v. Chandler*, 18 S. C., 529. The intent is to be determined by the words and acts of the parties, considered in connection with the attending circumstances. The alleged fraudulent transactions took

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*place between two brothers, one of whom (the grantee) is now dead. The survivor (the grantor) now volunteers to expose the fraud for the benefit of his creditors, whom he confesses he and his deceased brother intended to defraud in executing the deed sought to be declared void. The testimony is conflicting, and as the witnesses have not appeared before me, I can only endeavor to reach that conclusion that appears to me to be sustained by the testimony.

* * * * *

At the hearing, the defendants, Carrie B. McCown and her minor children, asked leave to amend their answer by alleging that Samuel O. McCown bought the land in dispute from John A. Gee, for Reese A. McCown, who in good faith paid Samuel O. McCown for the land. This proposed amendment is probably based upon the declaration of Reese A. McCown to his wife, Carrie B. McCown, and others, as well as payments made by W. K. Ryan, of Charleston, to Samuel O. McCown for Reese A. McCown.

The general rule is that declarations forming a part of the *res gestæ* are admissible. The plaintiff is entitled to introduce the declarations of Reese A. McCown against his interest made at any time, but this rule would be of little avail, if defendants were allowed to introduce other counter-declarations made in his favor at other and different times. Defendants are entitled to all of the declarations made at the time to which plaintiff's testimony refers, but the rule cannot in this case be further extended. *Edwards v. Ford*, 2 Bail., 464. Declarations to show the character of possession is an exception to the rule above stated, but this exception does not apply in this case, as defendants claim the land by virtue of a deed through Samuel O. McCown, and do not rely upon adverse possession.

* * * * *

The payments by Reese A. McCown through his factor Ryan to Samuel O. McCown do not appear to have exceeded the one-half of the net proceeds of cotton sold by Ryan. These payments, under the testimony,

should be referred to the account of the joint cultivation of the land, rather than to the purchase of the land by Reese A. McCown.

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The facts that Samuel O. McCown permitted Reese A. McCown to build on the land, and to collect insurance upon a house burnt on the disputed land, are urged as additional evidence that Reese A. McCown had paid for the land. Parties who attempt to perpetrate frauds often involve themselves in inconsistencies that cannot reasonably be accounted for. These matters occurred subsequently to the execution of the deed in dispute, and do not relieve the transaction in question of its fraudulent surroundings.

But assuming that Reese A. McCown did pay Samuel O. McCown full consideration for the land, yet the deed to the land in dispute is void as to creditors, if at the time the deed in question was executed Reese A. McCown accepted the deed for the purpose of hindering, delaying, and defeating the creditors of Samuel O. McCown. *Thomas & Ashby v. Jeter and Abney*, 1 Hill, 380; *Hipp v. Sawyer*, Rich. Eq. Cas., 410.

I am satisfied from the testimony that all of the other transactions between Samuel O. McCown and Reese A. McCown, May 2, 1868, were entered into by Reese A. McCown, without consideration, with intent and for the purpose of hindering, delaying, and defrauding the creditors of Samuel O. McCown. It is quite probable that Samuel O. McCown and Reese A. McCown originally bargained with John A. Gee to purchase the land together. Samuel O. McCown, however, alone, gave his note and took title from Gee, and by the said deed, May 2, 1868, Reese A. McCown acknowledged that Samuel O. McCown had title from Gee. The testimony, in my judgment, is not sufficient to credit Reese A. McCown with good faith in the transaction in dispute, and to isolate this from the other contemporaneous fraudulent transactions between Samuel O. McCown and Reese A. McCown.

I am therefore constrained by the testimony to conclude that Reese A. McCown, through the influence of his elder brother, Samuel O. McCown, was induced to accept the deed in dispute, without consideration, and for the purpose of hindering, delaying, and defrauding the creditors of Samuel O. McCown.

Whilst the deed to the land in dispute must be held void as to creditors, yet it is good as between the parties. The defendants, heirs at law of Reese A. McCown, should therefore be

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allowed *to retain the land upon paying the costs of this action, and the debts hindered and delayed by the fraudulent deed, and upon their failure to pay the costs and said debts, the land should be sold and proceeds, after paying costs, should be applied to the payment of said debts—any surplus of said

proceeds to be paid to the defendants, heirs at law of Reese A. McCown, according to their respective interests.

I find as matters of fact: 1. That the deed by Samuel O. McCown to Reese A. McCown, May 2, 1868, conveying two hundred acres of land in Darlington County, was without consideration, and was executed by Samuel O. McCown, and accepted by Reese A. McCown, with intent and for the purpose of hindering, delaying, and defrauding the creditors of Samuel O. McCown. 2. That plaintiff has an unsatisfied execution in the sheriff's office for Darlington County, against Samuel O. McCown for \$381.46, lodged March 9, 1882, upon which the sheriff returned nulla bona April 8, 1882.

I conclude as a matter of law: 1. That the deed from Samuel O. McCown to Reese A. McCown, May 2, 1868, conveying two hundred acres of land, more or less, in Darlington County, is void as to creditors of Samuel O. McCown. 2. That plaintiff's action is not barred by the statute of limitations.

It is therefore ordered and adjudged, that the deed of conveyance aforesaid from Samuel O. McCown to Reese A. McCown, as aforesaid, and referred to in plaintiff's complaint, be, and the same is hereby, declared to be void as to the creditors of Samuel O. McCown, &c.

Messrs. Dargan & Dargan, for appellants.

Messrs. Boyd & Nettles and E. K. Dargan, contra.

August 3, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. On May 2, 1868, Samuel O. McCown, being then sued as surety for one Brown, on a large note to Singletary, conveyed his whole estate to his young unmarried brother, Reese A. McCown, consisting of four separate tracts of land, three in Williamsburg County, embracing some 1,396

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*acres, and one in Darlington County, containing 200 acres; and stock, provisions, and farming implements on said lands. At the same time Reese A. McCown executed a will, by which all of his property was bequeathed and devised for the benefit of the wife and children of S. O. McCown, who was appointed executor, with power to take "full and unlimited control and manage to the best of his ability for the interest of the parties concerned." These papers were all executed on the same day and before the same witnesses. Similar papers had been executed a short time before, but being accidentally destroyed by fire, they were all reexecuted on the day indicated.

Reese A. McCown lived on the Darlington place (200 acres), and conducted a farm, under some arrangement, not very clearly defined with Samuel O. McCown. Reese A. McCown married in 1869, carried his wife to the said Darlington place, which he improved,

and died in 1876, leaving his widow, Carrie B., and three infant children, surviving him. This, of course, operated as a revocation of the will in favor of the wife and children of Samuel O. McCown, and Reese A. McCown really died intestate. Up to the time of the death of Reese there was controversy between him and Samuel O. as to the land.

On March 22, 1880, the plaintiff obtained a judgment against Samuel O. McCown for \$382.46, and the execution thereon being returned unsatisfied, he commenced this action on April 27, 1882, in behalf of himself and other creditors, alleging that the deed of the Darlington place was made by S. O. McCown to evade the payment of his debts; that no consideration passed, and that the fraudulent purpose was known to R. A. McCown, and that he combined with and aided S. O. McCown in carrying it out. It was further alleged that the plaintiff had no knowledge of the fraud until within six years previous to the commencement of the action, and the prayer was that the said deed should be set aside, and the land sold for the payment of the debts of S. O. McCown. S. O. McCown interposed no defence, but the widow and children of Reese A. McCown answering, denied that R. A. McCown had combined with S. O. McCown to aid him in evading the payment of his debts, denied that the land was conveyed without consideration, and alleged that Reese

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A. purchased and paid for the same in good faith. They further interposed the statute of limitations and adverse possession, alleging that Reese A. went into possession about the beginning of 1867, claiming the land as his own, and that he or his heirs had ever since been in the open, exclusive, and continuous possession thereof.

The testimony was taken by G. W. Brown, Esq., as special referee. There was much evidence, consisting of correspondence, factor accounts, and the testimony of witnesses, all of which is in the Brief. The cause came on for trial by Judge Witherspoon. At the hearing the appellants asked leave to amend their answer by alleging that the land in question "was purchased by S. O. McCown from one John A. Gee for his brother, Reese A. McCown, and by the said S. O. McCown sold to the said Reese A." In his decree the judge held that the testimony did not sustain the proposed amendment. The Circuit Judge held as follows: "I am satisfied from the testimony that all the other transactions between Samuel O. and Reese A. McCown in May, 1868, were entered into by Reese A. McCown without consideration, with the intent and for the purpose of hindering, delaying, and defrauding the creditors of S. O. McCown. * * * and the testimony, in my judgment, is not sufficient to credit Reese A. with good faith in the transaction in dispute, and to isolate this from the other contemporaneous

fraudulent transactions between the parties. * * * I find as matter of fact that the deed from Samuel O. McCown to Reese A. McCown May 2, 1868, conveying 200 acres of land in Darlington County, was without consideration, and was executed by Samuel O. McCown and accepted by Reese A. McCown, with the intent and for the purpose of hindering, delaying, and defrauding the creditors of Samuel O. McCown. * * * And I conclude as matter of law that said deed is void as to the creditors of S. O. McCown, and that the plaintiff's action is not barred by the statute of limitations," &c.

From this decree the widow and children of Reese A. McCown appealed upon the following grounds:

1. "Because his honor erred in refusing to allow, before the trial, the amendment to

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their pleadings proposed by the defend*ants, Carrie B. McCown, Marion H. McCown, Harriet A. McCown, and Reese A. McCown.

2. "Because his honor erred in excluding the declarations of Reese A. McCown, a deceased person, in his own favor, made during his possession of the land in question, and tending to show the character of that possession.

3. "Because his honor erred as matter of fact, 'that the deed from Samuel O. McCown to Reese A. McCown of May 2, 1868, conveying two hundred acres of land in Darlington County, was without consideration, and was executed by S. O. McCown and accepted by Reese A. with the intent and for the purpose of hindering, delaying, and defrauding the creditors of Samuel O. McCown,' the overbearing weight of testimony adduced by the plaintiffs themselves being against such finding.

4. "Because his honor erred in concluding as matter of law, 'that the deed from S. O. McCown to R. A. McCown of May 2, 1868, conveying 200 acres of land in Darlington County, is void as to creditors of S. O. McCown.'

5. "Because his honor erred in concluding in effect, as matter of law, that the rights of the parties to this action are dependent upon the validity or invalidity of the deed bearing date May 2, 1868, and purporting to convey the land in question; whereas, it is respectfully submitted, he should have held that at the date of said paper, by a conveyance not impeached in this action, the said Reese owned the right, title, and interest of the said Samuel O. McCown in said land.

6. "Because his honor erred in concluding in effect, as matter of law, that the defendants, Carrie B., Marion H., Harriet A., and Reese A. McCown, had not acquired title to the land by adverse possession," &c.

1. As we understand it, the proceedings were aimed at the transaction by which Samuel O. McCown conveyed the Darlington land to Reese A. McCown. The papers executed

on May 2, 1868, were only the evidence of that transaction, substituted by the parties themselves for similar papers before executed for the very same purpose and accidentally consumed by fire. The appellants in their answer made no reference to any other deed than that executed on May 2, 1868,

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and recorded on May 22, 1876, and they deny "that no consideration was paid by the said Reese A. McCown for the purchase of the land conveyed to him by the deed referred to in the complaint." The parties themselves substituted the deed of May 2, 1868; upon that as the evidence of the transaction they made their defence, and we cannot say that the judge "should have held that at the date of said paper, by a conveyance not impeached in this action, the said Reese owned the right, title, and interest of the said Samuel O. McCown in said land."

II. As to the refusal of the motion for leave to amend the answer of appellants. It seems that the motion was made at the trial. The testimony had been taken and the amendment proposed must, therefore, have been for the purpose of conforming the pleadings to the facts proved. No evidence upon the point indicated had been excluded for lack of the proposed amendment. The judge thought the special fact proposed to be alleged was not proved. The amendment would have added nothing whatever to the case of appellants. If made, it would have been only a pleading and not evidence, and could not have affected the result. Amendments are largely in the discretion of the Circuit Judge. *Trumbo v. Finley*, 18 S. C., 305.

III. As to the exception which complains that the Circuit Judge excluded the declarations of Reese A. McCown in his own favor during his life-time, while he was in possession of the land, and, as alleged, tending to show the character of that possession. The general rule is, that declarations of a party against himself, but not for himself, are admissible unless they were made at the time of other declarations proved against him. The party has the right to bring out all that was then said. In regard to the question of fraud or no fraud in the original transaction between S. O. and Reese A. McCown, the subsequent declarations of the latter, the grantee, in his own favor, could not possibly be regarded as a part of the *res gestæ*. The declarations of one in possession of land cannot be admitted for the purpose of proving title in himself, or those claiming under him. As was said in the case of *Wardlaw v. Hammond*, "had the declarant been living and on the stand, his answer to the questions propounded would not have

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been competent; how, then, is it that the declarant, because in possession, becomes a privileged witness?" 9 Rich., 463. But there

are circumstances in which the declarations of a party in possession may explain the manner of his holding as to tenancy and possession, whether adverse or not, but not as to title, "as where a man's title is to depend on his acts." *Hall v. James*, 3 McCord, 223.

IV. As to the statute of limitations. The plaintiff recovered judgment against Samuel O. McCown on March 22, 1880, and he alleged and proved that he had no knowledge of the fraud charged until within six years previous to the commencement of the action. *Suber v. Chandler*, 18 S. C., 526. As to adverse possession, the appellants claimed the land under the deed from Samuel O. McCown, and they must stand or fall upon that. When that failed them, we do not see how the discovery of the truth can have relation back so as to change the whole character of the possession. Reese A. McCown was put in possession by S. O. McCown under a secret trust, and therefore he could not plead adverse possession as against Samuel O. Mrs. McCown entered into possession with her husband, and must be considered to have done so on the terms and conditions on which he received it. "When there is no new entry, but the heir is in of his ancestor's possession, the possession of the heir is that of the ancestor." *Reeder & Davis v. Dargan*, 15 S. C., 182; *Blackwell v. Ryan*, 21 S. C., 123. "The question of adverse possession is inseparably connected with that of the statute of limitations, because, if there were no statute limiting the right of entry upon or of bringing the action for the recovery of real property, there would never be a necessity for scrutinizing the possession to learn whether such possession be adverse or not. Possession in law, to be sure, is *prima facie* evidence of legal title; but if it actually appears that the title to the property is in a person out of possession, except for the statute of limitations, the possession of such property would avail nothing." *Tyler Eject.*, 851.

V. This brings us to the main question in the case, viz., whether the Circuit Judge committed error in his finding of fact that the deed of S. O. McCown to Reese A. McCown, conveying the *Darlington tract* of land in

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1868, was fraudulent as against the creditors of Samuel O. McCown. In behalf of the widow and children of Reese A. McCown, it was most earnestly urged upon us that the finding of the judge below was not in accord with the intrinsic probabilities of the case, and against the overbearing weight of the testimony. The presumption is in favor of the correctness of the conclusions of the Circuit Judge, and the clear result of undisputed testimony must point to a different conclusion before it will be disturbed on appeal.

As is usual in such cases there was a volume of testimony more or less pertinent. We have read it all carefully, but we cannot, of course, discuss it in detail. Only one of the witness-

es to the original transaction in 1868 was examined, Samuel O. McCown, himself, who testified positively as follows: "Was in debt at the time of execution of deed, was pressed on debt of Sarah Singletary, security debt; was being sued and Brown, the principal, was also sued. No money was paid as consideration for deed; made deed because Brown had made over his property to my brother Morgan, to evade debt. Brown was my brother-in-law. I made over my property to my brother Reese to avoid paying this security debt. Not the only deed I made to Reese. Perhaps a month previous I had made deed of same land; that deed was burned in Reese's dwelling, so he said; deed made for same purposes. I protected myself by Reese making a will. He was to hold property for me; will provided that on death of Reese, property was to go to my wife and children. (Produced the will.) It was the agreement to deposit the papers with mother for safe keeping. * * * Reese came out of the war with nothing, and I desired to help him and put him on place. I supplied part of stock and he part, and crop was equally divided after expenses were paid. This was arrangement 1866-7-8, and continued after execution of papers. Was never any other arrangement between us about the land, and it was continued until his death," &c.

The character of this witness was assailed, but we do not think with entire success. Some witnesses swore that they would not believe him on oath, but a greater number said that they would—that he was somewhat "gassy," "fond of witty sayings, and talks wildly and loosely on indifferent matters, such

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as crops, &c., but *when it comes to material things worthy of belief," &c. It seems to us that the testimony of Samuel O. McCown was corroborated by many of the circumstances. He was sued on the Singletary debt as stated; the will referred to as executed by Reese was produced. It was not probable that Reese, a young man just out of the war, was able at the time to pay for the land. But beyond all this, it did appear that on the very day the Darlington land was conveyed, Samuel O. McCown was engaged in the business of covering himself from his creditors, and actually transferred to the said Reese A., three other tracts of land in Williamsburg County, and all the stock, plantation tools, &c., thereon. It is admitted that all these other conveyances were fraudulent and void as made to evade the payment of the donor's debts. Under these circumstances, the object plainly being to put all his property out of the reach of his creditors, and the deed of the Darlington land being found in such bad company, it seems to us that it would require very strong proof, stronger than the case affords, to make this particular deed an exception, when all the other three were fraudulent and void. We cannot say that the finding of the

Circuit Judge was unsustained by the evidence.

It is unnecessary to go into the controversy whether Reese A. ever subsequently paid for the land out of his part of the profits of the partnership in farming. Even if that were so, which we think was not made to appear, it could not alter the character of the original transaction, as made to delay and defraud the creditors of Samuel O. McCown. "A judgment confessed for the purpose of defeating other creditors, is fraudulent and void as to them, although based upon a valuable consideration." Beattie v. Pool, 13 S. C., 379.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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*FROST & CO. v. WEATHERSBEE.

(April Term, 1885.)

[1. *Guaranty* ⚡38.]

A letter of guaranty in the following words, to wit: "In consideration of your agreeing to advance to W. & Co. not exceeding the sum of \$7,000 and interest, I hereby guarantee to you the repayment of the sums advanced and commissions as agreed," is a limited and not a continuing guaranty.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 47; Dec. Dig. ⚡38.]

[2. *Guaranty* ⚡60.]

The words "commissions as agreed" in this letter of guaranty did not mean that cotton purchased by the principal debtor should be received in payment of the guaranteed debt to the exclusion of subsequent advances made by the creditor to purchase cotton.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 70; Dec. Dig. ⚡60.]

[3. *Guaranty* ⚡36.]

The facts of this case show a new and independent arrangement between this creditor and W. & Co. after the guaranteed debt was full, under which the creditor advanced moneys to W. & Co. to purchase cotton, which was to be shipped to the creditor; and these two debts, one secured by the guaranty and the other by the cotton, to be shipped, remained distinct, notwithstanding their entry upon the books of the creditor as one continuous account.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. §§ 38-45; Dec. Dig. ⚡36.]

[4. *Payment* ⚡38.]

Seable. Where cotton is shipped by a debtor to a creditor holding two demands, the proper time for the debtor to direct application of payment is when the cotton is shipped, and not when its sale is ordered.

[Ed. Note.—Cited in *Baum v. Trantham*, 42 S. C. 109, 19 S. E. 973, 46 Am. St. Rep. 697.

For other cases, see *Payment*, Cent. Dig. §§ 99-103; Dec. Dig. ⚡38.]

[5. *Factors* ⚡45.]

But money having been advanced by a factor to purchase cotton, upon the security of such cotton being shipped to him, the person receiving the advances cannot direct the proceeds of cotton so shipped to be applied to another debt.

[Ed. Note.—Cited in *Hankinson v. Hankinson*, 61 S. C. 193, 204, 39 S. E. 385.

For other cases, see *Factors*, Cent. Dig. § 64; Dec. Dig. ⚡45.]

[6. *Factors* ⇨6.]

And the creditor, as factor, had a factor's lien upon the cotton in his possession, it having been purchased with money advanced by him, and he therefore had the right to apply the proceeds of its sale to the repayment of his advances.

[Ed. Note.—For other cases, see *Factors*, Cent. Dig. § 7; Dec. Dig. ⇨6.]

[7. *Appeal and Error* ⇨32.]

As it does not appear that any material fact or principal involved was overlooked in the decision, there is no ground for a re-argument. Petition for re-hearing therefore refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215–3228; Dec. Dig. ⇨32.]

Before Witherspoon, J., Barnwell, March, 1884.

The Circuit decree, omitting such facts as are re-stated in the opinion, was as follows:

The defendant, A. J. Weathersbee, occupies the position of a surety. The contract of a guarantor or surety cannot be enlarged beyond its terms. The court say, in *Tinsley v. Kirby*, 17 S. C., 4: "A rule never to be lost

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sight of in construing the liability of a surety is that he is a favorite of the law, and has the right to stand on the strict terms of his obligation, where such terms are ascertained. This is a rule invariably recognized by the court, and is applicable to every variety of cases." Plaintiff's action is based upon written contracts of guaranty, and the guarantor's liability depends upon the construction of said contracts. The terms of the contracts, except as to amounts to be advanced, will be found in the paper signed by A. J. Weathersbee, February 1, 1881, as the paper subsequently signed May 26, 1881, merely furnishes a further guaranty for \$1,500 more than it was at first agreed that plaintiffs should advance.

But for the expression in the guaranty, "and commissions as agreed," it seems to me that the intention of the parties could be readily discovered, and the contract would be free from ambiguity. The first paper states that the guarantor assumed the liability as surety for A. M. Weathersbee & Co., in consideration of plaintiffs agreeing to advance to the principal debtors not exceeding the sum of \$7,000 and interest. This amount was increased \$1,500, May 26, 1881, by the second paper referring to the limit in the original undertaking. It therefore appears that the contract expressly imposes a limitation upon the amount to be advanced with interest, and as this limitation was the consideration that induced A. J. Weathersbee to become guarantor, it must have been intended as a measure of the amount of the guarantor's liability to plaintiffs. The terms advance, accept, interest, and commissions, used in the guaranty, evidently contemplated the repayment at some future time.

I construe the terms, "and commissions as agreed," in the guaranty, to indicate that

cotton was intended to be shipped plaintiffs by the principal debtor, as the medium for paying for the advances, and that the term commissions referred to some special rate of compensation agreed to be allowed plaintiffs for the sale of the cotton as factors. There was no antecedent debt due by the principal debtor to plaintiffs, as the principal debtors had just commenced business relations with plaintiffs. As three hundred bales had been mentioned as the probable amount of cotton that would be handled by the principal debtors, it would be reasonable for them to try

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and make special rates as to the commissions to be allowed on the sale of such a large lot of cotton. The defendant, A. J. Weathersbee, testifies that at the time he gave the guaranty he did not expect plaintiffs to advance to A. M. Weathersbee & Co. beyond the amount of the guaranty.

I am constrained to conclude and hold that under the contract of guaranty plaintiffs were limited to \$8,500 advances to be made A. M. Weathersbee & Co., with interest, and that upon the payment of said sum and interest, by shipments of cotton by the principal debtors, the guarantor should be discharged. As already observed, plaintiffs' account shows payments by A. M. Weathersbee & Co. of the sum of \$15,047.40. This view as to the intention of the parties is confirmed by the action of the plaintiffs. It appears by plaintiffs' account that A. M. Weathersbee & Co. commenced shipping cotton to plaintiffs on February 23, which was continued during the months of March and June. The proceeds of this cotton was applied as a credit upon A. M. Weathersbee & Co.'s account.

As already stated, on May 19 plaintiffs refused to honor a draft of A. M. Weathersbee & Co., giving them as a reason that they had drawn up to the guaranty (first guaranty), and that plaintiffs did not expect them to draw more until they had sent cotton. If the limit as to amount in the guaranty had referred to any balance due by principal debtors for advances, why should plaintiffs require additional guaranty when the principal debtors drew up to the limit in the first paper? The plaintiffs by their conduct have construed the original contract to be limited as to amount, and that the advances were to be paid out of cotton shipped them by the principal debtors.

It further appears that on August 31, 1881, one of the firm of A. M. Weathersbee & Co., applied to and obtained from plaintiffs the additional sum of \$1,500 in cash, without security, to pay for goods to replenish stock and to move cotton crop. Thereafter plaintiffs continued to make advances, and A. M. Weathersbee & Co. continued to ship cotton to plaintiffs. Plaintiffs contend that this was the contraction of another debt by the firm of A. M. Weathersbee & Co., and that

from August 31 the firm (principal debtors) owed them two separate and distinct debts—the one for advances secured by the guaran-

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ty, and the other for advances to *move the cotton crop. Plaintiffs therefore contend that they had the right to apply proceeds of cotton on hand November 1 to the unsecured advances made to move the crop.

The account presented by plaintiffs, however, is one entire running account, including debits and credits blended together. Plaintiffs protest against any inference being drawn from their mode of keeping books. It is the duty of the court to decide a case according to the law applicable to the case as presented. The principle of law is, that in an account current the payments shall be applied to the charges in the order of time in which they accrue. In such cases the debt consists not of the items, but of the balance found to be due after applying credits to debits. Under this principle of law I do not think plaintiffs can invoke the right of application of partial payments to this case.

But even assuming that A. M. Weathersbee & Co. contracted two separate debts, it would admit of doubt whether the money could be considered in the hands of plaintiffs until the cotton had been sold or ordered to be sold. It appears that when A. M. Weathersbee & Co., the principal debtors, on November 21 directed the sale and application of proceeds of cotton to the guaranteed advances, the cotton was then being held subject to order as to time of sale.

It was contended that the factor's lien attached to the cotton in the hands of plaintiffs to the extent of advances to move the crop. Having concluded that it was the intention of the parties at the time of the guaranty that payments by the principal debtors were to be first applied to the guaranteed advances, and that no further advances were contemplated, the factor's lien cannot be enforced in violation of such contract to the prejudice of the guarantor. I have no doubt, and it is reasonable to suppose, that plaintiffs expected the principal debtors to ship enough cotton to pay the guaranteed debts, as well as the extended credit for advances allowed the principal debtors. Unfortunately for all parties, the short crop of 1881 disappointed any such expectations, and, as already stated, the parties must now stand upon their legal rights.

It was further insisted that even if the contract of guaranty should be held to limit advances to \$8,500, to be paid out of pro-

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*ceeds of cotton, the limit of credit was waived with the knowledge and consent of all parties, so as to include advances to move the crop. One of the plaintiffs testifies that the guarantor told plaintiff at the time that he overlooked and saw that the business of the principal debtors was kept straight. It also appears from the accounts that some

of the drafts paid by the plaintiffs were for the benefit of the guarantor. The guarantor testifies that he delivered cotton to the principal debtors, to be shipped plaintiffs to meet the draft of \$507.50 at the Bank of Charleston. He further testifies that he looked after the business of the principal debtors to see that the amount for which he endorsed was paid, and insisted that they should ship plaintiffs cotton enough for that purpose. Waiver of the items of the contract of guaranty is not alleged in the complaint, nor does the evidence establish the guarantor's liability beyond the terms of his contract upon which he is sued.

The plaintiffs in their complaint allege that certain transactions took place between the principal debtors and the surety to protect the surety from liability as guarantor to plaintiffs. Records of a confession and conveyances from the principal debtor to the surety were introduced before the master. The plaintiffs therefore demand that the guarantor should account to them for value of property of the principal debtors received by the guarantor as indemnity. The guarantor in his answer alleges and testifies that he advanced money to the principal debtors to enable them to commence business and that he took possession of property of the principal debtors under the conveyances aforesaid in payment of bona fide indebtedness of said principal debtors.

The plaintiffs have had an opportunity before the master of interrogating the guarantor as to the character of the transactions between himself and the principal debtors above referred to. If the guarantor has received any of the property of the principal debtors to indemnify him against liability upon his contract of guaranty, he should be required to account therefore to plaintiffs. As the transactions last above referred to were between members of a family, about the time that the principal debtors were discovered to be insolvent, and as the guarantor admits he received property of the principal

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debtors, plaintiffs, if so advised, *should be permitted to require an accounting by the guarantor for the value of the property received by him from the principal debtors to indemnify him against liability upon his guaranty to plaintiffs.

As Matter of Fact. I. I find from the evidence that there was but one debt between plaintiffs and defendants, as represented by the account current presented by plaintiffs. II. That the amount of advances made by plaintiffs to A. M. Weathersbee & Co., with interest and commissions, secured by the contract of guaranty of A. J. Weathersbee, dated February 1 and March 26, 1881, have been paid by the principal debtors.

As Matter of Law. I. I find that the contracts of guaranty signed by A. J. Weathersbee limited the amount of advances to be

made by plaintiffs to A. M. Weathersbee & Co. to eight thousand five hundred dollars, with interest and commissions on sales of cotton to be shipped by said firm to plaintiffs as factors, to pay said advances and interest. II. That the defendant, A. J. Weathersbee, is not indebted or liable to plaintiffs upon the contract of guaranty for advances made to the defendants, A. M. Weathersbee & Co.

It is ordered, adjudged, and decreed, that plaintiffs have leave to apply to the Court of Common Pleas for Barnwell County for an order requiring the defendant, A. J. Weathersbee, to account for the value of property received from the defendants, A. M. Weathersbee & Co., to indemnify him under the contract of guaranty set forth in plaintiffs' complaint. Should plaintiffs fail to apply during the next two succeeding terms of the Court of Common Pleas for Barnwell County, after the filing of this decree, for the order herein provided, requiring the defendant, A. J. Weathersbee, to account, it is ordered, adjudged, and decreed, that plaintiffs' complaint herein be dismissed with costs.

Messrs. Smythe & Lee, for plaintiffs.

Mr. H. M. Thompson, contra.

The written contracts of guaranty are, by their express and unequivocal terms, limited

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and not continuing. Rice, 131. The limitation upon the amounts to be advanced was the consideration which induced A. J. Weathersbee to become guarantor, and was the measure of the liability of the guarantor to the plaintiffs. The contract of a guarantor and surety cannot be enlarged beyond its terms. 17 S. C., 4. A material deviation from the contract by a party claiming to enforce it rescinds the contract. 16 S. C., 271; 14 Ill., 20; Chit. Cont. (10 Amer. ed.), 577. The debtor, in the first instance, has the right at the time of payment to direct its application. 1 McMull., 76; 9 S. C., 344; 20 Id., 46. As the plaintiffs at the time of payment held no other debt or claim against the principal debtors, distinct and separate from the account current, to such account alone the payments must necessarily be applicable. In the case of current accounts the successive payments or credits are to be applied to the discharge of the items of debit antecedently due in the order of time in which they stood in the account, which is not to be taken backwards, and the balance struck at the head instead of at the foot of it. Story Eq. Jur., 469 b, et seq.; 11 Rich., 466. A factor cannot separate his account into independent items and subject these items to different regimens to suit his own interests. Ibid. There can be no application of cotton or other commercial articles of uncertain or fluctuating value to an account until a sale is effected. Payment must necessarily mean money payment. An order to a factor to hold cotton suspends its conversion into money until fur-

ther orders from shipper as the factor or commission merchant is only the paid agent of the consignor, and bound to follow the direction of the latter as to the consignments. Dudley, 248. The "time of payment," referred to by the court in Bell v. Bell, 20 S. C., 47, as the time for the debtor to make the appropriation, has reference to the time when the cotton is properly convertible into a circulating medium. Directions by the debtor, therefore, for application of proceeds should accompany orders to sell. The confession of judgment by A. M. Weathersbee & Co. to A. J. Weathersbee was partly to indemnify the latter against the contingent liability of his guaranty to plaintiffs, and partly to secure a debt due to himself individually. The contingency did not happen, and never can happen, if the liability of the guarantor is dis-

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charged by payment on the part of the principal debtors; hence the plaintiffs have no subrogation to any rights acquired by A. J. Weathersbee under the confession of judgment or under any compromise thereafter made in satisfaction of said judgment.

Mr. Robert Aldrich, same side.

August 12, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiffs are factors and commission merchants, doing business in Charleston, and in 1881 the defendants, A. M. Weathersbee & Co., viz., Ashley M. Weathersbee, Martin F. Weathersbee, and John A. Weathersbee, were merchants doing business at Williston, in Barnwell County, and the other defendant, Allen J. Weathersbee, the father of two and the uncle of the other member of the above firm, was, as alleged, guarantor for them to the plaintiffs. On June 29, 1882, E. H. Frost & Co. recovered judgment against A. M. Weathersbee & Co. for advances made to them, for \$7,117.56, besides interest and costs, and the execution issued thereon having been returned unsatisfied, they instituted these proceedings to recover the said judgment from Allen J. Weathersbee as the guarantor of the defendants in execution and to set aside certain conveyances, assignments, confessions of judgments, &c., alleged to be fraudulent, made by the firm of A. M. Weathersbee & Co. to the said A. J. Weathersbee for the purpose of transferring all their property in fraud of their creditors, &c.

The defendant, Allen J. Weathersbee, admitted that he had guaranteed to secure the plaintiffs for advances to A. M. Weathersbee & Co., to the extent of \$8,500; but he pleaded payment, insisting that, although a large part of the advances made to A. M. Weathersbee & Co. had not been paid, yet that all moneys received by the plaintiffs from them should be applied to the amounts first advanced, which were covered by his guaranty, and beyond

the amount of \$8,500 he was not liable as guarantor. The principal question, therefore, was whether the guaranty of A. J. W. was a continuing guaranty, intended to cover, to its extent, the eventual balance between the parties; and if not, as to the proper application

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of the proceeds of certain cotton purchased with money advanced by the plaintiffs for that special purpose, &c. The other defendants did not answer, but simply adopted that of A. J. Weathersbee.

The following is an outline of the principal facts. In the early part of February, 1881, A. J. Weathersbee and one or more members of the firm of A. M. Weathersbee & Co. went to the office of E. H. Frost & Co. in Charleston, for the purpose of getting advancements to run their business in Williston. The plaintiffs agreed to advance \$7,000 upon condition that A. J. Weathersbee should guarantee the same, who signed the following paper:

"Charleston, S. C., February, 3, 1881.

"Messrs. E. H. Frost & Co.:

"Dear Sirs: In consideration of your agreeing to advance to Messrs. John A. Weathersbee, Ashley M. Weathersbee, and Martin F. Weathersbee, doing business at Williston, S. C., under the firm name of A. M. Weathersbee & Co., not exceeding the sum of seven thousand dollars and interest, I hereby guarantee to you the repayment of the sums advanced and commissions as agreed.

"Yours respectfully,

"A. J. Weathersbee.

"Witness:

"A. H. Gerard."

The plaintiffs on that day advanced to the firm of A. M. Weathersbee & Co. \$2,000 in cash, and continued to accept their drafts until May 19, when they refused to honor another draft, because the balance on account was then as large as the guaranty, and, as they wrote, plaintiffs did not expect that they would draw any more until they sent cotton. A. M. Weathersbee & Co. replied that they were doing a larger business than anticipated and would need \$1,500 more. Accordingly, on May 26, the firm delivered to plaintiffs an additional guaranty of A. J. Weathersbee for that sum, making the aggregate guaranty \$8,500. The plaintiffs then continued to accept drafts until August 26, at which day the firm of A. M. W. & Co. owed the plaintiffs, balance of advances over receipts, the sum of \$8,570, the full amount of the two guaranties, having sent but two bales of the new crop of cotton.

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*On August 31, one of the firm went to the city and, as Mr. E. H. Frost swears, "told us he wanted \$1,500 to pay for goods to replenish his stock and to carry into the country in cash, so as to have the means from both sources to move the cotton. No guaranty was spoken of for this loan, there was

no question of guaranty, no need for it. The crop was made, was coming every day to market, and this money was actually needed to move and control the cotton by the sale of which the indebtedness was to be paid," &c. A. M. W. & Co. wrote to the plaintiffs, saying: "We would be glad for you to furnish us with the money to pay for cotton to be purchased, which we will forward to you as fast as we get it." In this way large advancements were made for the purpose of buying cotton, which was shipped to the plaintiffs.

At the time the shipments were made no directions were given except to hold for a better price. Nothing was said about applying the proceeds until a large amount, nearly \$10,000, had been thus advanced, and a large quantity of cotton accumulated, when, on November 21, A. M. Weathersbee & Co., by direction of A. J. Weathersbee, wrote: "As our endorser, Mr. A. J. Weathersbee, is desirous of being relieved from any further liability for the amount endorsed for us, you will proceed to sell our cotton at once and apply net proceeds to credit of amount he has endorsed for us." The plaintiffs declined to make the application directed, and declined to make further advances. On December 9, one of the firm visited Frost & Co., who were so well satisfied that A. M. Weathersbee & Co. revoked their former order as to direction of the proceeds of cotton, that they actually made the further advance which they before had refused.

On December 18, A. M. Weathersbee & Co. confessed a judgment to A. J. Weathersbee for \$12,000, for the purpose, as stated, of securing him against his liability as guarantor as aforesaid, \$8,500, and certain notes due by the members of the firm, \$3,500. On December 19, two of the partners conveyed all their real estate to A. J. Weathersbee, without stating any consideration. On December 10, the day after it was understood that E. H. Frost & Co. objected to the proceeds of cotton being applied to the guaranteed debt before the advances to purchase it were paid, A. M. Weathersbee & Co. mortgaged all their stock

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*and animals as additional security for the aforesaid debt of \$12,000. On February 28, 1882, A. M. W. & Co. also made an absolute assignment of all their property of every nature and kind whatsoever to further secure the aforesaid debt of \$12,000.

The advances made by E. H. Frost & Co. exceeded their receipts, and, as before stated, they recovered judgment for the amount of \$7,117.56, and instituted these proceedings to make the guarantor liable for the same. The cause came on for trial before Judge Witherspoon, who construed the words in the first guaranty "and commissions as agreed" to indicate that it was the agreement of the parties "that cotton was to be shipped plaintiffs by the principal debtors, as the medium for

paying for the advances, and that the terms 'commissions' referred to some special rate of compensation agreed to be allowed plaintiffs for the sale of the cotton as factors," &c.; and holding that the guaranty was limited to \$8,500, he decided that it was paid and satisfied by the proceeds of the cotton shipped to plaintiffs, leaving unpaid the advances to purchase it, as to which both the usual lien of the factor and an alleged new arrangement as to advances for the special purpose of buying cotton were excluded by the terms of the original contract of guaranty, that the advances were to be paid by the shipment of cotton. But the judgment gave permission to the plaintiffs to ask an account by A. J. Weathersbee, the guarantor, for the value of all property received by him from the principal debtors to indemnify him against liability upon his guaranty to plaintiffs.

From this decree both the plaintiffs and the defendant, A. J. Weathersbee, appealed, the latter because the plaintiffs were allowed an account against him for the property received by him as an indemnity as guarantor, and the plaintiffs filed twenty-one exceptions, which are in the Brief, and need not be restated here.

There are really but two questions in the case: First, whether the guaranty was in its character continuing, and intended to guarantee the credit of the debtors to the amount indicated, so as to cover any "eventual balance" which might exist upon an adjustment of the accounts of creditors and debtors; or simply a security to be paid and cancelled by the first money of the debtors which, in the course of business, reached the

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hands of *the plaintiffs; and if the latter, second, whether the guaranteed debt of \$8,500 was paid by the direction of the debtors to apply the proceeds of the cotton in the hands of the plaintiffs to the payment of the guaranteed debt, leaving unpaid their advances to purchase the same.

The first question must depend upon the agreement of the parties as to the purpose of the original guaranty. What was that agreement? It is not easy to determine precisely. It was not committed to writing, for it is plain that the guaranty was only a part of the contract. There was not even a bond or note given for the amount guaranteed. Nothing clearly appears, except what may be inferred from the nature of the transaction and the relation of the parties. It is certain that the advances were not all made at the same time like a simple loan, but were to be made as occasion required to enable A. M. Weathersbee & Co. to carry on the business of their country store at Williston, receiving advances as their necessities required and making payments as they might be able. Under such circumstances a guaranty of a particular amount is generally giv-

en, not as a limit to the business, but as continuing in its nature and intended to cover and secure "any balance" which may appear upon adjusting the advancements and payments, as in *Conway v. Cunningham*, 4 S. C., 351; *Witte v. Wolfe*, 16 *Ibid.*, 260; and *Kaphan v. Ryan*, *Ibid.*, 356. But in all these cases there was something which authorized that construction. In this case, however, we agree with the judge that nothing of the kind appears. The guaranty itself, by the words "not exceeding" the amount indicated would serve to limit the amount to be advanced as if it were a simple loan of that sum, and as a consequence, we think, was subject to discharge by any proper payments by the principal debtors under their original contract.

But we do not concur with the Circuit Judge as to the scope and extent of that original agreement. He construes the guaranty as affording the evidence that the advances were to be paid in any "cotton" that the debtors might ship to the plaintiffs, whether it was really their property, received in the course of their ordinary business, or purchased on speculation with borrowed funds. The word "cotton" does not appear in the

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guaranty. Nothing was said about it when the guaranty was executed, except the casual remark of A. J. Weathersbee (when he was holding out inducements to obtain the advances), that the principal debtors would probably "handle about 300 bales of cotton," and from this remark, taken in connection with the last words in the first guaranty, "and commissions as agreed," the Circuit Judge reached the conclusion that the parties then agreed "that cotton [we suppose the aforesaid 300 bales] was to be shipped, as the medium for paying the advances, and the term 'commissions' referred to some special rate of compensation agreed to be allowed plaintiffs for the sale of the cotton as factors." &c.

It seems to us that the isolated, unexplained phrase, "and commissions as agreed," will not properly bear any such very wide and expanded construction; especially when taken in connection with the fact that the guaranty then given was limited to \$8,500, which, in such a large business as that indicated, would necessarily be swallowed up, and really amount to no security at all. If we assume that the agreement was to enable the parties to run their country store, we must also assume that it was to be run in the usual and ordinary way. There is not in the whole transaction an intimation that it was to be conducted in any other way, and we do not understand that it is any part of the legitimate business of a country store to speculate in cotton with money advanced for that purpose; and we are satisfied that the original agreement of guaranty did not contemplate any such condition of things, or provide that cotton so purchased should be received in

payment of the guaranteed debt, to the exclusion of advances made to purchase it. This is abundantly confirmed in various ways, but especially by the declarations of A. M. Weathersbee & Co., that they had enlarged their business, and on that account were continually calling for more money after they had received the full amount guaranteed.

Having concluded that the guaranty was not continuing in the sense of securing any "eventual balance," but limited to \$8,500, like a simple loan of that sum; the next question is whether that limited guaranty was paid and discharged by the direction of A. M. Weathersbee & Co. to apply to that debt the proceeds of the cotton purchased on specula-

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tion, leaving the advances made to *purchase it unsecured. We have just determined that such transaction was not within the original contract of guaranty. Was there a new and special arrangement upon the subject of purchasing cotton? On August 26 A. M. Weathersbee & Co. owed plaintiffs \$8,570. This was secured by the guaranty, which was full to overflowing, and the plaintiffs had refused to make further advances. Mr. E. H. Frost swears: "On August 31 one of the firm came to the city and told us he wanted \$1,500 to pay for goods to replenish his stock and to carry into the country in cash so as to have the means from both sources to move the cotton. No guaranty was spoken of for this loan, there was no question of guaranty—no need of it. The crop was made, was coming every day to market, and this money was actually needed to move and control the cotton, by the sale of which the indebtedness was to be paid, * * * in supplying these means no risk was to be run. They were advanced on the faith of the crop then coming to market, and were, of course, to be repaid from the first sales," &c. A. M. Weathersbee & Co. wrote for more money for the purpose of buying cotton. After inquiring about the cotton market and the advisability of continuing to purchase, they said: "We would be glad for you to furnish us with money to pay for same, which we will forward to you as fast as we get it."

We cannot resist the conclusion that this was a new arrangement for the purchase of cotton, over and above and outside of the original guaranty, with which A. J. Weathersbee had no concern, except, perhaps, to get credit on his guaranty for anything which A. M. Weathersbee & Co. might make clear in the business. It is perfectly certain that the plaintiffs so understood it. They so swear. They made these advancements after the original guaranty was full, and they had refused on the old arrangement to go further. It is not possible to suppose that they would have made these cotton advances for the mere purpose of receiving "cotton in pay-

ment" of their guaranteed debt, which was well secured, leaving the said advances unsecured. And we think that was also the understanding of A. M. Weathersbee & Co.; else why continue to ask for more money to buy cotton, with the promise that it should be sent forward to the plaintiffs "as soon

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"as we get it;" else why confess judgment and make mortgages, assignments, &c., to secure A. J. Weathersbee against his liability as guarantor, &c.? We are constrained to conclude that as to the purchase of cotton there was a new arrangement, in which the cotton itself was to secure the advances for its purchase. There were, in fact, two distinct debts, one secured by the guaranty and the other by the cotton shipped. We do not think that a matter so important and vital should be controlled by the mere form in which the plaintiffs happened to keep their accounts.

Had A. M. Weathersbee & Co. the right to direct the proceeds of the cotton purchased with the advances made under this new arrangement, to be applied to the guaranteed debt, which had arisen under the original contract? The doctrine of the application of payments has recently been fully considered by this court in the case of *Bell v. Bell* (20 S. C., 34), in which it was held that "a debtor owing two debts to the same creditor has the right on making payment to direct its application. If the debtor has given no directions, the creditor may make the application at his pleasure," &c. In this case, while the advances were being made to purchase cotton, and the shipments to plaintiffs were being made, no instructions were given, except to hold for better prices. No instructions whatever were given as to the application of the proceeds until nearly ten thousand dollars had been advanced to buy cotton, and a large lot of cotton had been accumulated, when, on November 21, A. M. Weathersbee & Co., by direction of A. J. Weathersbee, wrote, directing "the cotton" sold at once and the proceeds applied to the payment of the guaranteed debt under the original agreement. This the plaintiffs at once declined, and again refused to make further advances.

It is manifest that if the plaintiffs had been aware of this view on the part of the debtors, the advances would not have been made; and whatever may be the legal rights of the parties, it is clear that this silence while the advances were being made and the cotton was going forward, operated to mislead the plaintiffs. The rule is very positive, that if the debtor wishes to control the application, he must make the direction at the time of the payment. We incline to think that in

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this case the time of payment was when the cotton was shipped and put into the possession and under the control of plaintiffs, and

not afterwards, when the cotton was ordered to be sold. As in the case of *Bell v. Bell*, supra: "There is no evidence that the debtor gave any direction as to the precise application when the consignments went forward. In the absence of this the creditor had the right to make the application." But without going into that we think that the arrangement as to the purchase of cotton amounted to a contract that these advances were made upon the condition that they should be first paid out of the sales of the cotton, which effectually prevented the direction afterwards attempted to be given.

Besides, it is admitted to be the general law that a factor, who advances money in the purchase of goods, has a lien upon them to secure such advances. Judge Story, in his work on agency, says: "A factor who has possession of goods, in consequence of its being usual to advance money upon them, has a special property in them, and a general lien upon them." See *Smith Merc. Law*, 151, and notes; *Bank v. Levy*, 1 *McMull.*, 435. The Circuit Judge fully recognized the general rule, but from the construction which he gave the original contract of guaranty, as embracing "the cotton" purchased under the new arrangement, he held "that the factor's lien cannot be enforced in violation of such contract to the prejudice of the guarantor." We have held that the original contract of guaranty did not embrace this cotton at all, and that the new arrangement, in precise unison with the principles of equity, and the factor's lien, made the cotton first liable for the advances made in its purchase. According to this view the plaintiffs, as factors in possession, had the right to apply the proceeds of sale, first to the advances made in purchasing it, and then the balance in liquidation pro tanto of the guaranteed debt. This was substantially done, in no way injuring the guarantor, *A. J. Weathersbee*, but, on the contrary, liquidating the debt for which he was clearly liable by the sum of \$1,399.36, leaving the judgment for \$7,117.56, with interest and costs, still to be paid by him as guarantor.

This view makes it unnecessary to enter into the question of account claimed against *A. J. Weathersbee* for the money and property alleged to have been transferred to him

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by *A. M. *Weathersbee & Co.*, to indemnify him against all liability as guarantor for them as aforesaid.

The judgment of this court is that the judgment of the Circuit Court be reversed, and judgment entered against *A. J. Weathersbee* in accordance with the conclusions herein announced.

In this case a petition was filed, asking for a rehearing, alleging error in some of the conclusions of fact drawn by this court from the testimony, and more particularly alleging

that the case did not show that all the cotton shipped by *Weathersbee & Co.* to *Frost & Co.* had been purchased with money advanced by *Frost & Co.*, but, on the contrary, that defendant could show, if permitted so to do, that 185 bales of the cotton so shipped were obtained in the ordinary course of trade in payment of balances due on customer's ledger.

November 28, 1885. The following order was passed

PER CURIAM. We have carefully considered this petition. After the new arrangement that the plaintiffs should advance for the purpose of buying cotton, the proceeds of all the cotton received (except what was necessary to refund the advances and pay commissions) was credited upon the guaranteed debt, so that an inquiry whether the money advanced for the purpose of buying cotton was, or was not, actually used for that purpose, was not in the case. As it does not appear that any material fact or principle involved was overlooked in the decision, there is no ground for a reargument. The petition is dismissed.

23 S. C. 370

CHARLOTTE, COLUMBIA & AUGUSTA R.
R. CO. v. GIBBES.

(April Term, 1885.)

[1. *Jury* ⇨ 12, 14; *Pleading* ⇨ 192, 370.]

(1) An issue of fact can only arise when some material allegation of fact is made in the pleadings of one party and controverted in the pleadings of the other party. (2) The proper mode of raising an issue of law is by demurrer. (3) An issue of law must be tried by the court. (4) An issue of fact, in an action for the recovery of money only, must be tried by a jury, unless that mode of trial be waived.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 27-34, 40-60, 66-83, 99, 101, 103; Dec. Dig. ⇨ 12, 14; *Pleading*, Cent. Dig. §§ 408-427, 1210; Dec. Dig. ⇨ 192, 370.]

[2. *Pleading* ⇨ 4, 34, 201.]

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*The answer in this case having controverted no material allegation of fact in the complaint, should be regarded as a demurrer, and the only issue raised being one of law, it must be tried by the court.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 5½; Dec. Dig. ⇨ 4, 34, 201.]

[3. *Jury* ⇨ 14.]

An action for the recovery of money only does not require a jury trial, unless the pleadings raise an issue of fact.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. ⇨ 14.]

[4. *Trial* ⇨ 11.]

The pleadings in this action having raised an issue of law, only, the Circuit Judge erred in ordering the cause transferred from calendar 1 to calendar 2.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 28-30; Dec. Dig. ⇨ 11.]

Before Witherspoon, J., Richland, April, 1885.

The opinion states the case.

Mr. J. H. Rion, for appellant.

Mr. C. R. Miles, attorney general, contra.

September 9, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action brought by the plaintiff, under section 268 of the General Statutes, for the purpose of having the amount assessed upon it, as its proportion of the expenses of the railroad commission, and paid by it, under protest, to the defendant, as county treasurer of Richland County, declared to be illegally and wrongfully collected, and for the purpose of obtaining a certificate to that effect from the court, so that the same may be refunded. The case was docketed by the clerk, presumably at the instance of the plaintiff's attorney, on calendar No. 2, when, on motion of the attorney general, appearing for the defendant, the Circuit Judge granted an order that it be transferred to calendar No. 1, upon the ground that it was an action for the recovery of money, and as such triable by a jury. The act of 1882 (18 Stat., 41) declares that: "Upon calendar No. 1 shall be placed all cases and issues to be passed upon by a jury. Upon calendar No. 2 shall be placed all cases to be passed upon by the court, including all motions and rules to show cause." So that the only question raised by this appeal is whether this was a case "to be passed upon by a jury" or by the court.

The code, in the chapter entitled "Issues and the mode of trial," provides in section

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269 as follows: "Issues arise upon the *pleadings when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds: 1. of law; and 2. of fact." Section 270 provides that "an issue of law arises, 1, upon a demurrer to the complaint, answer, or reply, or to some part thereof." Section 271: "An issue of fact arises, 1, upon a material allegation in the complaint controverted by the answer"—the remainder of the section, not being material to the present inquiry, is omitted. Section 274 provides that "an issue of law must be tried by the court. * * *. An issue of fact, in an action for the recovery of money only, * * * must be tried by a jury, unless a jury trial be waived." From these quotations from the code, we deduce the following conclusions: 1st. That an issue of fact can only arise when some material allegation (of course of fact) is made in the pleadings of one party and controverted in the pleadings of the other party. 2d. That the proper mode of raising an issue of law is by demurrer. 3d. That an issue of law must be tried by the court. 4th. That an issue of fact, in an action for the recovery of money

only, must be tried by a jury, unless that mode of trial be waived.

Now, applying these conclusions to the case in hand, we think it clear that there was no issue of fact raised requiring a trial by a jury, but that the only issue presented was an issue of law which "must be tried by the court." There is not a single material allegation of fact in the complaint which is controverted by the defendant in his pleadings, styled an answer, but the sole issue presented is one of law, whether the act requiring this assessment was constitutional. It is true that, as we have seen, the proper mode of raising such an issue would be by demurrer, and the defendant has not seen fit so to style his pleading; but that cannot alter its legal effect. It does not controvert any material allegation of fact contained in the complaint, and therefore it does not raise any issue of fact. It simply controverts the legal positions taken in the complaint, and thereby raises only an issue of law, and can therefore be regarded only as a demurrer. Even if the case be regarded as an action for the recovery of money only, it would not follow that it must be tried by a jury; for, as we have

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seen, the code does not provide that an *action for the recovery of money only must be tried by a jury, but its language is: "An issue of fact, in an action for the recovery of money only, * * * must be tried by a jury, unless a jury trial be waived." &c. Here there is no issue of fact presented by the pleadings, and there was nothing for a jury to try.

Inasmuch as the plaintiff insists upon its legal right, guaranteed by statute, of having its case, which involved no issue of fact, but only an issue of law, placed upon the proper calendar for trial by the court, we think there was error in refusing such demand.

The judgment of this court is that the order of the Circuit Court be reversed, and that the case be restored to calendar No. 2, for trial by the court.

23 S. C. 373

FRASER & DILL v. CITY COUNCIL OF CHARLESTON.

Ex parte CITY COUNCIL OF CHARLESTON.

Ex parte RAVENEL & CO.

(April Term, 1885.)

1. The decision in *Fraser & Dill v. City Council of Charleston*, 19 S. C., 381, stated.

[2. *Judgment* ⇨ 626, 677; *Receivers* ⇨ 90.]
A receiver will not be ordered to institute proceedings to test the validity of judgments which have been already finally adjudged to be valid. This case distinguished from *Ex parte Brown & Wife*, 15 S. C., 519, and 18 Id., 87.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1193; *Dec. Dig.* ⇨ 626, 677; *Receivers*, Cent. Dig. § 164; *Dec. Dig.* ⇨ 90.]

[3. *Judgment* ¶735.]

Claims were left open by a decree and further proof required, and no exceptions were taken, and on appeal by other parties this decree was affirmed. *Held*, that it was res judicata that these claims had not been then established.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1263, 1265; Dec. Dig. ¶735.]

[4. *Executors and Administrators* ¶238.]

Claims established against an estate without proper parties before the court, may be again brought in question and rejected at the instance of such parties when brought in, even though such rejection may enure to the advantage of other creditors who did not, or could not, contest these claims.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 844; Dec. Dig. ¶238.]

[5. *Receivers* ¶151.]

Decree of the Circuit Judge approving the master's report, that certain claims presented were not proved, affirmed.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 269-271; Dec. Dig. ¶151.]

[6. *Executors and Administrators* ¶260.]

A judgment against an executor, without collusion, is conclusive as to the validity of the claim upon which it is based, but the rank of

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the *claim, in the distribution of the assets, is determined by its condition at the death of testator. Where all the unpaid valid claims against testator were simple contract demands at his death, since reduced to judgment against the executor, it is not error to order the assets to be applied to them ratably.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 939; Dec. Dig. ¶260.]

7. Concurring finding of fact by master and Circuit Judge approved.

[This case is also cited in *City Council of Charleston v. People's Nat. Bank*, 23 S. C. 413, 414, without specific application.]

Before Fraser, J., Charleston, November, 1884.

For a history of this case, see the reports of the case upon previous hearings in 8 S. C., 318, 344; 11 Id., 486; 13 Id., 533; 14 Id., 214; 19 Id., 384. After its last hearing in this court the City Council filed a petition praying the Circuit Court to order the receiver of the estate of Joseph Whaley to institute proceedings to test the validity of the judgments obtained by the plaintiffs in the principal case, and others.

In the principal case it was referred to T. M. Hanckel, Esq., master, to inquire and report upon the claims of the receiver of the Bank of the State of South Carolina, and leave was given to the legatees of Joseph Whaley to except to all claims against the estate not reduced to judgment. The City Council of Charleston, assignee of these legatees, accordingly excepted.

Upon the claim of Ravenel & Co., master Hanckel reported as follows:

The first claim examined under the exceptions was the claim of Ravenel & Co. against the estate of Joseph Whaley, for loans and advances made by them in the manner stated in the evidence herewith filed. From that

evidence I find that the correct amount of this claim of Ravenel & Co. is ascertained to be the sum of \$6,404.13, with interest from January 1, 1873; and I find that the amount so ascertained is a valid and subsisting claim of Ravenel & Co. against the estate of Joseph Whaley.

Upon the claim of Theodore D. Jervey, No. 2, the master reported as follows:

Note of William Whaley for \$2,387, dated June 1, 1874, payable ten days after date to Theodore D. Jervey, Esq., or order, with interest after maturity at the rate of one and one-quarter per cent. per month, secured by an assignment to the payee of a certain "stated claim," alleged to be due to said William

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*Whaley by the estate of Joseph Whaley, for his commissions and for expenses of the last illness of Joseph Whaley, and for judge of probate's fees, and sundry other "items"; and a statement of said "stated claim" being annexed to said note and therewith filed with this report. There has not been submitted to me, nor can I find in the records of the case, any evidence whatever to show whether or not any commissions were ever earned by William Whaley as the executor of Joseph Whaley, or any sums of money ever advanced by him out of his individual means to pay the expenses of the last illness of Joseph Whaley, or the judge of probate's fees, or any other items legally due by this estate of Joseph Whaley, or the amounts of such advances; or that upon the accounting between the said William Whaley as executor and the said estate any balance has been found due the said William Whaley for such advances; such accounting being, of course, necessary to establish such claim. I therefore find that there is no evidence whether or not this claim of Theodore D. Jervey, No. 2, is a valid claim against the estate of Joseph Whaley.

Upon the claim of G. L. Buist, the master reported that the note was not produced, and all the other claims he reported to be based upon forged signatures of Joseph Whaley.

The Circuit decree was as follows:

The above stated case came before me at the fall term of the Court of Common Pleas for Charleston County in 1884. The matters were not heard together, but at the same sitting of the court. The first of the above stated causes comes up on a report of the master, and the second on a petition for an order instructing the receiver to adopt such proceedings as are proper and necessary to test the validity of certain claims presented in this case against the estate of the testator. The City Council of Charleston also filed exceptions to the master's report, as well as other parties to the proceedings. The purpose of the exceptions filed by the City Council is substantially the same as that sought to be obtained by the petition. The matters will therefore be considered together. The

questions raised by the petition, report, and exceptions will more fully appear by reference to them.

There is no allegation of any facts which show any ground of invalidity in, or any matter of defence to, any of these claims

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*which have not already been considered by the court in this case, between the petitioners and the creditors, whose claims the court is now asked to order the receiver to contest. This petition refers only to certain creditors who have obtained judgments at law, because all others are now undergoing investigation in this court, according to the practice of the court in such cases, and are passed upon in said report. The claims of these judgment creditors after a long litigation have been established by the Circuit Court, and the judgment of the Circuit Court has been affirmed by the Supreme Court, and this has been done in this case, in which the petitioner and these judgment creditors are parties, and in which the contest was carried on directly between these parties, each represented by counsel.

The receiver, as I understand it, is an indifferent person, who is simply to hold the fund for the parties entitled to it, and has in himself the rights of both parties. As the representative or successor of the deposed executor, he cannot repudiate his acts, unless for fraud or collusion between the executor and the creditor, and which he may do, as for this purpose he will be invested with all the rights and equities of other creditors or legatees. As the representative of the other creditors and legatees, he ought not to be allowed to assail these judgments, because their rights have already been passed upon by the court, and the petitioner, as assignee of the legatees, does not now say anything in any manner impeaching them, more than has heretofore been said in this case. It is difficult to conceive what rights of the creditors and legatees can be vested in the receiver in this case, which are not vested in them directly, and which they have not the right and have not had the opportunity in this case to litigate. I do not, therefore, see any propriety in ordering the receiver to institute proceedings as prayed for in the petition.

It may be that these judgments are founded on instruments to which the name of the testator, Joseph Whaley, was forged by the executor, who had been deposed. The court has held that it is too late after the rendition of these judgments to raise this question. There is not a single suggestion throughout this long litigation that these creditors are not innocent of any fault in reference to them. Mere legatees are volunteers, and

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take by the testator's bounty, and it is presumed were in a much better position to know of the mismanagement of the estate,

than the creditors whose means were used by the chosen representative of the testator, their ancestor.

The other questions in this case arise on the report of the master, filed November 18, 1884, and exceptions thereto. Whatever may have been the legal effect as amongst the creditors themselves, of certain orders which were made in the cause, before the amendments were made by which the City Council of Charleston was impleaded as assignee of two of the legatees, and from which no appeal was taken by any of the creditors, all the claims which had not been put into judgment were left open as unadjudicated by the decree of September 18, 1882, as between all parties to the action, and from so much of that decree there has been no appeal. I am inclined to the opinion that the decree was, as to those matters in which it is said to have been modified by the decree of Judge Kershaw, simply administrative and within his control. If, however, the said decree of September 18, 1882, was as to such matters judicial, the proper way to correct the subsequent ruling was by an appeal to the Supreme Court, and not by application to a Circuit Judge. In either view of the case, I will not go behind the order of Judge Kershaw.

Considering, therefore, that all the claims not in judgment were open for investigation before the master, I see no good reason why there should be any new trial before him, or by a jury, which is, in cases like this a matter of discretion. There is really more evidence that the claim of Ravenel & Co. is founded on a contract made by Joseph Whaley himself than there is outside of the presumptions of law in favor of even those which are in judgment. There is sufficient in the evidence before the master, as to this and all other claims reported on, to justify his conclusions, and I therefore concur in them.

It is therefore ordered and adjudged, that the petition of the City Council above referred to be dismissed, the costs to be paid by the petitioner. It is further ordered, that the exceptions to the said report be overruled and the report confirmed. It is further ordered, that the receiver, T. W. Bacot, do pro-

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ceed to *sell, as soon as practicable, the city four per cent. bonds in his hands, and that he apply the proceeds of sale and any other funds in his hands, after deducting his commissions as fixed by the previous orders in this case: First, to the payment of any taxes due the State: second, to the payment of the costs and disbursements of the master and other officers of the court: third, to the following claims established in this case:

* * * * *

Should the funds in the hands of the receiver be insufficient to pay the above claims

in full, it is ordered that the receiver do pay them pro rata.

From this decree, the City Council of Charleston and the creditors whose claims were rejected appealed; and E. H. Gadsden, administrator, also appealed from so much of the decree as allowed the claim of Ravenel & Co.

Mr. George D. Bryan, for City Council.

Mr. W. St. J. Jervey, for rejected claims.

Messrs. E. McCrady, Jr., John Wingate, and J. E. Burke, for judgment creditors.

Messrs. W. H. Brawley and Langdon Cheves, for Gadsden, appellant.

Messrs. Simonton & Barker, for Ravenel & Co.

September 9, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. This case has been so often before this court on previous occasions that anything like a full statement of the facts is unnecessary, as they can be gathered from the report which may be found in 19 S. C., 384, and from the reports of the master and the decree of the Circuit Judge in the "Case" as prepared for argument here.

The appeal on behalf of the City Council of Charleston seems to us to be an effort to reopen questions which have heretofore been finally adjudged, and therefore calls for no

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further discussion than to show that the questions raised by the appeal have already been determined. The object of these appellants is to assail the validity of the judgments recovered by the plaintiffs and others against Wm. Whaley, as executor of Joseph Whaley, in actions at law, upon the ground that the notes upon which they were recovered did not bear the genuine signature of Joseph Whaley, but that his name was forged by the executor, Wm. Whaley. As we understand it, this was the very question determined adversely to the appellants by the decree of Judge Fraser of September 18, 1882, affirmed by this court in 19 S. C., 384. The fact that in this case the appellants, by their petition, ask for an order requiring the receiver to contest the validity of these judgments, cannot alter the case. The former decision was not based upon the fact that the attack upon the judgments proceeded from the wrong source, but the question was determined upon its merits. The language of Judge Fraser—"in the absence of collusion, I must regard a judgment against an executor as conclusive against the world whenever the same matter comes in question again"—conclusively shows this; and the whole tenor of the opinion of this court affirming that decree demonstrates that this court based its decision, not upon the form of the proceeding, but upon the merits. To say the least of it, therefore, it would be entirely nugatory to grant an order authorizing or directing the receiver to litigate a

question which has already been determined in this very case.

The cases of *Ex parte Brown and Wife* (15 S. C., 519), and *Ex parte Layne* (18 Id., 87), which have been cited to sustain the view contended for by the appellants are not applicable. In those cases, claims which arose subsequent to the appointment of the receiver, were in controversy, and of course, therefore, the judgments which had been recovered against the railroad company were not binding upon the receiver, while the claims in controversy here arose prior to the death of Joseph Whaley, and, of course, prior to the appointment of the receiver of his estate. The other cases cited by the appellants (with the exception of *Wilson v. Kelly*, 19 S. C., 160, which has been sufficiently explained in the former decision refusing a motion for a rehearing of this case), relate to ques-

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tions of the rank of claims *reduced to judgment against an executor or administrator in the distribution of the assets of an insolvent estate, and have no application to the question sought to be reopened by this appeal.

Our next inquiry is as to the appeal in behalf of the simple contract creditors, together with one bond creditor, the People's Bank, who had not reduced their claims to judgment, and whose claims have been rejected, either because they were forgeries, or because there was no evidence to establish them as debts of the testator. It is quite clear that the Circuit Judge in this case was right in saying that "all the claims which had not been put into judgment were left open as unadjudicated by the decree of September 18, 1882, as between all parties to the action, and from so much of that decree there has been no appeal," for in that decree the same judge, after adjudging that the judgments recovered at law were valid claims against the estate of Joseph Whaley, uses this language, manifestly referring to the claims of these appellants: "The other claims presented to the referee, G. W. Dingle, stand on a different footing, and I prefer, in the present state of the evidence, to have more light in reference to them," and he therefore ordered that all of the creditors (which, of course, included these appellants), except the judgment creditors, should be required to establish their claims within a prescribed time before the master, or be barred from any benefit or advantage of any judgment or decree in this cause. If there was any error in this, the proper time to correct it would have been by appeal from that decree; but when there has been no such appeal and no exception constituting a basis for an appeal from the final decree in the cause, and, on the contrary, the same has been affirmed by this court, it has become at least the law of this case. So that even if there was error in that decree, as we do not think there was, it cannot now avail the appellants.

It is quite certain that a judgment rendered in a cause in the absence of necessary parties has no force or effect as against such parties. Hence, even granting that the very loose and informal proof of these claims, if indeed, there was any proof at all, before the clerk or referee, Dingle, converted them into judgments or decrees in equity, inasmuch as all this occurred in the absence of parties whom this court has adjudged to be

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necessary *parties, they would have no validity as to such parties. And when these necessary parties were brought in, it was not only the right, but the duty, of the court to provide for the investigation of the validity of these claims, and if upon such investigation they have been shown to be no claims against the estate of the testator, they certainly cannot be allowed to participate in the distribution of the assets of the estate.

The fact that this may enure to the benefit of the judgment creditors who possibly may have been estopped from raising the question as to the validity of the claims of these appellants (though we do not deem it necessary to determine that question), cannot alter the case. The court certainly cannot order any of the assets of the estate paid to any one claiming to be a creditor of the estate until he has established his claim in a proper proceeding, wherein all necessary parties are before the court and are allowed an opportunity to contest such claim if they see fit to do so. Even if every one of the judgment creditors had, throughout this litigation, and even yet, consented that the claims of these appellants should be regarded as valid claims against the estate, this could not make them so as long as any other party to the cause, whether legatee, or assignee of legatees, insisted upon proper proof of such claims, as has been done in this case; and in the absence of such proof this court would be bound to reject them as invalid claims against the estate, even though the effect might be to increase the dividend which the judgment creditors would receive. These appellants have no claim, and do not pretend to have any, against the judgment creditors. Their claims are against the estate, and until they are established against the estate they are entitled to nothing. The claim of Theodore D. Jervy, No. 2, is supposed to stand upon a somewhat different footing from the other claims, which were rejected as forgeries. But we do not see that there is, practically, any difference. This claim was never established as a debt of the testator in any proceeding where all necessary parties were before the court, and therefore cannot be allowed as a claim against the estate.

The exception taken by the City Council that the Circuit Judge has ordered all the judgments to be paid ratably, if there is a deficiency of assets, without regard to rank,

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seems to have *been taken under a misapprehension of the facts. The master reported that all the judgments, except that in favor of Richard Lathers, which has been paid and is out of the case, were based upon simple contract debts, and all bearing the same rank would, of course, be paid ratably in case of a deficiency of assets, as directed by the decree. For while a judgment recovered against an executor is, in the absence of proof of collusion, conclusive as to the validity of the claim upon which it is based, as a judicial ascertainment of that fact, in a proceeding in which all proper parties are before the court, yet it has no effect in determining the rank of such claim, which, according to the well settled rule, must be determined by reference to the condition of the claim at the time of the death of the testator, or intestate, as the case may be. If it was then a mere simple contract claim, it still retains that rank, after it has been reduced to judgment, against the executor or administrator.

The appeal from so much of the decree as allows the claim of Ravenel & Co. seems to be based upon a question of fact, and in view of the concurring judgment of the master and the Circuit Judge, we see no ground which would warrant this court in interfering.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 382

WOOD v. REEVES.

(April Term, 1885.)

[1. Evidence ¶332.]

In action for foreclosure by the mortgagee against the vendee of the mortgagor, records of the Probate Court may be introduced by defendant to show that the interest of the mortgagor in this property was not subject to mortgage.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1237-1246; Dec. Dig. ¶332.]

[2. Trial ¶105.]

A will introduced in evidence without objection to the absence of proof by a subscribing witness, cannot be afterwards objected to as unproved.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. ¶105.]

[3. Mortgages ¶12.]

Land directed by a will to be sold by the executors and the proceeds divided is converted into money, and the interest of a beneficiary therein cannot be mortgaged. If sold under an arrangement between the executors and the other parties in interest, the sale is binding upon all.

[Ed. Note.—Cited in Walker v. Killian, 62 S. C. 487, 40 S. E. 887; Mattison v. Stone, 90 S. C. 149, 72 S. E. 991.

For other cases, see Mortgages, Cent. Dig. § 13; Dec. Dig. ¶12.]

[4. Mortgages ¶171.]

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*A mortgage must be proved by the affidavit of one of the subscribing witnesses and the

proof recorded with the mortgage; and if this be not done, its record does not affect the rights of subsequent purchasers without notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 402; Dec. Dig. ☞ 171.]

[5. *Appeal and Error* ☞ 1178.]

The Circuit Judge having inadvertently omitted to state the sum for which he gave judgment, the case was remanded for correction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604–4620; Dec. Dig. ☞ 1178.]

Before Pressley, J., Laurens, November, 1884.

This was an action by T. R. L. Wood against William A. Reeves and others for foreclosure of a mortgage. The opinion states the case. The Circuit Judge decreed as follows:

My judgment on the above facts is that the interest of W. A. Reeves in the estate of his father was neither an interest in land nor in tangible property of any kind. The direction that his property "be sold and divided" gave each legatee a purely money interest, which he could assign and transfer, but the record of such assignment in the register's office is not notice to the purchasers of the land, nor does it give to the holder thereof any lien upon the land which he could foreclose as a mortgage. It is in law only an irrevocable power to receive from the executors the share of W. A. Reeves in the proceeds of testator's property when sold, and notice thereof comes too late after he had received his share.

Furthermore, if said deed be a valid mortgage on property which could be mortgaged, then in that case the record of the same without the proof and the registry thereof, as required by the act of 1839, makes the record ineffectual as constructive notice to a subsequent purchaser. Before that act, it was decided in *Lamar v. Raysor*, 7 Rich., 509, that legal proof before recording would be presumed; but not so since that act, which requires, as prerequisite to recording, the affidavit of one of the witnesses, and that same be recorded.

It is therefore ordered and adjudged, that plaintiff have leave to enter judgment and issue execution against W. A. Reeves, with interest thereon from commencement of this action, and for costs of this case. Further ordered, that as to all the other defendants the complaint in this case be dismissed.

Mr. F. P. McGowan, for appellant.

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*Messrs. Ball & Watts, contra.

September 9, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. Some time after November 24, 1869, and prior to the year 1879, but at what particular date does not appear, Drury Reeves departed this life leaving a will, bearing date November 24, 1869, by

which he disposed of his property as follows: "After all my just debts are paid, I give to my wife, Elizabeth Reeves, all my property, both real and personal, during her life, or until M. A. Reeves, my youngest son, arrives at the age of twenty-one. In the event that my wife should die before my son, M. A. Reeves, arrives at that age, then in that case the property shall remain the same undivided in the hands of my executors until that time, or until M. A. Reeves arrives at the age of twenty-one years. Then I desire my property, both real and personal, sold and equally divided among the surviving heirs according to law. 2d. I make and constitute W. A. Reeves and J. S. Reeves my executors to carry out my last will and testament."

On December 8, 1879, Wm. A. Reeves, one of the sons of the testator, being indebted to the plaintiff, in order to secure the payment of said debt executed a paper under seal, in the presence of two witnesses, whereby, after reciting the amount of said debt, he declares that, in order to secure the payment of said debt, "I hereby assign, transfer, and convey to the said T. R. L. Wood, and by these presents do assign, transfer, and convey to the said T. R. L. Wood, all my right, title, and interest in the real and personal estate of my father, Drury Reeves, deceased." This paper was recorded in the office of the register of mesne conveyances on the day of its date, but it did not appear that its execution had ever been proved by either of the subscribing witnesses, there being no affidavit to that effect either in the book of records or upon the original paper.

On October 31, 1881, M. A. Reeves, the youngest son of the testator, having attained the age of twenty-one years, the legatees and devisees under the will entered into agreements for the settlement of the estate, by which the real estate was sold to some of the children, a portion of it passing into the

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hands of the *defendant, Wm. G. Gambrell, and to each child was paid his or her equal proportion of the estate in money, and these agreements, together with a statement of the settlement of the estate, were filed in the office of the judge of probate, who, on March 14, 1882, granted an order discharging the executors from their trust.

On July 24, 1883, this action was commenced by the plaintiff to foreclose his alleged mortgage on the undivided interest of the defendant, Wm. A. Reeves, in the real estate of which his father died seized. The Circuit Judge held that the interest of Wm. A. Reeves in the estate of his father was not an interest in property that could be mortgaged, but was a mere money interest, which might be the subject of assignment, which would not affect the other executor and legatees or devisees without notice, and that the record of such a paper would not operate as

constructive notice. He further held that even if the paper could be regarded as a mortgage on the interest of Wm. A. Reeves in the land, the registry thereof without the proof of the execution being recorded was ineffectual as constructive notice. He therefore dismissed the complaint as to all the defendants except Wm. A. Reeves, with leave to the plaintiff to enter judgment against Wm. A. Reeves, "with interest thereon from the commencement of this action, and for costs of this case," but omitted the amount for which he directed judgment to be entered, no doubt through inadvertence, or probably as a mere clerical error.

From this judgment the plaintiff appeals upon the following grounds: "Because his honor erred: 1. In holding that the defendants, except Wm. A. Reeves, were bona fide purchasers without notice. 2. In holding that the mortgage as recorded was not notice to third parties. 3. In holding that William A. Reeves had no interest in the land of Drury Reeves, deceased, that could be mortgaged and sold under said mortgage. 4. In not holding that the land of Drury Reeves, deceased, until sold as the will directed, descended to the heirs at law, and that a mortgage given by William A. Reeves on his undivided interest before said sale could not be prejudiced by any proceedings to which the mortgagee was not a party. 5. In holding that the estate of Drury Reeves, deceased,

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had been settled as the will *directed. 6. In not holding that William A. Reeves paid no part of his distributive share to the extinguishment of said mortgage debt. 7. In admitting in evidence the records of the Probate Court and testimony going to show that defendants were purchasers of the interest of William A. Reeves without notice. 8. In not finding the amount of money due the plaintiff by William A. Reeves."

We are unable to perceive the pertinency of the fifth and sixth grounds of appeal to the questions presented for our consideration, as we do not deem it important to the real issues to be determined whether the estate was settled in accordance with the terms of the will or not, and as the amount due by Wm. A. Reeves was not determined by the judgment, it will be time enough yet when that is to be ascertained to determine whether Wm. A. Reeves applied his distributive share, or any part thereof, to the plaintiff's claim. As we understand it, the appeal really presents but four questions. 1st. As to the admissibility of the evidence mentioned in the seventh ground of appeal. 2d. As to whether Wm. A. Reeves had such an interest in the estate of his father as could be the subject of mortgage. 3d. If so, was the record of the paper styled a mortgage constructive notice to third parties? 4th. As to the defect in the judgment in not fixing the amount due by Wm. A. Reeves to the plaintiff.

As to the first question, we do not see upon what ground the evidence should have been excluded. It appears from the "Case" that the only objection made was "that the defendants have put in a general denial, and cannot be allowed to put up a special affirmative defence showing settlement of the estate." We do not understand that the testimony was offered with any such view, but simply for the purpose of showing that Wm. A. Reeves had no interest in the estate which could be the subject of mortgage—that his interest was a mere money interest, which might be the subject of assignment, but not of mortgage; and in this view the testimony was clearly competent. No objection was made to the introduction of the will for want of proof by one of the subscribing witnesses, which possibly might have been supplied if made at the proper time, and it cannot now avail the appellant.

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*As to the second question, we agree with the Circuit Judge that Wm. A. Reeves took under the will of his father a mere money interest, which could not be the subject of mortgage. Land directed to be sold by a will and the proceeds divided is converted into personalty, money, which certainly cannot be mortgaged. *Andrews v. Loeb*, 22 S. C., 274. The fact that the land in this case was sold by private arrangement amongst the parties interested, and not by the executors, cannot alter the case, for the executors were parties to, and acquiesced in, such arrangements, and neither they nor any one else can now repudiate them; certainly not to the detriment of an innocent purchaser. Even granting that the fee in the land descended to the heirs at law, to prevent it from being in abeyance, between the time of the death of the testator and the time of the sale, yet the heirs could only hold it subject to its being disposed of according to the will. No interest whatever was given to Wm. A. Reeves in the land, but only a share in the proceeds of its sale, and his attempt to mortgage what he never had was necessarily nugatory.

We also agree with the Circuit Judge as to the third question. Even if the paper in question be assumed to be a valid mortgage, yet, unless it was recorded according to law, it could not, under the express terms of the statute, and not upon the plea of purchase for valuable consideration without notice, affect the rights of a subsequent purchaser without notice; for as to him it is no mortgage. Was it recorded according to law? It could not be legally recorded unless its execution was first proved by one of the subscribing witnesses according to law (*Woolfolk v. The Graniteville Manufacturing Co.*, 22 S. C., 332); and although prior to the act of 1839 the fact of the deed being upon the records of the proper office might have been sufficient to warrant the presumption that

the deed had been properly proved, yet as that act, which was incorporated in section 5, chapter XXIII., of the General Statutes of 1872, the law then in force, expressly required "the proof in every case to be recorded with the writing," it would seem to follow that a paper was not recorded according to law unless proof of its execution was recorded also. And when, as in this case, nei-

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ther the original *nor the record showed any evidence that its execution had ever been proved, we think it clear that the paper cannot be regarded as recorded, and hence cannot be constructive notice to any one.

In reference to the fourth question, as we have already intimated, it is apparent that there was error in omitting to fix the amount for which the plaintiff was entitled to judgment against the defendant, Wm. A. Reeves, and therefore, upon this ground alone, the case must go back to the Circuit Court, in order that this deficiency may be supplied.

The judgment of this court is that the judgment of the Circuit Court be affirmed in every respect except as above indicated, and that the case be remanded to the Circuit Court for the purpose of having the above mentioned deficiency in the judgment supplied.

23 S. C. 388

McGEE v. HALL.

(April Term, 1885.)

[Partition ⇐17.]

Where, in action for partition, the defendant alleged an absolute title in himself, and claimed to hold the land under the statute of limitations, the issues of title raised in the answer should have been placed on calendar 1 for trial by a jury, leaving the question of partition to be afterwards determined by the court. It was error to dismiss the complaint on the ground that the court could not try titles to real estate in a case of partition.

[Ed. Note.—Cited in *Sale v. Meggett*, 25 S. C. 81; *Reams v. Spann*, 28 S. C. 533, 6 S. E. 325; *Westlake v. Farrow*, 34 S. C. 273, 13 S. E. 469; *Osborne v. Osborne*, 41 S. C. 197, 19 S. E. 494; *Threatt v. Brewer Mining Co.*, 42 S. C. 95, 19 S. E. 1009; *Loan & Exchange Bank v. Peterkin*, 52 S. C. 238, 29 S. E. 546, 68 Am. St. Rep. 900; *Alston v. Limehouse*, 61 S. C. 5, 39 S. E. 192; *Windham v. Howell*, 78 S. C. 191, 59 S. E. 852; *Jenkins v. Jenkins*, 83 S. C. 544, 65 S. E. 736; *McCown v. Rucker*, 88 S. C. 183, 70 S. E. 455.

For other cases, see *Partition*, Cent. Dig. § 58; Dec. Case ⇐17.]

[This case is also cited in *Westlake v. Farrow*, 34 S. C. 273, 13 S. E. 469, without specific application.]

Before PRESSLEY, J., Anderson, February, 1885.

The opinion sufficiently states the case.

[For subsequent opinions, see 26 S. C. 179, 1 S. E. 711; 28 S. C. 562, 6 S. E. 566.]

Messrs. Broyles & Simpson, for appellants.
Messrs. Murray, Breazeale & Murray, contra.

September 14, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. David Hall, late of Anderson County, died in 18—, leaving a will in which, among other devises and bequests, he devised certain tracts of land

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situate in *said county, containing some seven hundred and eighty-four acres to his three youngest sons, to wit, Absalom J., John M., and William C. Hall, to be divided equally in value between them. "The issue of any of said sons who may be dead to take the share of the parents, and if either of them should die without issue living at his death, then his or their share in said land to go to the surviving brothers, or their issue, as above." These two tracts, it seems, were surveyed and divided between the three sons named, William C. taking three hundred and forty acres, John M. two hundred and twelve, and Absalom J. three hundred and thirteen.

Shortly after this division, to wit, on May 21, William C. was killed in battle at Jackson, Miss., intestate, unmarried, and without issue; and during the same year, to wit, in August, 1863, his brother, John M., died, intestate, unmarried, and without issue, leaving Absalom J. the sole survivor of the three brothers. The entire lands then, as it appears, went into the possession of Absalom, who sold a portion of the William C. Hall tract, to wit, about one-half in value, to one Jonathan Adams, leaving about 175 acres, the balance of the William C. Hall tract, which, on the death of William C., it was supposed had gone under the will of David to John M. Hall. On the death of John M., Absalom being indebted to one O. H. P. Fant, and supposing that upon the death of John M. he had become the sole owner of the lands in question, on June 5, 1871, mortgaged said land, including the 175 acres mentioned above, to the said Fant. Under proceedings for the foreclosure of this mortgage in December, 1879, this 175 acres was sold and purchased by one Mrs. E. C. Bell, who subsequently sold and conveyed the same to the defendant, Lemuel M. Hall.

Under this state of facts, which are all set out in the complaint, the action below was instituted in June, 1883, the plaintiffs claiming that under the will of their grandfather, David Hall, the tract of land which William C. Hall took in the division went, upon his death, one-half to each of his surviving brothers, to wit, to John M. and Absalom J., and that upon the death of John M., unmarried, and without issue, the share of John M. therein descended to his heirs at

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law, including the *plaintiffs, Absalom J. and some of the other defendants named in the complaint; and that Lemuel J. Hall having purchased said land from Mrs. E. E. Bell, who bought at the foreclosure sale referred to above, he had become the owner of the share of Absalom J. Hall in said tract, thereby becoming a tenant in common to the extent of the share of Absalom J. therein with the plaintiffs and the other heirs at law of the said John M. Hall. Wherefore the plaintiffs prayed judgment: 1st. That the deed of the master for the 175 acres to Mrs. E. C. Bell under the foreclosure sale, and the deed of Mrs. Bell to the defendant, Lemuel M. Hall, be declared null and void, except as to the distributive share of Absalom J. therein. 2d. That there might be an accounting and partition and division of said land among the parties entitled, or sale, if necessary. And, 3d. That if deemed necessary an issue to try the title to said land should be ordered and directed between the heirs of the said John M. Hall and the said Lemuel M. Hall. Lemuel M. Hall answered the complaint, and resisting plaintiffs' claim for partition, denied the tenancy in common, and set up as his main defence independent title to the 175 acres involved, relying for title upon the deed of Mrs. Bell and the statute of limitations.

The case came up for trial before his honor, Judge B. C. Pressley, February, 1885, when a motion for an issue at law to try the titles to said land made by plaintiffs' attorneys being refused, an order, on motion of the attorneys of the defendant, Lemuel M. Hall, was passed, ordering as follows: "That the complaint be dismissed as to said defendant, on the ground that this court, sitting in chancery, has no jurisdiction to try titles to real estate in a case in partition. And it appearing to the court from the complaint and answer of the said defendant, L. M. Hall, that the said defendant claims titles in his own right; now, on motion of Murray, Breazeale & Murray, attorneys for L. M. Hall, it is ordered that the complaint herein be dismissed as to the defendant, L. M. Hall, and that he be allowed his proper costs and charges."

The plaintiffs excepted, and have appealed upon various grounds, all alleging in substance error to the judge in refusing the motion for an issue at law and dismissing the complaint as to the defendant, Lemuel M. Hall.

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*Was it error to dismiss the complaint? His honor, the Circuit Judge, construed the complaint to be a complaint in chancery for partition, and it having appeared from said complaint and the answer of the defendant, Lemuel M. Hall, that said Hall claimed title to the land in his own right, thereby raising

a question of title to real estate, in the opinion of his honor, the jurisdiction of the court sitting in chancery was ousted, and upon that ground he dismissed the complaint as to the said Lemuel M. Hall. It is no doubt true that an action in the nature of an action of ejectment for the recovery of real estate cannot be tried or entertained on the equity side of the Court of Common Pleas; such a case is strictly a case at law, and must be tried on the law side, and by a jury, unless a jury trial is waived by the parties. And if the action below had been in terms an action for the recovery of the land in dispute from the defendant, L. M. Hall, there would have been no error on the part of the Circuit Judge in declining to hear it on the equity side of the court; yet even in that case we do not think that the complaint should have been dismissed. The proper order would have been to transfer the case from calendar 2 to calendar 1, in other words, from the equity calendar to the jury calendar.

But the action was in no sense an action for the recovery of real estate in the nature of an action of ejectment, or of trespass to try titles. It was strictly an action in partition, based upon the plaintiffs' construction of the will of David Hall and the rights of Lemuel M. Hall in the land, arising upon his purchase from Mrs. E. C. Bell. And the right of the plaintiffs to the partition demanded depended upon the fact whether they had properly construed said will and the sale under the foreclosure proceedings. In their view, upon the death of William C. Hall, one-half of the land which he took in the division made under the will of his father went to John M., which, upon his death, became subject to partition among his heirs at law, Absalom being one of these heirs, whose interest was sold under the foreclosure proceedings, and finally reached the defendant, Lemuel M. Hall, thereby making him a tenant in common with the other heirs to the extent of Absalom's interest. And upon this ground they claimed partition, the complaint

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being filed for this purpose, *and for no other, except the incidental prayers, intended to remove the obstacles in the way of the partition, to wit, the prayer for vacating the deed of the master and of Mrs. Bell, except as to the interest of Absalom, and also the prayer for an issue if deemed necessary.

The case then came before the Circuit Court as a plain and simple case for partition on the part of the plaintiffs, with a statement of the facts upon which they relied. These facts were not denied by the defendant, Lemuel M. Hall, but the legal conclusion arising therefrom, and claimed by the plaintiffs, was contested, and, in addition, said defendant set up an independent title under the statute of limitations, thereby raising a legal issue. The case, then, upon the answer, assumed the attitude of a case in chancery for

partition by the plaintiffs, met by a legal defense on the part of the defendant, Lemuel M. Hall, the one subject to trial by the court, and the other to trial by a jury. In such a case, under the old practice, an issue at law would no doubt have been ordered, but under the principles in the code, and the decided cases in our State since the adoption of the code, a special issue would be unnecessary, and the court, upon the pleadings, could proceed with the trial of both the issues—that raised in the answer before a jury, and that in the complaint by the court, unless the jury trial rendered the court trial unnecessary. See *Adickes v. Lowry*, 12 S. C., 108; *Smith & Co. v. Bryce*, 17 Id., 544; *Chapman v. Lipscomb*, 18 Id., 232.

Under these authorities we think it was error on the part of the Circuit Judge to dismiss the complaint as to the defendant, Lemuel M. Hall. The proper practice would have been to have transferred the issues of title raised in the answer to calendar 1 so as to be tried by a jury, unless a jury trial was waived by the parties, leaving the equity question of partition to be determined by the court, dependent upon the result of the said jury trial. And to this end the judgment below should be reversed.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial as above.

23 S. C. *393

*AUSTIN, NICHOLS & CO. v. MORRIS.

(April Term, 1885.)

[1. *Fraudulent Conveyances* ⚡241.]

Is nulla bona return an essential prerequisite to creditors seeking equitable relief against a conveyance made by an insolvent debtor for the purpose of defrauding his creditors?

[Ed. Note.—Cited in *National Bank of Newberry v. Kinard*, 28 S. C. 112, 5 S. E. 464; *Compton v. Patterson*, 28 S. C. 154, 5 S. E. 470; *Holladay v. Hodge*, 84 S. C. 112, 65 S. E. 1019.

For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 722; Dec. Dig. ⚡241.]

[2. *Assignments for Benefit of Creditors* ⚡14.]

A mortgage for a past due debt, not executed bona fide for the purpose of securing its payment, but with intent to transfer all of the debtor's property to one or more of his creditors to the exclusion of others, is, in effect, an assignment giving preferences, and therefore null and void under section 2014 of General Statutes.

[Ed. Note.—Cited in *Lamar v. Pool*, 26 S. C. 441, 445, 446, 447, 2 S. E. 322; *Meinhard Bros. & Co. v. Strickland*, 29 S. C. 493, 496, 497, 7 S. E. 838; *Putney v. Friesleben*, 32 S. C. 494, 496, 11 S. E. 337; *McIntyre v. Legon*, 38 S. C. 463, 17 S. E. 253; *Porter v. Stricker*, 44 S. C. 190, 21 S. E. 635; *Perkins v. Douglass*, 52 S. C. 133, 29 S. E. 400.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 21; Dec. Dig. ⚡14.]

[3. *Assignments for Benefit of Creditors* ⚡290; *Fraudulent Conveyances* ⚡241.]

Such a transaction may be assailed by creditors, even though their demands be not reduced to judgment. Gen. Stat., § 2016.

[Ed. Note.—Cited in *Harmon v. Wagener*, 33 S. C. 496, 12 S. E. 98; *Holladay v. Hodge*, 84 S. C. 113, 65 S. E. 1019.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 848; Dec. Dig. ⚡290; *Fraudulent Conveyances*, Cent. Dig. §§ 697, 705; Dec. Dig. ⚡241.]

[4. *Fraudulent Conveyances* ⚡64.]

Where a debtor, with the purpose of evading the assignment law, and the transferring all his estate to certain preferred creditors to the exclusion of all others, gave chattel mortgages at short date to three of his creditors for past due debts, covering all his tangible property, and on default consented to a sale in bulk or in parcels, at their option, and on insufficient notice, such mortgages were held void at the suit of the unpreferred creditors.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 159-161, 164, 165; Dec. Dig. ⚡64.]

[5. *Fraudulent Conveyances* ⚡295.]

Findings of fact by the Circuit Judge upon testimony taken before him approved.

Mr. Chief Justice Simpson dissenting.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 867-875; Dec. Dig. ⚡295.]

[This case is also cited in *Magovern & Co. v. Richards*, 27 S. C. 284, 3 S. E. 340; *Meinhard Bros. & Co. v. Strickland*, 29 S. C. 497, 7 S. E. 838, without specific application and in *Verner v. McGhee*, 26 S. C. 249-251, 2 S. E. 113; *Porter v. Stricker*, 44 S. C. 189, 21 S. E. 635, as to facts.]

Before Hudson, J., Sumter, February, 1885.

This case is fully stated in the opinion of this court. The evidence was all taken in open court, and consisted of the mortgages, the depositions of the members of the firm of E. H. Frost & Co., and the testimony of other witnesses. The Circuit decree was as follows:

At the trial of this cause, so soon as the plaintiffs' counsel had read the complaint and exhibits, the counsel for the defendants moved to dismiss the complaint because it did not state facts sufficient to constitute a cause of action, in that creditors of David Morris, without first having obtained judgment at law and exhausted their legal remedies, were invoking the aid of this court on its equity side to relieve them of the consequences of deeds of mortgage given by the said Morris to certain of his creditors, in alleged preferences fraudulent as to the plaintiffs.

It is well established that a creditor must first exhaust his remedy at law before he can

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invoke the aid of equity to relieve *him against a fraudulent conveyance of property by a debtor. The only exception to this rule is that contained in section 2016, chapter LXXII., of the General Statutes, which gives to a simple contract creditor, or any creditor who has no judgment, a right to assail on the equity side of the court such an assign-

ment for the benefit of creditors as is set forth in section 2014 of said chapter, without first having reduced his claim to judgment.

Now, the term "assignment" in said section has been defined by our Supreme Court, in the late case of Wilks v. Walker (22 S. C., 108 [53 Am. Rep. 706]), to mean not only the usual formal deed of assignment for the benefit of creditors in its directly technical sense, but any other mode of conveyance or transfer of property which is intended to have the effect of an assignment, and which in truth and fact does operate as such, be the said transfers called by whatsoever name. It must, however, be equivalent or tantamount to the instrument technically called an assignment, and must make preferences prohibited in section 2014. If the instrument or instruments of conveyance in effect accomplish, and are intended to accomplish, what is inhibited in said act, they are within its purview, whether called an "assignment" eo nomine or not. The court says: "Any other view, it seems to us, would sacrifice substance to mere form, and enable insolvent debtors by evasion to effect a purpose declared by statute to be unlawful."

Now, the motion to dismiss the complaint, commonly called an oral demurrer, and which in this instance is an objection to the jurisdiction of the court for want of equity shown in the complaint, admits the truth of all the allegations of the plaintiffs. An examination of the complaint shows that it is there in substance and in strong language alleged that the defendant, David Morris, being totally insolvent, and wishing to prefer certain of his creditors to the exclusion of others, and by far the largest in amount, and intending thus to defraud them of their just demands, did make to the said preferred creditors conveyances of all his property of every description for their sole and exclusive benefit: that he did not do this by an instrument technically called an assignment, but resorted to the subterfuge of chattel mortgages of very short

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maturity which were accepted by said *preferred creditors with a full knowledge of the insolvency of Morris, and his inability to redeem, and with a full knowledge that all his property was thus conveyed.

Such in substance are the allegations of the complaint, and the demurrer admits their truth. It is very clear that by such a transaction an assignment for the benefit of certain creditors is made to the exclusion of the great body of his other creditors, and that the attempt is by this mode of conveyance to evade the plain terms of the act. I therefore overrule the demurrer, holding that under section 2016 of said act they are admitted to assail the transaction without waiting first to recover judgment at law, and obtain a return of nulla bona to an execution, before

the possible accomplishment of which the entire stock of goods would have certainly been sold and the proceeds inevitably lost to these plaintiffs.

The defendants excepted. The answers were then read and the trial of the cause proceeded. I do not propose to review the testimony. It is sufficient to say that I find as a fact that the evidence fully sustains all the material allegations of the complaint. The defendant, David Morris, at and before he gave these mortgages on his stock of goods, &c., was clearly insolvent; hopelessly so. He knew it well, and to the defendant creditors he conveyed his entire property, consisting of his stock of goods, &c., and no realty. The mortgages were to mature at a very short day, less than a month. He knew he could not redeem, and did not intend to try to do so, but intended that a sale should take place, and before the maturity of the notes consented in writing that a sale should be made soon after maturity, and without the usual time of advertisement. He further knew that he could not effect this preference by a formal assignment, and deliberately set himself to work to evade the statute by mortgages at short time of maturity. In these transactions he has violated section 2014 of the General Statutes, and the conveyances cannot stand. The invalidity of such an assignment as is contemplated in said statute does not depend upon the fact whether or not the preferred creditor has knowledge of the fraudulent intent of the debtor; the stat-

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ute declares the assignment invalid, and this is its character regardless of the bona or mala fides of the preferred creditors.

It is therefore ordered, adjudged, and decreed, that the said mortgages assailed in the complaint be set aside as null and void, and that all rights assigned thereunder be vacated and annulled, and that the property seized and sold, or its value, be delivered and paid over to the receiver appointed under these proceedings, by whichever of the said mortgagees the same was so taken and sold, viz., Alexander Morris. And it is further ordered, that the plaintiffs in this action who have proved their claims have judgment therefor, and that such of the creditors of said David Morris as have not, be allowed to come forward and establish their claims before the master of this court, who shall call upon them to do so by advertising to that effect in the Sumter Watchman and Southron for the space of two weeks, and that the funds of the said estate be distributed among said creditors as the law directs. The plaintiffs proved their debts, and the same was not questioned by defendants' counsel.

It is further ordered, that it be referred to the master of this court to ascertain and report what would be a reasonable fee to be paid out of the assigned estate to the attorneys for the plaintiffs of record in this cause.

Mr. Jos. H. Earle, for appellant.

I. The only question in this case is whether or not the mortgages executed by David Morris to his co-defendants constitute an assignment for the benefit of creditors in the sense of the term used in Gen. Stat., § 2014. If there has been no such assignment made by David Morris, then it must follow that his honor, the Circuit Judge, erred in overruling the demurrer to the complaint. For, notwithstanding the strong language used by the plaintiffs in reference to the fraudulent transfer of their debtors' property, they were not in a position to question such transfers. They came into court as simple contract creditors, and as such they have no standing, except under Gen. Stat., § 2016. A simple contract creditor cannot maintain a bill in equity against his debtor, and the grantee to set

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aside a fraudulent conveyance of the debtor's property, even though the debtor be insolvent and without the aid of the injunction the debt may be lost. He must first proceed at law and exhaust his remedy there. 1 S. C., 186, 96; 18 Id., 526. Equity has jurisdiction of fraud, but does not collect debt. A creditor must establish his demand at law, and obtain a lien upon the property before the transfer interferes with his rights, or he has any title to claim relief in equity. Bump Fr. Conv., 533-4; Wait Fr. Conv. 80, 81; High Rec., 277; High Inj., 18, 19.

II. There was no assignment for the benefit of creditors in this case. An assignment is properly the transfer of one's whole interest in any estate; but it is now generally appropriated to the transfer of chattels, either real or personal, or of equitable interests. 2 Watk. Conv., 227. The common law definition of an assignment is the transferring and setting over to another of some right, title, or interest in things in which a third party, not a party to the assignment, has a concern and interest. 1 Bac. Abr., 329; 2 Bl. Com., 326; Burr. Ass., 3. When it is said of a merchant that he has "made an assignment," it is understood, not that he has made a transfer of some specific article, or portion of property to this or that particular creditor in payment or as security, but that he has made a general disposition of his property, and suspended his whole business in consequence. Burr. Ass., 148, f. note; 1 Paine, 188, 195; 26 Vt., 462, 473.

III. A mortgage is not an assignment within the meaning of the act. The distinction is that the latter is an absolute transfer of the debtor's property to a trustee or assignee for the purpose of being turned into money and applied to the payment of the debts of the assignor; the former is a security for a debt and involves a resulting interest to the mortgagor. An assignment is more than a security for the payment of debts; it is an absolute appropriation of property to their payment. Burr. Ass., 12; 21 N. Y., 574; 20

Id., 15; 13 Iowa, 474; 42 Penn., 441; 41 Cal., 566. It does not create a lien upon the property, which is still regarded in equity as the assignor's but under it the whole estate, legal and equitable, passes to the assignee. This distinction is pointed out in, and made the basis of, the following decisions: 4 Watts & Serg., 383, 391; 7 Id., 335;

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2 Mete., 99; *13 N. H. 298; 25 Id., 155; 10 Conn., 280; 26 Vt., 686; 37 Id., 225; 10 Cal., 269; 18 Ga., 668; 27 Id., 385; 1 Rand., 306; 3 S. C., 285.

IV. Under a mortgage of personalty the right of property is absolute at law in mortgagee after condition broken. 1 Tread., Con. R., 154. But in equity the rule is: "Once a mortgage, always a mortgage." That which was intended as a security shall never be turned into an absolute conveyance. McMull. Eq., 2. Mortgagee has no right to the property until debt is due. 14 S. C., 162. Mortgagor can enforce his equity of redemption until foreclosure sale. Jones Chat. Mort., § 693. Sale under mortgage must be advertised for fifteen days, unless mortgagor consent, in writing, to a sale in some other mode or on some other notice. Gen. Stat., § 2348. "The doctrine that a mortgagee can, after breach of condition has occurred, obtain an absolute title, is utterly antagonistic to the nature of a mortgage, and had its origin in the time when a valid mortgage or encumbrance could be made only upon an actual change of possession, and prior to the establishment of the equitable powers of courts." Herm. Chat. Mort., 454. In order to get rid of the equity of redemption, the mortgagee must either sell in the manner provided in the mortgage, or in the statute, or under judicial process. Ibid., 453.

V. The case at bar is distinguished from Wilks v. Walker, 22 S. C., 108. There "the conveyance of the land to Wilks in consideration that he would pay the donor's debt to the Patterson estate, was substantially an assignment for the payment of that debt." That case was somewhat analogous to the case of Peck & Co. v. Merrill (26 Vt., 686), where the debtor made an assignment, and also several mortgages of real estate, all executed about the same time. They were treated as one instrument. The like principle was adjudicated in the following cases, viz.: 10 Wisc., 443; 8 Iowa, 96; 45 Barb., 317; 16 Md., 101; 42 Me., 445; 26 Vt., 468. But in the case at bar the instruments executed by the debtor have none of the characteristics of an "assignment." They are mortgages, pure and simple. Before the act known as the assignment act was passed, a debtor could make a preference among credi-

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tors in various ways. The mode *usually adopted, and which oftentimes resulted in great injustice to some of the parties interested, was by executing a deed of "assign-

ment for the benefit of creditors." To remedy this evil the act of 1882 was passed. If the statute is not broad enough to afford complete protection, it should be amended by the general assembly, not by the courts. A debtor can give a preference among his creditors by executing a mortgage to one or more of them. Rice Ch., 309; 12 S. C., 154.

Messrs. Moises & Lee, contra, cited 22 S. C., 108; Gen. Stat., § 2016; 2 Speers, 183; 2 Rich., 80; Jones Chat. Mort., §§ 447, 440.

September 17, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. David Morris and Alexander Morris were partners in a mercantile business at Sumter. The firm did a large business and claimed to be prosperous. On July 1, 1884, the partnership was dissolved, and Alexander retired; David undertaking to pay the debt of E. H. Frost & Co., and giving him for a half interest his note for \$2,389.64. David then carried on the business and immediately purchased a large stock of goods, costing in the neighborhood of \$20,000. The face of affairs suddenly changed, and David Morris, on December 17, 1884, executed two mortgages to E. H. Frost & Co., one to secure a note to themselves for \$1,383.33, and one to them as agent of the Pacific Guano Company for \$946.48; and two days after, on December 19, 1884, he executed another mortgage to his brother Alexander, to secure his aforesaid note given at the dissolution for \$2,389.64, and also another note for \$1,899.38, said to have been cash advanced, making the aggregate sum of \$4,289.02.

All these mortgages covered the stock of goods, the only tangible property of David Morris. They were taken as due a few days after their date, viz., on January 1, 1885, and not only contained a clause authorizing seizure when due, but each has endorsed on it the following consent of the mortgagor: "I hereby consent that the mortgaged property

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within described be sold by *public auction on Tuesday, 8th instant, either in bulk or in parcels, at the option of the mortgagees, and under their direction, and that notice of such sale be given by posting a notice thereof on the door of the store on Liberty street, and also at the court house, on one of the front doors thereof. (Signed) D. Morris." Alexander Morris, being still liable for it as a member of the late firm of D. Morris & Brother, settled the debt of E. H. Frost & Co., but took an assignment of the mortgage, so that all of the mortgages are now claimed by Alexander Morris. Under these mortgages, the whole of the stock of goods was seized and sold in bulk, and bought by Alexander Morris, who took possession of the same.

The plaintiffs, creditors of David after the dissolution, instituted these proceedings to

set aside the aforesaid mortgages and sale, for injunction, &c. The complaint alleged that "the said David Morris is wholly insolvent owing to plaintiffs and other creditors in the neighborhood of \$20,000, the major part of which was contracted within four months, and since he knew of his intended insolvency; that on January 2, 1885, the defendant, David Morris, procured and suffered the mortgages aforesaid to be foreclosed upon his entire stock of goods, and by connivance, understanding, and agreement with his co-defendants, caused, procured, and suffered the entire stock of goods, &c., to be sold under said mortgages, on a side street in the town of Sumter, at shortly past 9 o'clock on the morning of January 8, 1885, just six days after the seizure aforesaid, without advertisement, except by a posted notice, and before the plaintiffs, all bona fide creditors of the said Morris, had opportunity or time to protect their rights, either by contesting the validity of said mortgages or by causing the property sacrificed at said sale to bring a full and fair price; that said mortgage to Alexander Morris was without consideration, and was and is null and void, and was executed for the purpose of giving to the said Alexander Morris security for a supposed indebtedness, &c.; that the whole transaction, from the beginning to the end, to wit, from the dissolution of the firm of D. Morris & Brother to the end of the sale, which took place on the morning of the 8th instant, was a systematic scheme to cheat and defraud the entire

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number *of creditors, aggregating near \$20,000, and with the intent to shift the property from the possession of David to that of his co-defendant, Alexander Morris, and thereby preserve the entire property without paying for the same; that the said Alexander Morris has obtained possession of the large and valuable stock of goods recently held by the said David Morris, and is selling and disposing of the same at almost any price offered for cash, and is disposing of such articles as do not pertain to a bar-room business in a reckless manner," &c. The complaint prayed judgment that said mortgages be declared illegal, fraudulent, and void; that the sale aforesaid be declared illegal and void; that David and Alexander Morris be enjoined from selling said property, and to restore what they had removed; that a receiver be appointed and all the creditors called in by publication, &c.

The cause came on for trial before Judge Hudson, who, after overruling a verbal demurrer that the complaint did not state facts sufficient to constitute a cause of action, heard the evidence and decreed that "by such a transaction an assignment for the benefit of certain creditors is made to the exclusion of the great body of his other creditors, and that the attempt is by this mode of conveyance to evade the plain terms of the act. I therefore

overrule the demurrer, holding that under section 2016 of said act they are admitted to assail the transaction without waiting first to recover judgment at law, before the possible accomplishment of which the entire stock of goods would have certainly been sold and the funds inevitably lost to these plaintiffs. * * * In these transactions he has violated section 2014 of the said statute, and the mortgages cannot stand. * * * The invalidity of such an assignment as is contemplated in said statute does not depend upon the fact whether or not the preferred creditor has knowledge of the fraudulent intent of the debtor. The statute declares the assignment inoperative, and that is its character regardless of the bona or mala fides of the preferred creditors," &c. He gave judgment to the plaintiffs for their debt against David Morris, declared the said mortgages null and void, and ordered that the property seized and sold be delivered to the receiver appointed, and that such of the creditors of

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the said *David Morris as have not, be allowed to come in and establish their claims before the master of the court, and that the funds arising from the sale of the stock of goods be distributed among all the creditors who establish their claims as the law directs, &c.

From this decree, Alexander Morris appeals to this court upon the following grounds: "I. Because the plaintiffs, as simple contract creditors of D. Morris, had no right to question the validity of the mortgages made by him. II. Because there has been no assignment by David Morris for the benefit of creditors. III. Because the mortgages in this case did not constitute such an assignment for the benefit of creditors as is set forth in section 2014 of the General Statutes of the State. IV. Because the mortgagees of said David Morris, defendants herein, did not know, and had no good reasons to believe, that said Morris was insolvent at the time of the execution of said mortgages."

This being a proceeding in which equitable relief is sought, in having the mortgages declared void, it is objected at the very threshold that it is premature, and the court has no jurisdiction to entertain the case—that, admitting the truth of all the allegations of the complaint, the creditors have no right to be heard in this court until they show that they had recovered judgment at law against the debtor and the execution thereon had been returned nulla bona before the proceedings were instituted. It is certainly true that equity has no jurisdiction where there is plain and adequate remedy at law, and it is generally required that the want of such plain and adequate remedy should be shown by a judgment and a return of nulla bona against the debtor,—that is to say, *inter vivos*, for it does not seem to be considered necessary in the

case of a decedent debtor. There is no doubt that such judgment and return are necessary when the conveyance is assailed as merely voluntary, for in such case it cannot appear that any wrong has been done until it is shown that the debtor has not the means of paying the debt with property other than that covered by the contested conveyance. See *Suber v. Chandler*, 18 S. C., 526.

As we understand it, however, there is no law requiring such preliminary proceedings as an indispensable prerequisite to seeking equitable relief, but it has been adopted by

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the courts as the *most satisfactory manner of proving that which is indispensable to such relief, viz., the fact that the party has no adequate remedy at law, that the debtor is insolvent, and, outside of the property in controversy, has not the means from which payment may be made. This is the very purpose of requiring judgment and a return of nulla bona. If that is shown by other proof or the admissions of the party, I never could see why judgment should be insisted on as an indispensable prerequisite. Why insist upon that evidence if there is other perfectly satisfactory evidence of the fact in question? especially if the circumstances are such that the delay in getting judgment may be fatal to the relief sought. For instance, in this case the allegations of the complaint, admitted by the demurrer and as the Circuit Judge says "substantially proved," were that David Morris was utterly insolvent, indeed owned no property whatever outside the stock of goods covered by the conveyances assailed. In such case it is difficult to conceive of any necessity for the useless proceeding of suing him to judgment at law, especially since the courts of law and equity are united, and the creditor can ask judgment on his demand and for equitable relief in the same action.

Could there be any other result of requiring such a preliminary proceeding than to afford by the delay an opportunity to the defendants, with their expeditious modes of procedure, to appropriate the personal property involved, and entirely emasculate and make useless the proceeding? The plaintiffs needed much the protection of equity, and they needed it promptly. In the case of *Case v. Beauregard* (101 U. S., 690 [25 L. Ed. 1004]), it is said by the Supreme Court of the United States: "But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a Court of Equity may be made otherwise to appear. Neither law nor equity requires a meaningless form. *Bona sed impossibilia non cogit lex*. It has been decided that where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a neces-

sary prerequisite to equitable interference"—citing many authorities. And see *Pettus v.*

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**Smith*, 4 Rich. Eq., 198. But it is admitted that the authorities upon the subject are not in accord, and as we do not consider the point as necessarily involved in the decision of the case, we make no ruling upon it, but reserve our judgment.

There is no doubt that under the general law a debtor has the right to give one creditor an honest preference over others. Until lately this preference could be effected by confession of judgment, mortgage, or assignment, but it never was the law that this indulgence included the right on the part of a debtor to enter into a conspiracy with one or more of his creditors by which he secured advantages to himself at the expense of his other creditors. *Bird v. Aitken*, Rice Eq., 73. Influenced most probably by the abuse of this privilege, the legislature, in 1882, passed an act, now embraced in section 2014 of the General Statutes, which provides as follows: "Any assignment by an insolvent debtor of his or her property for the benefit of his or her creditors, in which any preference or priority is given to any creditor or creditors of the said debtor by the terms of the said assignment over any other creditor or creditors, * * * or in which any provision or disposition of the property so assigned is made or directed other than that the same be distributed among all creditors of the said insolvent debtor equally * * * and without preference or priority of any kind whatsoever, * * * such assignment shall be absolutely null and void and of no effect whatever." &c. While this act only deals with one of the instrumentalities by which preferences might be effected, we cannot doubt that it is a general expression of the legislature against insolvent debtors giving preferences to some creditors over others; for if objectionable when effected by an assignment, we can hardly suppose it to be less objectionable when accomplished in any other way.

It will be observed that this act does not require the creditor to have a judgment and a return of nulla bona on the execution against the debtor as a condition precedent to the enforcement of its provisions, which declare in the most general terms that an assignment of his property by an insolvent debtor giving "preference or priority of any kind whatever," shall be utterly null and void; but, on the contrary, section 2016 ex-

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pressly dispenses *with such preliminary proceedings. Now, as *David Morris* was undoubtedly insolvent when he executed the mortgages, covering his whole property, to pay certain claims, to the exclusion of all others, it is perfectly manifest that if the transaction had taken the form of an assignment (in reference to merchandise the natu-

ral and usual form), it would have been absolutely "null and void."

It is said, however, that there was no assignment, but, on the contrary, mortgages, which the party might legally make. This may be so, if the papers were genuine mortgages, executed bona fide for the purpose of securing certain debts. But if they were put in that form as a mere device to evade the law—if the transaction was in fact a transfer of the whole property in payment of certain claims to the exclusion of all others—if the instruments in effect accomplished, and were intended to accomplish, the very purpose of an assignment under another name—should the transaction in the form assumed receive the sanction of the court and be enforced as such? It seems to us that the court cannot sustain an evasion of that kind, simply for the reason that the parties did not call it an "assignment." It is familiar doctrine that equity considers the substance and not the mere form and appearance of things. It is matter of every-day occurrence that instruments, in form absolute conveyances, are, according to the facts and circumstances and the real intention of the parties, declared to be mortgages and treated as such. This court has lately, in reference to this very provision of the law, held that "substance is not to be sacrificed to mere form, to enable insolvent debtors by evasion to effect a purpose declared by statute to be unlawful." See *Wilks v. Walker*, 22 S. C., 108 [53 Am. Rep. 706]. We cannot distinguish this case from that. "A deed of conveyance of real estate to a trustee in trust to hold the said premises as a security for certain creditors, who had accepted the notes of the assignors, &c., and such other creditors as should within a limited time accept the same terms, with power to sell or mortgage the property, held to be an assignment for the benefit of creditors, and not a mortgage." *Stewart v. Kerison*, 3 S. C., 266.

The question is, then, really one of fact as

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to what was the *intention and purpose of these parties. That question has been found by the Circuit Judge before whom the testimony was offered. He found as follows: "The defendant, *David Morris*, at and before he gave these mortgages on his stock of goods, &c., was clearly insolvent, hopelessly so. He knew it well, and to the defendant creditors he conveyed his entire property, consisting of his stock of goods, &c., and no realty. The mortgages were to mature at a very short day, less than a month. He knew he could not redeem, and did not intend to try to do so, but intended that a sale should take place, and, before the maturity of the notes, consented in writing that a sale should be made soon after maturity and without the usual time of advertisement. He further knew that he could not effect his

purpose by a formal assignment, and deliberately set himself to work to evade the statute by mortgages at short time of maturity. In these transactions he has violated section 2014 of the General Statutes, and the conveyances cannot stand," &c.

We have considered the allegations of the complaint and read all the testimony carefully, and we cannot say that this finding of the Circuit Judge was error. The instruments were in the form of mortgages, but they were given at short day, less than the period allowed for recording. They had in them the Scotch clause giving permission to seize and sell without foreclosure, and on them a written consent of the debtor to sell on a given day, either in bulk or in parcels, and upon entirely insufficient notice. What was this but substantially an absolute transfer or "assignment" of the property to be delivered on a particular day, for the purpose of paying certain claims to the exclusion of all others? What but an effort to give to the brother and late partner, Alexander Morris, under the forms allowed by law, the whole property of David Morris to the entire exclusion of the debts, contracted for the very goods thus transferred? It strikes us as not a little remarkable that a prosperous mercantile firm should dissolve, the retiring brother taking a large note for his clear interest in the concern, and that within six months, and after the purchase of a very large stock of goods upon credit, the remaining brother should suddenly fail, without even the means to pay the preferred claims of the retired brother.

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*The judgment of this court is that the judgment of the Circuit Court be affirmed.

Mr. Justice McIVER. While I do not doubt that an insolvent debtor may, by a bona fide mortgage, which is intended merely as a security, prefer one creditor, yet if the mortgage is really designed, not as a security, but as a means of transferring his property to one or more of his creditors in preference of others, then it seems to me that it is, in effect, though not in form, an assignment, and comes within the mischief intended to be suppressed by section 2014 of the General Statutes. Such I understand to be the principle upon which the case of Wilks v. Walker (22 S. C., 108 [53 Am. Rep. 706]) was decided; and, therefore, I think that case controls this. The Circuit Judge found as matter of fact that the real purpose of the several mortgages brought in question in this case was to evade the assignment law, and to effect the very object which that law was designed to prevent; and this finding of fact is fully sustained by the testimony. This being the fact, it follows necessarily that this assignment of David Morris, though in the form of mortgages, which were not designed as mere securities, but as a means of trans-

ferring his whole property to one creditor in preference of others, must be held void. For this reason I concur in the conclusion reached by Judge McGOWAN, that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON, dissenting. The material question in this case is, whether under the facts as stated in the opinion of the majority, and as found by the Circuit Judge, the mortgages executed by the defendant, David Morris, to E. H. Frost & Co., and to the defendant, Alexander Morris, can be declared void under section 2014 of the act entitled "assignments by insolvent debtors," found in General Statutes of 1882, page 585. The Circuit Judge so held, and his ruling has been sustained by the majority of this court. In this judgment I am unable to concur for the reasons briefly given below.

Section 2014 of the assignment act is as follows: "Any assignment by an insolvent

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debtor of his or her property for *the benefit of his or her creditors in which any preference or priority is given to any creditor of the said debtor by the terms of the assignment over any other creditor or creditors, other than as to any debts due the public, or in which any provision or disposition of the property so assigned is made or directed, other than that the same be distributed among all creditors of the said insolvent debtor equally, in proportion to the amount of their several demands, and without preference or priority of any kind whatsoever, save only as to debts due the public, and save only as to such creditors as may accept the terms of such assignment and execute a release of their claim against the debtor, and except as hereinafter provided, such assignment shall be absolutely null and void and of no effect whatsoever."

Previous to the passage of this act a debtor, whether he was insolvent at the time or not, could secure one creditor in preference to another, and this, too, in a general assignment for the benefit of creditors, or by an independent security, provided the preference was bona fide and free from any purpose to delay, hinder, and defraud his other creditors. This principle, whether wise or not, I have regarded as well established, and by a long and unbroken current of decisions in this State; in fact, so firmly as to have become almost a rule of property. And, further, I have understood it to be settled beyond controversy that preferences could only be avoided by a direct proceeding to that end, based upon allegations of fraud, either express or implied, instituted by a debtor whose claim had been judicially established, and who was without redress, except by the aid of the property covered by the preference. Now, the question arises, how far has the assignment act of 1882 changed or modified these principles? The important sections of

that act are sections 2014 and 2015. As I understand these sections, they refer entirely to preferences made in assignments by insolvent debtors for the benefit of creditors generally. They do not touch preferences other than those contained in or connected with such general assignments. As to all other preferences by mortgages, judgments, and such like instruments not connected with a general assignment, they leave the law as previously established, such preferences being vulnerable or not, as the facts of each

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case *might determine, either at common law or under the statutes of Elizabeth.

Before the assignment act, the law was abundant for vacating any and all fraudulent preferences. This act was not, therefore, intended to meet and destroy such preferences, but it was intended to prevent all preferences in a certain class of cases, whether fraudulent or not, to wit, in general assignments made by judgment debtors for the benefit of their creditors, and it was confined to such cases. This, as it appears to me, was the intention of the act, and this was its extent, as appears, first from its title, "assignments by insolvent debtors;" and, second, from the express terms of the two sections in which its purpose is presented, sections 2014 and 2015. Section 2014 says: "Any assignment by an insolvent debtor * * * for the benefit of creditors, in which any preference is given, * * * shall be null and void." In section 2015 it is provided that: "If any person being insolvent, within ninety days before the making of any assignment * * * for the benefit of his creditors, shall give any preference to any creditor, * * * the same shall be void."

Now, to bring a case under either of these sections, unless we go beyond the terms of the act, the facts must show (1) an assignment for the benefit of creditors, (2) executed by an insolvent debtor, and (3) a preference given to one or more creditors over others contained in the assignment, or given within ninety days previous to the execution of the assignment. Can the mortgages in contest here be properly held to be preferences by an insolvent debtor, contained in an assignment for the benefit of creditors generally, or executed within ninety days before such assignment, and therefore null and void under the act, without regard to the fact whether said mortgages are fraudulent or bona fide? There is no doubt as to the preference, and the insolvency of David Morris when he executed these mortgages is perhaps equally as apparent; but where is the assignment in which, according to the act, these preferences must either be found, or with which they must be connected within ninety days before its execution? Where is the substance to which these conditions, one or both, must attach before the act becomes operative? I do

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not find it *in the evidence, or in the facts as stated, and therefore I cannot see how the act can apply.

These mortgages may have been founded in fraud, they may be wholly without consideration, and may have been intended to delay, hinder, and defeat the claims of judgment creditors of David Morris, and possibly under section 2016 of the assignment act, they may have been subject to attack by creditors even before obtaining judgment; and when a proper case is presented I shall not hesitate to go to the full extent of the law in uprooting fraudulent transactions. But the question of fraud is not presented here. These mortgages have not been vacated on that ground. They have been vacated because, in the opinion of the court, section 2014 of the assignment act has been violated in their execution, not in terms, but in spirit, and the question involved is the soundness of this conclusion. It is claimed that the object of the assignment act was to prevent an insolvent debtor from giving any preferences, and that wherever and in whatever form this might be done, and whether bona fide or fraudulent, still it is void under the assignment act, and should be vacated by the courts. If this be so, the assignment act is, in substance, a bankrupt law, demanding upon insolvency a suspension of all business and a surrender of all assets, making it dangerous and useless to struggle for recovery. This might be a wise law, and one which, in the end, would be best for all. But I do not think that the legislature intended the act in question to be so far-reaching, and therefore I fail to see its application to the facts of this case.

The case of Wilks v. Walker (22 S. C., 108 [53 Am. Rep. 706]), as it seems to me, falls short of this case, and therefore does not control it.

Judgment affirmed.

23 S. C. 410

CITY COUNCIL OF CHARLESTON v. PEOPLE'S NATIONAL BANK.

(April Term, 1885.)

[*New Trial* ⇐41.]

In action by a city council to recover city stock transferred under a forged assignment, and the defence being the statute of limitations, the judge charged the jury that the statute did

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not commence to run until discovery by the city of the invalidity of the assignments, or knowledge of facts sufficient to excite inquiry. Being then asked by a juror, "Do we understand you to say that the filing of the case of A was sufficient notice to the city, and that the statute of limitations, therefore, runs from that date?" The judge replied: "If the evidence satisfies you that the case of A was sufficient notice to the council to put them on the inquiry

as to whether that was a forged paper or a genuine one, then it was a sufficient notice to fix the time at which the statute of limitations should commence to run." *Held*, that this response, interpreted in the light of the main charge, was not erroneous.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 71; Dec. Dig. ☞41.]

Before Kershaw, J., Charleston, March, 1884.

Upon the point considered and determined by this court, the opinion sufficiently states the case.

Messrs. G. D. Bryan and A. G. Magrath, for appellant.

Messrs. Simonton & Barker, contra.

September 17, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The action below was brought by the plaintiffs, appellants, under the following state of facts: Joseph Whaley, late of Charleston, previous to the 13th and 19th of February, 1872, had standing in his name on the books of the treasurer of the city of Charleston certain six per cent. certificates, stock of said city. On said days these certificates were transferred to H. G. Loper, cashier of the defendant, and for the use of the defendant, by virtue of an alleged assignment from the said Joseph Whaley, which both plaintiff and defendant believed to be genuine and valid. Subsequent to said transfer, to wit, on April 23 and in May, 1872, two of these certificates were purchased in the market for the use of the city.

In the month of June, 1874, certain creditors (Fraser & Dill) of Joseph Whaley, then deceased, upon an examination of the certificates which had stood in the name of the said Joseph Whaley on the books of the city treasurer, came to the conclusion that they had been improperly transferred, and in July, 1874, they instituted action against the city

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for the restoration of said stock *to the estate of the said Whaley. In the progress of this action, which continued until April 17, 1879, it was developed that the signature of Joseph Whaley to the assignment under which the transfers of the stock had been made, was a forgery, and a decree was rendered against the city. In July, 1879, the city settled this decree; and on October 10, 1881, the action below was commenced, in which the plaintiff seeks to make the defendant bank liable for the certificates which the city has been compelled to make good to the estate of Whaley. Several defences were interposed; the most important, however, and the one upon which the case turned below, was the statute of limitations. The jury found for the defendant under the statute. The plaintiff has appealed.

In the appeal the dates of the different stages of the transaction may become important. They are as follows: The stock was

transferred to the defendant on February 13 and 19, 1872, over nine years before the action below. The certificates received by the defendant were purchased by the city some time in May, 1872, some nine years before the action below. An examination was made of the original certificates by an attorney of Fraser & Dill in the presence of the city treasurer in June, 1874, as to the regularity and validity of the transfer, seven years before the action below. Fraser & Dill commenced action against the city in July, 1874, alleging that said stock still belonged to the estate of Whaley over seven years before the action below. A decree was obtained against the city in this action in April, 1879, on the ground of forgery in the assignments, and the city settled this decree in July, 1879, by making good the stock to the estate of Whaley two years and three months before the action below.

It was not denied below that the plaintiff had a cause of action against the defendant at some stage of this transaction, nor that the statute began to run when this right accrued. The parties, however, did not agree as to the time when said right accrued, and the charge of the judge upon this matter is the single question raised in the appeal. His honor charged that the currency of the statute in a case like this "would not begin until discovery by the city of the defect and invalidity of the assignments of the certificates, or knowledge of facts sufficient to put

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*the city on inquiry, which, if pursued, would result in the discovery of the condition of things complained of, and which in legal effect would be the same thing as knowledge of the fact itself." And in applying this principle to the case, he said: "If the alleged forgery in this case had been only ascertained after the decision of the case of Fraser & Dill v. The City Council of Charleston [23 S. C. 373], the statute would not bar the plaintiff's right to recover, because the six years would not have elapsed before the commencement of this action from the time when the decree in that case was pronounced. But if the discovery was made after six years before the commencement of this action, then the plaintiff's claim would be barred by the statute of limitations, and the verdict should be for the defendant. If the plaintiff had no notice before the commencement of the action of Fraser & Dill against the City Council of Charleston, the proceedings in that case gave them notice of the defect of these papers, and the right of action at that time accrued against these defendants on behalf of the plaintiffs. And if six years have elapsed from that time to the commencement of this action, the plaintiffs would be barred, and the verdict must be for the defendant."

At the conclusion of the charge a juror asked the following question: "Do we understand you to say that the filing of the case

of Fraser & Dill was sufficient notice to the city, and that the statute of limitations therefore runs from that date?" To which the judge replied: "If the evidence satisfies you that the case of Fraser & Dill was sufficient notice to the council to put them on the inquiry as to whether that was a forged paper or a genuine one, then it was sufficient notice to fix the time at which the statute of limitations should commence to run." The appellant bases its claim to a reversal of the judgment below upon an alleged error contained in this response: the appeal therefore raising in the opinion of the appellant but a single question of law, growing out of said response, as appears from the opening remarks in the argument of the learned counsel of the appellant, where they say: "The form in which the verdict was given raises on this appeal a single question of law, and that is whether the instructions of the presiding judge on the question of law presented by the jury were given in a manner approved

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by the court, *and calculated to inform the jury correctly and distinctly of the matter submitted."

It is true that several other questions were discussed before us by the counsel on both sides: for instance, whether the right of action did not accrue to the plaintiff in February, 1872, when the illegal transfer of the stock was made, and before the plaintiff had sustained damage thereby or, if not, then in 1872, when the city purchased the stock after the transfer, or in April, 1874, when Fraser & Dill, in the presence of the city treasurer, examined the original certificates and ascertained the facts upon which their action against the city for the restoration of the stock was soon thereafter instituted. But the appeal of the plaintiff does not necessitate a deliverance from this court upon these interesting questions. Upon appellant's own statement it involves only the question mentioned above, and to that we have confined our investigations.

It seems to be conceded on all sides that whether a right of action accrued to the plaintiffs sooner or not, it certainly accrued when the plaintiff discovered the fact of forgery in the order of transfer, or became in possession of facts sufficient to have excited inquiry, and which, if pursued, would have led to this discovery. The judge so charged, and we must say this was as liberal to the plaintiff, and as strongly in its favor, as the authorities upon this subject allowed. In fact, if either party had the right to complain, under our view, strongly supported by the cases relied on by the respondent, it was the respondent, and not the plaintiff. But, as we have said, that question is not properly before us, and we therefore pass no judgment upon it.

Assuming, then, for this case that the law as laid down above by the Circuit Judge was correct, did the response of his honor to the

question of the juror modify or change it in any way? or to such extent as to make it legal error, and therefore demanding from this court a reversal of judgment below? It is complained that the juror asked a definite question, fixing a precise time from which the jury desired to know whether or not the statute would begin to run, to wit, the filing of the case of Fraser & Dill v. The City Council of Charleston, and that the judge, while failing to give a definite response, yet led the

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jury to *believe from what he did say that the statute would begin to run from that date: and the jury, acting with that understanding, found their verdict for defendant when there was no evidence in the case showing that the city at said date had discovered the forgery, or was in possession of facts sufficient to excite inquiry on that subject. In other words, that the jury understood the judge to lay down as matter of law for their government, that the filing of the case of Fraser & Dill gave currency to the statute.

If the charge of the judge and his response to the juror, taken and construed together, could be properly interpreted as announcing as matter of law the principle complained of, and by which the jury was to find their verdict, then there would be substance in the appeal. For the judge could not have come to that conclusion without invading the province of the jury as to the facts. Because, before he could have held as matter of law that the filing of the case of Fraser & Dill discovered to the city the alleged forgery, or facts sufficient to put the city upon inquiry thereof, it would have been necessary for him to find as matter of fact that said filing was accompanied with sufficient evidence of these facts, which was a question for the jury and not for him, and which if he had passed upon would have been legal error, and therefore fatal to the judgment. But did the judge so charge? He certainly did not in his general charge, nor can his response to the question of the juror be fairly so interpreted even when considered independent of, and disconnected from, the general charge.

We cannot say what may have been the understanding of the jury, independent of what ought to have been their understanding, derived from the language used by the judge in the response made, and when that is considered, we do not see how the jury could have come to any other conclusion but that the judge declined to instruct as matter of law that the filing of the Fraser & Dill action in itself would give currency to the statute. He had already charged fully and plainly that the discovery of the fact of the forgery, or of facts sufficient to excite inquiry on the part of the City Council, was necessary, and would alone give this currency as matter of law, and he had left the fact of such discovery to the jury, where it properly belonged; and

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*when the question of the juror was pro-

pounded in accordance with the charge, he replied, not that the filing of the Fraser & Dill case is sufficient evidence, thereby taking the question of fact involved in the interrogatory from the jury, but "if the evidence satisfies you that the case of Fraser & Dill was sufficient notice to the Council to put them on the inquiry as to whether that was a forged paper or a genuine one, then it was a sufficient notice to fix the time at which the statute of limitations should commence to run."

This, as it appears to us, clearly left to the jury the question of fact whether or not at the filing of the Fraser & Dill Case the city had information sufficient to put them upon the inquiry suggested; and it cannot be denied that there was testimony upon that subject of which the treasurer of the city at least had knowledge even before the filing of said action. Under these circumstances, we cannot say but that the jury was satisfied, as matter of fact, that the evidence brought the case under the principle laid down in the main charge, and about which there is no complaint.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

23 S. C. 416

CLAFLIN & CO. v. ISEMAN.

(April Term, 1885.)

[1. *Assignments for Benefit of Creditors* ¶39, 99.]

An assignment for the benefit of creditors in which an interest is reserved to the assignor without provision for the payment of all his debts, is fraudulent.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 156, 332, 333; Dec. Dig. ¶39, 99.]

[2. *Assignments for Benefit of Creditors* ¶101.]

An assignment for the benefit of creditors, giving preferences to such creditors as shall accept and release, but making no provision for non-accepting creditors, and directing that the assignee should, "after the payment of all the creditors who accept, pay over the balance to me, if any balance should remain in his hands," is null and void, as well under the law as it existed prior to 1882 as under section 2014 of General Statutes; and it may be vacated by a non-accepting creditor, notwithstanding no actual fraud was intended and the demands of the creditors who accepted far exceeded the assets of the assigned estate.

[Ed. Note.—Cited in *Trumbo, Hinson & Co. v. Hamel & Co.*, 29 S. C. 533, 8 S. E. 83; *Clarke v. Baker*, 36 S. C. 424, 15 S. E. 614; *Middleton & Ravenel v. Taber & Willard*, 46 S. C. 355, 24 S. E. 282; *Forbes v. Bowman*, 87 S. C. 506, 70 S. E. 165.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 315, 316; Dec. Dig. ¶101.]

[3. *Assignments for Benefit of Creditors* ¶310.]

A non-accepting creditor having success-
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fully assailed this assignment, *after judgment against the assignor and return of nulla bona,

he is entitled to be paid first out of the assigned estate.

[Ed. Note.—Cited in *Ryttenberg v. Keels*, 39 S. C. 213, 17 S. E. 441; *Ex parte Spragins, Buck & Co.*, 44 S. C. 75, 77, 21 S. E. 543.

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 907-912½; Dec. Dig. ¶310.]

[4. *Appeal and Error* ¶832.]

Petition for rehearing refused, it not bringing to the attention of this court any material fact or important principle that was overlooked in the decision of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. ¶832.]

[This case is also cited in *Trumbo, Hinson & Co. v. Hamel & Co.*, 29 S. C. 528, 8 S. E. 83; *Younger v. Massey*, 41 S. C. 64, 19 S. E. 125, as to facts.]

Before Wallace, J., Marion, June, 1884.

The opinion states the case. The order of Judge Hudson, granting an interlocutory injunction, omitting its statement of the case, was as follows:

Under a rule to show cause, the application for a preliminary injunction was heard by me at chambers at Orangeburg, on the 16th day of May instant. The arguments for and against the application were very full and exhaustive, leaving nothing for me to do but to review some of the leading authorities relied on by the opposing counsel. This I have endeavored carefully to do before determining the motion, not desiring to act hastily in a matter involving large pecuniary interests.

* * * * *

The deed of assignment is assailed as being fraudulent on its face, by reason of the benefit reserved, or intended to be reserved, to the debtor in and by the aforesaid third clause of the trust.

Is it lawful for an insolvent debtor to assign his property for the benefit of such creditors alone as shall, within a given time, accept a pro rata share of the debtor's property in full payment of their respective claims, on condition that an absolute release in writing be delivered to the debtor of the entire debt, excluding from all share in said estate such as do not accept the terms of said deed, and directing the surplus, if any, to be paid to the assignor? Can a debtor lawfully pro-pound such terms to his creditors, and remove his estate entirely beyond the reach of such of his creditors as do not accept? [Here the learned judge cited and quoted from *Vaughan v. Evans*, 1 Hill Eq., 415; *Nixon v. Douglas*, 2 Id., 443 (30 Am. Dec. 368); *Jacot v. Corbett*, Chev. Eq., 71; and *Stewart v. Kerrison*, 3 S. C., 266.] I think, therefore, that I may say that it is settled law in this State that if an insolvent debtor assign his

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property in trust to pay such creditors only as accept under the assignment, and executes an absolute release to the debtor, and directs the surplus, if any, to be paid to himself in-

stead of the creditors refusing to accept, such a deed is on its face fraudulent and void, under statute 13 Elizabeth.

It is true that in all the cases cited and relied on by the plaintiffs' counsel, there seems to have been some additional vice, some other obnoxious provision, in the deed of assignment besides the mere reservation of the surplus to the debtor. But upon examining the cases, it will readily be seen that the reserving clause for the benefit of the debtor in preference to the recusant creditors is the capital vice which calls forth the most earnest condemnation of the courts. In *Burrill on Assignments* (p. 271, § 209), also in *Bump on Fraudulent Conveyances* (pp. 428, 429, 430, 436), this reservation of the surplus to the debtor against the claims of non-accepting creditors, is pronounced per se fraudulent, and avoids the deed at the suit of any complaining creditor. It is a matter of no little regret among the courts of the older States that they have so far favored insolvent assignees as to sustain the compulsory release clause so universally prevalent in those deeds of assignment for the benefit of creditors, and I find that in some of the new States west of the Mississippi the courts condemn such terms in deeds of assignment, and hold such deeds void on the face. *Daggan v. Bliss*, 4 Col., 223, reported in 34 Am. Rep., 80.

The counsel for the defendants placed great reliance upon the case of *Beck v. Burdett* (1 Paige [N. Y.] 305 [19 Am. Dec. 436]), which case, it is contended, establishes the doctrine that the mere naked reservation of a contingent surplus to the debtor does not vitiate a deed of assignment. I regret not having access to that case and the notes thereto by the editor of *American Decisions* (vol. 19, p. 436). But it was said in the argument before me that the assignment assailed there was only a partial assignment, and hence the distinction. I did hope to be able to examine the case, but circumstances prevented. I can only say that the law of that case, as contended for by counsel for the defense, is not the law of our State, either as defined by our courts in interpreting 13 Elizabeth nor by our legislature in declaring the

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law in section 2014 *of General Statutes. I regard this last statute as fatal to the validity of Mr. Iseman's deed.

It is contended, however, that fraud is a question of fact, and that Iseman really intended no fraud upon his creditors; also that the reservation clause is utterly harmless, because there will certainly be no surplus after paying accepting creditors—in fact, that these will, in exhausting the estate, realize only a part of the debts due to them. In *Jacot v. Corbett* both these defences were interposed in behalf of Mr. Corbett, and I use this language of Chancellor Dunkin in answering them: * * * Whether a surplus will remain under such like assignments de-

pends upon the value of the effects, the number and the amount of the debts, the number who accept or refuse, contingencies any or all of which may determine whether or not the debtor will receive a surplus. Surely, the validity of a deed will not be made to depend upon these contingencies. The law does not await the event of the administration of the estate to determine the character and effect of the stipulations of this deed, nor does it require a non-accepting creditor to await the result before he can assail it. So soon as executed, the law stamps it with fraudulent intent, discoverable on its face. It is a presumption juris de jure, conclusive and irrebuttable, that fraud is intended, and the question is not affected by any facts arising dehors the deed.

Could I consider such evidence and throw the character of this old gentleman, M. Iseman, into the scale—a man who for perhaps more than three-score and ten years has borne an irreproachable character, who has been noted for honesty and integrity in all his business transactions—I would most cheerfully acquit him of all fraudulent intent in executing this deed. But I am constrained to say that the deed he has made, however honest in fact he may have been in so doing, is one that the law will not uphold against a resisting creditor. It needs but to be attacked to be overthrown.

It is therefore ordered, adjudged, and decreed, that until the further order of this court, the said debtor, M. Iseman, the said assignee, Junius H. Evans, and the said agent of creditors, Duncan Murehison, their servants and agents, be and they are enjoined and restrained from selling, &c.

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*The decree of Judge Wallace (also omitting his statement) was as follows:

The assignor states in his answer that he intended no fraud, and honestly intended to devote his property to the payment of his debts. This statement is supported by the testimony in relation to what took place at the time of the execution of the deed. There is proof, also, that the claims of the accepting creditors will absorb the whole estate, and that there will not, therefore, be any surplus. I am sure that Mr. Iseman did not conceive that he was doing a wrongful act. His reputation for strict business integrity has been too long and too well established to be overthrown by the facts of this case. Yet, if he has done what the courts hold is conclusive evidence of an intent to hinder and delay creditors, the law holds such act as to such creditors void and of no effect. The nature of the act, too, must be determined by the act itself, and not by subsequent developments. Why, if a surplus was not contemplated, direct it to be paid back to the assignor, and not make it distributable among such of the general creditors as should not accept according to the terms of preference?

To recur. Does this reservation of a contingent right to the surplus destroy the deed? This question has been repeatedly discussed in our own courts, and always decided in the affirmative. The case of *Jacot v. Corbett* (Chev. Eq., 71) is full to the point. The opinion in this case was prepared by Chancellor Dunkin, concurred in by Harper, chancellor, and by Chancellors Johnson and Johnston with hesitation. In the subsequent case of *Le Prince v. Guillemot* (1 Rich. Eq., 219), this case of *Jacot v. Corbett* is quoted by Chancellor Johnston as authority for the principle, "that a reservation for the debtor's benefit was a direct fraud." * * * This case (*Jacot v. Corbett*) has been again and again quoted in subsequent cases where the same question was raised. *Le Prince v. Guillemot*, 1 Rich. Eq., 219, already referred to; *Stewart v. Kerrison*, 3 S. C., 266.

In the deed here, the assignor has reserved to himself that which the general creditors failed to secure by accepting under the deed. This case falls completely within the rule stated in *Jacot v. Corbett*, and I must hold it therefore void. I have not here adverted to those of our cases referred to in the argu-

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ment of *commsel, which relate to the right of an assignor to make preferences in the order of the payment of his debts, or to make releases a condition of preference, because I do not consider these rules at issue here.

Since all of our reported cases upon assignments by debtors, the act of 1882 has been passed. This is now to be found from section 2005 to 2016, inclusive, of the General Statutes. By section 2014 all right of preference which an assigning debtor had before is taken away, save only as to debts due to the public, and save only as to such creditors as may accept the terms of such assignment, and execute a release of their claim against the debtor. This same section denounces as absolutely null and void any assignment "in which any provision or disposition of the property so assigned is made or directed other than that the same be distributed among all creditors of the said insolvent debtor equally," save, as above stated, as to debts due the public and to releasing creditors. A provision, therefore, which directs that upon certain contingencies a surplus, if any, shall revert to the assignor, is obnoxious to the denunciation of this statute.

The judgment of *Jacot v. Corbett*, in the case above referred to, was obtained after the assignment was made by Corbett, and on the deed being set aside by the court, the assignees were ordered to pay out of the funds in their hands under the assignment the costs of the case and *Jacot's* judgment.

It is therefore ordered and adjudged, that the deed of assignment made by Manuel Iseman to Junius H. Evans, Esq., be set aside and vacated as null and void, and that the said Junius H. Evans do pay to H. B. Claflin

& Co., out of the funds in his hands as assignee of Manuel Iseman, the sum of seven thousand eight hundred and ninety dollars and forty cents, with interest thereon from the date of the judgment for that sum obtained by H. B. Claflin & Co. against Manuel Iseman, together with the costs of the action in which the judgment was obtained, as well as the costs of this action.

Messrs. W. W. Sellers and Johnson & Johnson, for appellants.

Mr. J. N. Nathans, contra.

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*September 17, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. Manuel Iseman, merchant, of Marion, S. C., became embarrassed, and on January 29, 1884, executed an assignment of all his property, real and personal, to Junius H. Evans, Esq., for the benefit of his creditors, upon the following trusts: First, to pay all the expenses necessarily incident to the execution of the trusts therein imposed; second, to pay all his creditors in equal proportions, that is, pro rata, if the amount in his hands should not be sufficient to pay those in full who should come in and signify their acceptance under the deed of assignment, within four months from the date, provided said creditors so accepting should execute a full release and acquittance of their respective debts, and receive their respective proportions from the assignee in full payment thereof; third, "he shall, after the payment of all the creditors who accept, pay over the balance to me, if any balance should remain in his hands," &c.

Junius H. Evans accepted the trusts declared by the deed, and several of the creditors, in person or by agent, met and appointed Duncan Murchison, Esq., their agent in the management of the assigned estate.

H. B. Claflin & Co., of New York, held a large demand against Iseman, contracted in 1883. They did not accept under the assignment, but sued on their claim, and on April 23, 1884, obtained a judgment for \$7,890.48. Execution entered on the judgment was returned unsatisfied, and they then instituted these proceedings against Iseman, his assignee, and the agent of creditors, "to set aside the deed of assignment," and alleged "that the deed is fraudulent and void upon its face, in that it reserves to the assignor the benefit of any surplus which shall remain after the payment in full of the creditors who shall accept under the provisions of the said deed, to the exclusion of all other creditors," and that it was made and executed by the said defendant "to hinder, delay, and defraud his creditors," &c.

Judge Hudson granted an order staying proceedings under the assignment until further order, and the cause coming on for hearing before Judge Wallace, he ordered and ad-

judged, "That the deed of assignment be set aside and vacated as null and void, and that the said Junius H. Evans do pay to H. B.

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Clafin & Co., *out of the funds in his hands as assignee of Manuel Iseman, the sum of \$7,890.10, with interest thereon from the date of the judgment for that sum obtained by H. B. Clafin & Co. against Manuel Iseman, together with the costs of the action in which the judgment was obtained, as well as the costs of this action," &c.

From this decree the defendants appeal to this court, upon the following grounds:

"I. Because his honor erred in holding that the assignment of M. Iseman to Junius H. Evans for the benefit of his creditors is void, from the fact that it is provided in the same that after the payment of all the creditors who accept, the assignee do pay over the balance to the assignor, if any balance should remain, as fraudulent, though there was no fraudulent intent.

"II. Because his honor erred in holding that the assignment of M. Iseman, made to Junius H. Evans for the benefit of his creditors, was null and void from the fact that he inserted in the same a third clause, as before stated.

"III. Because his honor erred in holding that the assignment is null and void, in consequence of the third clause being obnoxious to the statute of February 9, 1882, though it is admitted by the plaintiffs and decided by the court that M. Iseman had really no fraudulent intent when he executed the assignment.

"IV. Because his honor erred in holding that the assignment is null and void, from the fact that it is fraudulent on its face, and obnoxious to section 2014 of the General Statutes.

"V. Because his honor erred in ordering the assignee to pay over the funds in his hands to H. B. Clafin & Co., instead of ordering him to distribute the sum equally among creditors as equitable assets."

The order granting the injunction and the decree of the Circuit Judge are both so clear and full that it is difficult to add anything to them. All that we can do is to put in form the conclusion already announced.

Until the recent statute (1882) in regard to assignments for the benefit of creditors, the law allowed a debtor in failing circumstances to assign his estate for the benefit of his creditors, and in doing so to prescribe the order in which they should be paid, or to make preferences among them. *Hill v. Rogers*,

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Rice Eq. 7; *[Riggs v. Murray]* 2 John. Ch. [N. Y.] 578. It was also, after some discussion as to the morality and policy of such allowance, finally settled that the debtor might attach the condition that the accepting creditors should execute a release in full. *Nixon v. Douglas et al.*, 2 Hill Eq., 446 [30

Am. Dec. 368]. As it seems to us, these great privileges were allowed to the debtor always upon the fundamental condition that the assignment should bona fide include his whole estate (*Le Prince v. Guillemot*, 1 Rich. Eq., 187), and without reserving to himself, directly or indirectly, any part of it, until all the debts are paid.

This view is expressly sustained by the case of *Jacot v. Corbett*, Chev. Eq., 76. In this last named case, the assignee was directed to pay certain claims in full, and then, "out of the surplus, to all the other creditors, who would accept the same in satisfaction of their demands, and execute a release thereof to the said James Corbett, by the first January next ensuing the date thereof, forty cents in every dollar of the amount of their claims, if the same was adequate thereto; and if not, to distribute such surplus ratably and in proportion among such creditors. And after payment of the said forty cents in every dollar, then if any surplus should remain, &c., to pay over the same to the said James Corbett, his executors, administrators, or assigns," &c. After mature consideration, it was held that, as against the plaintiff, the assignment was void and of none effect. It is true that there was in the case the other matter—limiting the payment to general creditors to forty cents in the dollar (which was not reached)—but a careful perusal of the judgment, we think, will show that the vice which proved fatal was the reservation of the surplus, if any.

Chancellor Dunkin, in his Circuit decree, which was affirmed in the Appeal Court, says: "But a debtor has no right to place his property beyond the reach of his creditors under the ordinary process of the law, prescribe the terms in which they participate in his effects, and secure to himself, in case of neglect or refusal, a control over such funds, and thereby the power to make other terms. Such deed is a direct violation as well of the terms as the policy of the statute (13 and 27 Eliz.). The purpose is to hinder and delay creditors,

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by transferring a colorable title to a *third person, while the real ownership is still in the assignor, unless the terms prescribed are assented to. No case, I think, can be found sanctioning an assignment which sustains such control in the debtor," citing *Hyslop v. Clarke*, 14 Johns. [N. Y.] 462; *Austin v. Bell*, 20 Johns. [N. Y.] 448 [11 Am. Dec. 297]; and *Mackie v. Cairns*, 5 Cow. [N. Y.] 585 [15 Am. Dec. 477]; and explaining *Lynah v. Lynah* (Mss.), and *Murray v. Riggs*, 15 Johns. [N. Y.] 571. As we understand it, this case of *Jacot v. Corbett* has never been overruled, but, on the contrary, has been cited and approved. See *Stewart v. Kerrison*, 3 S. C., 266.

But it is strongly urged upon the court that in this case Mr. Iseman, the debtor (who, we are pleased to state, has the reputation of an honest man), did not, in signing the deed

prepared for him, intend to do anything wrong; that the reservation was merely theoretical, in fact "hypothetical" and "suppositions," and that the actual fact is that the assigned estate amounts to very little over \$12,000, and creditors representing \$29,000 of claims have already accepted the terms of the assignment, showing conclusively that there will be no "balance" going back to the debtor under the reservation, and that therefore it will be an anomaly to declare an assignment fraudulent and void in law which was executed without fraudulent intent, and does not operate as a fraud upon any one. This view at first strongly impressed some members of the court, but upon careful consideration of the principles involved and our decided cases, we feel constrained to concur in the conclusion reached by the Circuit Judge. Precisely the same view was urged in the case of *Jacot v. Corbett*, supra, in which it was solemnly held that the argument was not sound. Although it does seem to be a hard case, the better opinion seems to be that "the character of the transaction must be determined by the interest of the parties at the time, and not by subsequent events." At the time the assignment was executed, it was certainly thought that there might be "a balance," or, as we suppose, the reservation would not have been made.

We have not been able to examine all the cases cited by the appellants, but from those to which we have had access it seems to us that proper consideration was not always giv-

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en to the distinction between a trust resulting from the circumstances and an express reservation in the deed of assignment itself. We have examined the case of *Beck v. Burdett* (1 Paige [N. Y.] 305), which seemed to be the case principally relied on by the appellants. We do not consider that case as at all analogous to this. That did not pretend to be a general assignment of the debtor's property for the benefit of all his creditors, with a condition requiring them to release any balance that might be unpaid; but, on the contrary, it was, in the exercise of the right which he had at that time to prefer one creditor, a partial assignment to pay certain debts in full and to return the balance if any. It was, in effect, the payment in the manner provided of these particular creditors, and, of course, if too much was paid, it should be returned. At all events, the cases cited were not South Carolina cases and we regard our own cases as controlling upon us, and in so doing we cannot avoid the conclusion that they are decisive of this case even under the old law.

But in 1882 the legislature passed an act upon the subject of assignments for the benefit

of creditors, which will be found in the General Statutes, from sections 2005 to 2016, inclusive. It will be observed that section 2014 expressly takes away from the insolvent debtor the right to make preferences, which, as we have seen, existed before the act, "save only as to debts due the public, and as to such creditors as may accept under the assignment and release." The act does not in express terms directly touch the subject of a reservation to the debtor or its effect. But it is manifest that the intent was to restrict the rights of debtors in making assignments, and we cannot doubt that its operation must be to strengthen the decisions that a reservation to the debtor was unlawful. The act specially denounces preferences, and the obvious effect of a reservation is either to withdraw so much of the debtor's property from his creditors, or at least to afford him the opportunity to make new terms. For instance, under this law such a partial assignment as was dealt with in the New York case of *Beck v. Burdett*, supra, would be impossible. As stated by the Circuit Judge, this section denounces as absolutely null and void any assignment "in which any provision or disposition of the property so assigned is made or directed

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other than that *the same be distributed among all creditors of the said insolvent debtor equally," &c. A provision, therefore, which directs that, upon certain contingencies, a surplus, if any, shall revert to the assignor, is obnoxious to the denunciation of this statute.

What, then, must be the practical effect of the assignment being declared void as to the plaintiffs? Other creditors have accepted the assignment and thereby undertaken to release the remainder of their debts, upon receiving their pro rata, estimated with reference to the whole assets. Shall the plaintiffs be paid in full, thereby reducing to that extent the assets for distribution? This seems hard, but as the assignment has been declared void quoad the plaintiffs, it is as to them the same as if it had never been made; and as before the assignment Iseman had property sufficient to satisfy their judgment and execution, we do not see how that result can be avoided.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

In this case a petition for rehearing was filed, upon which the court, on November 27, 1885, endorsed the following order:

We have carefully considered this petition, and as it does not bring to our attention any material fact or important principle which was overlooked in the decision of the case, the petition must be dismissed.

23 S. C. 427

CONNOR v. THE GREEN POND, WALTERBORO AND BRANCHVILLE RAILROAD COMPANY.

(April Term, 1885.)

[1. *Statutes* ⇨113.]

An act entitled "an act to incorporate the Green Pond, Walterboro and Branchville Railway Company" does not relate to more than the one subject expressed in its title (Const., art. II., § 20), even though the act contains, besides the charter, provisions authorizing the County of Colleton to subscribe in county bonds to the capital stock of this company, upon certain conditions, such as petition for election, elections, &c., and providing for a tax to pay interest on the bonds so issued.

[Ed. Note.—Cited in *Floyd v. Perrin*, 30 S. C. 9, 10, S. E. 14, 2 L. R. A. 242; *Ex parte Bacot*, 36 S. C. 136, 15 S. E. 204, 16 L. R. A. 586; *State v. Town Council of Chester*, 39 S. C. 317, 17 S. E. 752; *Riley v. Charleston Union Station Co.*, 71 S. C. 487, 51 S. E. 485, 110 Am. St. Rep. 579; *State v. O'Day*, 74 S. C. 449, 54 S. E. 607; *Aycock-Little Co. v. Southern Ry.*, 76 S. C. 332, 57 S. E. 27; *Buist v. City Council of Charleston*, 77 S. C. 272, 57 S. E. 862; *Jellico v. Commissioners of State Elections for County of Charleston*, 83 S. C. 487, 65 S. E. 725; *Verner v. Muller*, 89 S. C. 119, 71 S. E. 654; *Dove v. Kirkland*, 92 S. C. 323, 75 S. E. 503.

For other cases, see *Statutes*, Cent. Dig. § 142; Dec. Dig. ⇨113.]

[2. *Counties* ⇨196.]

The county commissioners having determined that the conditions precedent to a railroad subscription had been complied with, and having

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*issued to the railroad company county bonds in payment therefor, in action by taxpayers of the county to compel the cancellation of these bonds upon the ground that the conditions precedent had not been complied with, the burden of proof is upon the plaintiffs. They must show in such action, that the county commissioners acted without authority, or exceeded it.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 308; Dec. Dig. ⇨196; *Evidence*, Cent. Dig. § 113.]

3. Findings of fact by the Circuit Judge not disturbed.

4. Whether in a case like this the railroad company occupy the position of bona fide holders for value of the bonds issued to them, not considered.

[This case is also cited in *Riley v. Charleston Union Station Co.*, 71 S. C. 488, 51 S. E. 485, 110 Am. St. Rep. 579, without specific application.]

Before Hudson, J., Colleton, November, 1884.

The Circuit decree in this case, after reciting the act of incorporation and the pleadings, proceeded as follows:

The complaint showing these various matters and things upon its face, in the outset of the hearing a motion was made before me to dismiss the complaint, because it did not contain facts to constitute a cause of action. This motion I did not at the time grant, it being too grave a matter in my opinion to determine without a further investigation of the law, and without hearing further argument. I then, therefore, withheld my judgment upon that motion, and directed the

plaintiffs to proceed with their testimony; to the introduction of the testimony the defendants objected. The objection was overruled and the testimony received. I have heard argument of counsel fully upon the testimony and upon the law of the case, and propose now to render my judgment.

The first question that presents itself to my mind, and which I will pass upon now, is whether, after the bonds were issued and delivered to the railroad company, the plaintiffs, as taxpayers of the County of Colleton, will be admitted to question the validity of those bonds, and have an investigation made of the regularity or irregularity of the various proceedings of the board of county commissioners. During the progress of those proceedings there is no evidence that any objection on the part of these taxpayers, or others, was interposed to any part of the proceedings of the commissioners. No protest was preferred to the election, and now, for the first time, the validity of the bonds is attacked in the present complaint.

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*It is admitted by counsel on both sides that if these bonds were in the hands of bona fide purchasers for value, that these taxpayers could not assail their validity in this proceeding, or otherwise. Now, can they do so after the contract of subscription has been executed and the bonds delivered to the railroad company and the stock issued to the county? I find in *Jones on Railroad Securities*, to which I am referred by counsel for the plaintiffs, that the author, in section 268, holds that the taxpayer has the right in this form of proceeding and at this stage to ask for relief, and bases his authority upon two North Carolina cases, cited in his report below, one found in [State ex rel. *Cox v. Blair*] 76 N. C., at page 79, and the other in [Trustees University of North Carolina v. *McIver*] 72 Id., at page 86. These cases are not before me, and I regret that I have not the time to examine them for my own satisfaction.

I find in 24 Howard, U. S. Supreme Court Reports, in the case of *Bissell et al. v. The City of Jeffersonville*, that Mr. Justice Clifford, in delivering the opinion of the court, holds a different doctrine. Here is what he says on page 299 [16 L. Ed. 664]: "When the contract had been ratified and affirmed, and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and a fortiori, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value." Whether there has been any modification in this opinion in any subsequent judgment I don't know. Upon reason and upon principle I think that it is a sounder doctrine than that which would suffer the taxpayer, who took no steps during the progress of the subscription to assert his

rights, afterwards, and after the contract has been fully executed, to come forward and ask relief in the Court of Equity.

The process of preventing a subscription to a railroad company usually consumes a considerable length of time. All the taxpayers of the county are presumed to have full notice of so important and interesting a step, and, in fact, do ordinarily have actual notice, and are usually well informed in regard thereto. At all events, it is the duty of the taxpayer to watch such proceedings with vigilance, and to take such steps as will correct error or fraud on the part of those upon

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whom devolves the duty *of making the subscription. If he neglects so to do, and suffers the contract to become executed, and the railroad to become the holder of the bonds in exchange for their stock, sound policy requires that a court should not at so late a day interpose to relieve it.

I hold, therefore, that these taxpayers are too late in asking the relief at the hands of this court. It was an easy matter for them to know whether a bona fide subscription of \$10,000 was made; whether a bona fide petition of a majority of the freeholders had been presented, and whether the election ordered thereupon resulted in favor of subscription or no subscription. If they paid no attention to these matters and suffered the county commissioners to execute the contract, they are excluded now to ask the court to relieve them. But inasmuch as I have admitted and caused all a full hearing, and suffered these taxpayers to introduce evidence with the view to show that conditions precedent to the issue of these bonds had not been complied with, I deem it my duty to proceed and pass upon the weight of that testimony.

It is contended by the plaintiffs' counsel that it is only necessary that the plaintiff should make out a prima facie case of want of compliance with these conditions precedent, and that the proposition is then thrown upon the defendants to show fully and satisfactorily that the conditions were complied with. I do not so regard the burden of proof. He who assails the validity of a bond, or the validity of a judicial act of the board of county commissioners, whether acting as a board in the regular discharge of their duty, or a special board designated by the legislature to do and perform a certain act, takes upon himself the burden of proving the invalidity of that bond, or the error of the judgment so rendered.

In regard to the judgment of this special board, the doctrine that all things are presumed to have been rightfully done until the contrary is made to appear is rule of evidence in this case. Now, to show that the majority of freeholders did not sign a certain petition may be a very troublesome and difficult thing to do, and the fact that it is a difficult thing to prove does not relieve the

plaintiff from the burden of so proving. But
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before they can *have an executed contract rescinded, it devolves upon them to show by proof satisfactorily their right to have it so rescinded. The evidence adduced in this case, without attempting to repeat it here, is, in my opinion, not sufficient in justifying me in reversing the judgment of a local board, the members of which have large personal knowledge of the standing of the citizens of the county, and who possess facilities far greater than this court for ascertaining such a fact.

It appears from the evidence in the case that this board of county commissioners did take testimony, and resort to the most available testimony to ascertain the genuineness of the petition, and the status in regard to property of the various signers. The county auditor was examined and gave his certificate in regard to those petitions. Other citizens were examined. The board made use also, it is presumed, of their individual knowledge of the signers. They were in no haste to form a judgment, and after due deliberation decided that the majority of the freeholders of the county had signed a petition. For me now to hold otherwise would require full and satisfactory proof of the error committed by these men.

The evidence offered by the plaintiffs consists of the books of the auditor and the testimony of twenty-five or thirty persons, whose names appear upon the list, to the effect that they did not sign, nor did they authorize any one to sign for them. It is stated by counsel for the plaintiffs that of the names of the supposed signers of the petition, that there are 1,050 whose names do not appear upon the auditor's assessment book. This statement was allowed to be used by the counsel in the argument of the cause as a fact ascertained by them after comparison of the lists with the books.

In the argument of the cause counsel for the defendant gave a cursory examination to a part of the names and alleged that they had discovered that twenty-five of these names did appear upon the books. It is a well known fact that land is not always returned in the name or names of all the various persons entitled to a freehold interest therein. I fully appreciate the difficulty that the counsel for the plaintiffs labor under in verifying this list in full. The fact that the petitions seemed to have been signed

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*largely in the same handwriting, is relied upon as additional evidence of a want of genuineness. Giving full weight to all the testimony adduced by the plaintiffs, I do not deem it sufficient to overthrow the judgment of the board of county commissioners.

It is therefore ordered, adjudged, and decreed, that the restraining order and injunction hitherto granted be dissolved, and the complaint be dismissed with costs.

Messrs. G. W. Trenholm and Mitchell & Smith, for appellants.

Messrs. W. P. Murphy, Edwards & Tracy, Henderson & Behre, and L. F. Youmans, contra.

September 26, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On December 23, 1882, the legislature passed an act entitled "an act to incorporate the Green Pond, Walterboro and Branchville Railway Company," in which the County of Colleton was authorized to subscribe to the capital stock of said company the sum of \$60,000, in bonds of said county, upon certain conditions prescribed in the act. The conditions were as follows: 1. "That \$10,000 of the capital stock of said company is first subscribed by individuals or other corporations." 2. That upon the petition in writing of a majority of the freeholders of said county, an election should be ordered by the county commissioners, at which the question of "subscription" or "no subscription" should be submitted to the qualified voters of said county. 3. That at such election "the majority of the ballots cast shall be for subscription." The act goes on to provide that the managers of such election "shall make returns, count the votes, and meet at the court house at Walterboro and declare the result of said election, which result shall be certified in writing by said managers to the chairman of the board of county commissioners." Provision is also made for the payment of said bonds by taxation.

A petition, purporting to be signed by a majority of the freeholders of the County of

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Colleton, was presented to the county *commissioners, asking that an election be ordered, and on May 15, 1883, that body granted an order for an election to be held on June 30, 1883, to determine the question of "subscription" or "no subscription," in which it is recited that it appeared satisfactorily to them that the condition requiring a petition for such election, signed by a majority of the freeholders of said county, had been complied with. In pursuance of this order, an election was held on June 30, 1883, and the managers appointed to conduct said election certified in writing to the chairman of the board of county commissioners on July 3, 1883, that a majority of the ballots cast at such election was in favor of subscription, whereupon the board, after reciting this fact, passed an order "that upon sufficient evidence being submitted to us by the corporators of said railroad company, that the sum of \$10,000 has been subscribed, agreeably to section 5 of said act, it will then be lawful for the County of Colleton to subscribe through us to the capital stock of said company the amount of sixty thousand (\$60,000) dollars, as prescribed by said act."

On August 30, 1883, this evidence was furnished to the board of county commissioners,

and they then subscribed, in the name of the county, the said sum of \$60,000 to the capital stock of said company and received therefor twelve hundred shares of said stock, and at the same time executed and delivered to the officers of the said railway company seven per cent. bonds of said county to the amount of \$60,000, which bonds are still held by said company, a portion of the interest thereon having been paid by the county treasurer to the treasurer of the railway company.

On September 5, 1884, this action was commenced by the plaintiffs, as taxpayers of said county, in behalf of themselves and all the other taxpayers, against the railway company, the county commissioners, county treasurer, and county auditor of Colleton County, for the purpose of enjoining the railway company from disposing of the bonds, and that they be required to deliver the same to be cancelled, and for the purpose of enjoining the county auditor from assessing any tax for the payment of said bonds, and the county treasurer from paying out any taxes already assessed and collected for the purpose

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of paying said *bonds, and for general relief. The grounds upon which the plaintiffs base their demands are: 1. That so much of the act of the legislature above referred to as purports to confer upon the county commissioners power to issue bonds of the county is in violation of section 20, article II., of the constitution, and is therefore null and void, and consequently that the bonds would constitute no legal obligation of the county in the hands of any one. 2. That the said bonds being still in the hands of the railway company, they cannot claim the protection of bona fide purchasers for value without notice, and hence that if the bonds were issued without compliance with the prescribed conditions, they do not, while in their hands, constitute valid obligations of the county. 3. That the condition precedent to the issue of these bonds, which required a petition from a majority of the freeholders of said county before any election could be ordered, was not complied with, and the issue was therefore illegal.

The Circuit Judge held that the act was constitutional; that the railway company could claim the protection of bona fide purchasers for value without notice; and that even if they could not, the burden of proof was upon the plaintiffs to show a failure to comply with all the conditions prescribed in the act, and this they had not done. He therefore dissolved the temporary injunction previously granted and dismissed the complaint. From this judgment the plaintiffs appeal upon several grounds set out in the record, which need not be repeated here, because, according to our view, but three questions properly arise upon this record: 1. As to the constitutionality of the act. 2. As to the burden of proof. 3. As to whether the Circuit Judge erred in his finding of fact.

Section 20, article II., of the constitution, with which the act here in question is supposed to be inconsistent, reads as follows: "Every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." As we have said in *Charleston v. Oliver* (16 S. C., 56), upon the authority of Mr. Justice Cooley, "there has been, and ought to be, a general disposition to give a liberal construction to constitutional provisions like this now under consideration, rather than to embarrass legislation by an unnecessary strictness of

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construction." Hence, when a question, under this clause of the constitution, is presented for adjudication, we are bound to take a liberal and enlarged view, and if practicable bring the legislation which is assailed as unconstitutional within the limits prescribed by the supreme law of the land.

Now, looking at the act in question in this spirit, we do not see how it conflicts with the provision of the constitution which has been quoted. The "subject" to which the act relates is the Green Pond, Walterboro, and Branchville Railway Company, and that subject is undoubtedly expressed in the title. Nor do we find that the act relates to any other subject. As is usual with acts bearing such a title, after constituting certain persons a body politic and corporate by the name which they have chosen, it goes on to declare what such corporation may do, and how it may obtain the means for effecting the desired purpose—by receiving subscriptions to its capital stock. The fact that it also provides that a certain corporation, which otherwise would not have the power to do so, may subscribe to the capital stock upon certain prescribed conditions, does not, it seems to us, bring that portion of the act in conflict with the constitution. No new subject is introduced into the act, but the subject which all the while engages the attention of the legislature is the railway, which necessarily includes any appropriate means for its construction. For, as is well said in *San Antonio v. Mehaffy* (96 U. S., 315 [24 L. Ed. 816]), "when an act of the legislature expresses in its title the object of the act, the title embraces and expresses any lawful means to achieve the object, thus fulfilling the constitutional injunction that every law shall embrace but one object, and that shall be expressed in its title."

In that case the Supreme Court of the United States was called upon to decide a question identical in principle with the one now under consideration. There the legislature of Texas had passed an act entitled "an act to incorporate the San Antonio Railroad Company," the twelfth section of which authorized the city of San Antonio to subscribe for stock and issue bonds therefor, and in an action on those bonds it was contended that the act was in violation of that clause of the constitution of Texas which

declared that "every law enacted by the leg-

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islature shall *contain but one object, and that shall be expressed in the title." The court held that the act was not in violation of the constitution for the reason given in the language quoted above. It is observable that in that case the same cases from the Texas court (*San Antonio v. Gould*, 34 Texas, 49; *Giddings v. San Antonio*, 47 Texas, 548 [26 Am. Rep. 321]), which are relied upon here by appellants' counsel, were also cited before the Supreme Court of the United States.

So in *Supervisors v. People* (25 Ill., 181), it was held that an act to incorporate a railroad company may constitutionally contain a provision authorizing counties to subscribe to its stock, or otherwise aid in the construction of the road. See, also, the case of *Morton, Bliss & Co. v. Comptroller General* (4 S. C., at page 442), where it was held that a provision in an act entitled "an act to provide for the appointment of a land commissioner, and to define his powers and duties" for the issue of bonds of the State to be used by the land commissioner in the purchase of lands, was not in conflict with sec. 20, art. II., of the constitution. We agree, therefore, with the Circuit Judge, that the act is not unconstitutional.

The next inquiry is as to the burden of proof. The appellants contend that inasmuch as the county commissioners had no authority to issue the bonds in question until all the conditions prescribed by the act had been complied with, that the burden of proof is upon the defendants in this proceeding. It is to be observed that this is not a proceeding to compel the county commissioners to issue the bonds in question, nor is it an action on the bonds. On the contrary, the action here is to compel the cancellation of the bonds after they have been issued, upon the ground that the conditions upon which alone they could be lawfully issued have not been complied with.

There can be no doubt that the county commissioners were, in the first instance, to determine the question as to whether the conditions precedent were complied with, and having formally determined that they were, and having acted upon such determination by issuing the bonds, it is quite clear that the plaintiffs can have no cause of action until they show a failure to comply with some or all of the prescribed conditions. For in ad-

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dition *to the well settled rule that public officers are presumed to perform their duty until the contrary is shown, it is manifest that the only foundation for the plaintiffs' action is the allegation that some of the prescribed conditions have not been complied with, and until that allegation is proved the plaintiffs have no cause of action.

As is said in 1 Greenl. Evid., § 78: "To this general rule, that the burden of proof is

on the party holding the affirmative, there are some exceptions in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case; as, for example, in an action for having prosecuted the plaintiff maliciously and without probable cause," the want of probable cause must be proved. So here the very ground upon which the plaintiffs base their action is that there was no petition signed by a majority of the freeholders of the county, praying that an election might be ordered; and this, though a negative allegation, must be proved by the plaintiffs, as otherwise they would have no cause of action.

If this were a proceeding to compel the county commissioners to issue the bonds, or if it were an action by any one but a bona fide holder, without notice, upon the bonds, then the cases cited by the counsel for appellants would be in point; but as that is not the nature of the proceeding, but on the contrary, its object is to set aside and annul what has been done by the county commissioners, it is incumbent on the plaintiffs to show that they have either acted without authority, or that they have exceeded the authority conferred upon them. We do not think, therefore, that there was any error upon the part of the Circuit Judge in holding that the burden of proof was upon the plaintiffs.

The only remaining inquiry is one of fact. Did the plaintiffs succeed in showing that all or any of the prescribed conditions to the issue of the bonds had not been complied with? Upon this issue of fact the Circuit Judge found against the plaintiffs, and we cannot say that such finding was without any evidence to support it, or was manifestly against the weight of the evidence.

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*Under the view which we have taken, the question whether the railway company can claim the rights of a bona fide holder without notice, does not arise, and has not, therefore, been considered.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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23 S. C. 438

REYNOLDS v. REES.

(April Term, 1885.)

[1. *Appeal and Error* ⇨1010.]

Findings of fact by the Circuit Judge in a case of chancery approved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3979; Dec. Dig. ⇨1010.]

[2. *Witnesses* ⇨138.]

In action by executrix, an attorney is not incompetent under section 400 of the code to testify to communications between himself, as attorney for the testator, and the administrator, now deceased, of an estate under which defendants claim.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 574, 575; Dec. Dig. ⇨138.]

[3. *Evidence* ⇨186; *Witnesses* ⇨37.]

Entries on the docket and the common pleas journal, and the testimony of attorneys engaged, are competent evidence to establish the existence and contents of a judgment record which was proved to be lost. This case distinguished from *Brown v. Coney*, 12 S. C., 144.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 671; Dec. Dig. ⇨186; *Witnesses*, Cent. Dig. § 80; Dec. Dig. ⇨37.]

[4. *Pledges* ⇨30.]

A party who in good faith advanced money to an administrator for the use of the estate, and received as security the pledge of a bond and mortgage held by the administrator, has the right to a foreclosure of such mortgage.

[Ed. Note.—Cited in *Chapman v. City Council of Charleston*, 30 S. C. 559, 9 S. E. 591, 3 L. R. A. 311.

For other cases, see *Pledges*, Cent. Dig. §§ 75-85; Dec. Dig. ⇨30.]

[5. *Executors and Administrators* ⇨152.]

But the assignee having afterwards put this bond in the hands of this administrator, who was also an attorney, for collection, and who in his own name sued the bond to judgment, and the mortgagor, without notice of the assignment, having settled the judgment by a surrender of the mortgaged land, which thereupon passed into the possession of the heirs of the estate represented by this administrator, the lands remained liable for the payment of the mortgage debt, even though the mortgagor be relieved of further liability.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 626; Dec. Dig. ⇨152.]

[6. *Pledges* ⇨30.]

The bond should be credited with any payments made by the obligor, but not with payments made by the administrator upon the debt for which the assignment of this bond was collateral; the bond stood as security for the balance due on the debt thus secured.

[Ed. Note.—For other cases, see *Pledges*, Cent. Dig. §§ 75-85; Dec. Dig. ⇨30.]

Before Kershaw, J., Sumter, October, 1884.

The Circuit decree, after stating the conclusions of law quoted in the opinion of this court, proceeded as follows:

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*My reasons for the foregoing findings and conclusions are as follows:

The bond upon which the mortgage herein was founded was placed in the hands of the said Charles Mayrant by Judge Fraser, the agent of the said Mark Reynolds, the assignee thereof, for suit. He was thereby enabled to deal with Paul Rees as if he were still the true owner of the bond and mortgage. Paul Rees having no knowledge that the bond had been assigned, and no notice of any circumstance calculated to put him on his guard or to induce inquiry, acting under the belief that Mayrant was still the real

owner, settled with him as such, gave up the land in discharge of the judgment obtained against him by Mayrant on the bond, and became the tenant of Mayrant and the defendants, attending to them and paying rent on the land as of the estate of W. W. Rees. Under these circumstances, Dr. Mark Reynolds and his representatives are estopped so far as Paul Rees is concerned, and are to that extent bound by the settlement made between Charles Mayrant and Paul Rees. This proposition is sustained both by principle and authority, and I need do no more than refer to a few cases to establish it. *Holbrook v. Colburn*, 6 Rich. Eq., 293; *Maybin v. Kirby*, 4 Rich. Eq., 113; 3 Lead. Cas. Eq. (Am. edit.), 373; *Bull v. Rowe*, 13 S. C., 370.

The same authorities and principles will suffice to show that while plaintiff is estopped against setting up the mortgage against Paul Rees, the rights of the assignee remain in full force, so far as Mayrant and the defendants, his cestuis que trust, are concerned. Mayrant acted with full knowledge of the rights of the assignee, and the defendants are bound by all the equities which affected him. This is too plain to need argument or authority to support it.

The position taken on the part of the defendants that Mr. Mayrant, as administrator, had no right to bind the estate of W. W. Rees by his bond to Dr. Reynolds, appears to me to be avoided when it is shown, as it has been shown, that the debt was contracted for the purposes of the estate. The sale of the land was authorized by the court upon the hypothesis that the necessities of the estate re-

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quired it, to raise money for immediate *and pressing exigencies. The evidence shows that the sales did not bring the cash. It is a just inference that Mayrant borrowed money from Reynolds on the securities obtained by the sale, to meet the same demands whose existence had induced the court to sell the land. If there was a necessity of that sort, the administrator could borrow money for the use of the estate, and assign the assets of the estate to secure the same.

Under the authority of the court, the land had been sold and converted into choses in action, payable to the administrator, and were at his disposal as assets of the estate. In regard to these, it is said in the case of *Rhame v. Lewis*, which is a case of great authority, and is cited by counsel for the defendants, that "the administrator's power of disposition over his intestate's choses in action remains unaffected by this legislation, and continues as his power over the assets generally before the acts has been described to have been. Any one may securely take them from him, either absolutely or conditionally, by any of the usual methods of legal or equitable transfer for value, and in good faith." The reference to legislation was that in restraint of the common law pow-

ers of the administrator over the specific goods of his intestate. 13 Rich. Eq., 299.

The learned chancellor (Ingles), who delivered the admirable opinion in that case, summed up the propositions established as to this point, as follows: "A valid alienation, by way either of sale or pledge, of choses in action belonging to the intestate estate, may be made by the administrator of his own motion, to any one who takes them bona fide and for value, not grossly inadequate, and upon such alienation, they will be discharged of all equities which attach upon them merely as assets." *Ibid.*, 329. Nothing can be added to this admirable exposition of the law on this subject. The good faith of Dr. Reynolds in the transaction has not been questioned, and the bond of Mayrant shows on its face that it was given by Mayrant as administrator. There is literally nothing to impeach the bona fides of the transaction.

As to the grounds for overruling the objections to the evidence, they will be sufficiently apparent upon consideration. The objections to the admissibility of the evidence

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offered to establish the *lost records, all tended first to show the loss of the records, and next to show that such records had existed, and what they were. I could not exclude the evidence, because it tended to show those facts. The position taken that, inasmuch as a judgment cannot be proven but by the production of the record, which is admitted to be the rule, a lost judgment is incapable of being established, I apprehend is not well founded.

Since the hearing, I have been furnished by the counsel for the defendants with a reference to the case of *Harrison v. Manufacturing Company* (10 S. C., 296), as showing that the "judgment book" is the proper depository of a judgment, and that there was no proof that the clerk searched for that book. It is enough for my purpose to say that there was abundant evidence that the clerk's office was searched, and that no trace of the judgment in question could be found but those produced in this case. I cannot assume that there was any book in the office that was not examined in the face of that evidence. I may remark that the case last mentioned may, upon examination, fail to establish that there is any better evidence of an order or decree on the equity side of the court than the order or decree itself, signed by the judge, and filed by the clerk.

I was unable to perceive the pertinency of the objections to the evidence, based upon section 400 of the Code of Procedure. As to the amount of the mortgage debt, I consider the judgment obtained on the bond by Mayrant the best evidence thereof. Reynolds' agent having placed the bond in Mayrant's hands for suit, and the suit having been brought in the name of Mayrant, the judgment is to be regarded as obtained for the

benefit of Reynolds, and is in effect Reynolds' judgment. The amount to be recovered in this case is fixed by that judgment. The land is liable for that amount, but not for the costs, as they were against Paul Rees, and were settled by the arrangement between him and Mayrant.

It is therefore ordered, adjudged, and decreed, that the said mortgaged premises described in the complaint in this action, or so much thereof as may be sufficient to pay the sum due, with the interest and costs, be sold, &c.

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*From this decree defendants appealed upon the following exceptions:

1. That there ever was a final judgment in the case entitled Charles Mayrant, administrator, against Elizabeth N. Bradley and others.

2. That Charles Mayrant was the administrator of the estate of W. W. Rees.

3. That the bond of Charles Mayrant and Dr. Mark Reynolds was given for the benefit of the estate of W. W. Rees.

4. That the money received from Dr. Mark Reynolds was used for the estate of Rees.

5. That there was any judgment growing out of the case of Charles Mayrant, administrator, against Elizabeth N. Bradley et al., sufficient to give the authority claimed.

6. That the bond and mortgage of Paul Rees was a technical asset of the estate of W. W. Rees.

7. That there was any sufficient authority granted to Charles Mayrant to sell the lands described in said complaint.

8. That the said Mayrant had the power to deal with the bond and mortgage of Paul Rees as if it were a technical asset of the estate of Rees.

9. That the bond of Paul Rees having been paid by him, and he discharged from any liability thereunder, that the mortgage was not discharged as against the plaintiff.

10. That the testimony of the Hon. T. B. Fraser was competent or relevant.

11. That the testimony of W. H. Cuttino was not irrelevant and incompetent.

12. That the common pleas calendar for 1872 could be used in evidence before it was established that any final judgment had been made in the cause.

13. Because his honor erred in ignoring the testimony that, at the time Mayrant withdrew the bond and mortgage of Paul Rees from Judge Fraser, that he, Mayrant, had paid to the said Fraser more than the amount of the bond of Paul Rees on the obligation to which said bond was collateral, some of which payments are stated to have been made by Paul Rees.

14. Because his honor erred in not holding

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that if the powers claimed for Charles Mayrant, administrator, were duly granted, that they were specific and limited and could not be departed from.

Messrs. Moises & Lee and H. F. Wilson, for appellants.

Messrs. Jos. H. Earle and J. D. Pope, contra.

September 26, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. Some time in 1864 W. W. Rees died, leaving a last will and testament, of which one Samuel J. Bradley was the qualified executor. Before fully administering the estate of his testator, Bradley died, leaving a will, of which Elizabeth Bradley was the qualified executrix. It is alleged in the complaint that one Charles Mayrant was duly appointed administrator de bonis non, cum testamento annexo, of the estate of said W. W. Rees, and that as such he filed a complaint against said Elizabeth Bradley, as executrix, as aforesaid, and the heirs at law and devisees, asking, amongst other things, for authority to sell a portion of the lands of the estate of Rees to pay debts, current expenses, taxes, &c., of said estate; that such authority was duly granted, and on January 30, 1873, in pursuance of such authority, the said Mayrant, as administrator as aforesaid, duly sold several parcels of land belonging to said estate, including the parcel described in the complaint, which was purchased by the defendant, Paul Rees, who, to secure the purchase money, executed his bond, secured by a mortgage of said parcel, to the said Mayrant, as administrator as aforesaid; that afterwards, to wit, on September 24, 1873, the said Mayrant, as administrator as aforesaid, in order to raise money for the use and benefit of said estate, borrowed from plaintiff's testator the sum of seven hundred and twenty-six dollars and forty-two cents, for which he gave his bond, secured by an assignment of the above mentioned bond and mortgage of Paul Rees; and the object of this action, to which the heirs at law of W. W. Rees, who are now in possession of the mortgaged premises, are made parties, is to obtain a foreclosure of said mortgage.

It also appeared in evidence that the bond

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of Paul Rees was, *at some time prior to April 15, 1876, delivered by Judge Fraser, who was then the attorney and agent of plaintiff's testator, to said Charles Mayrant, at his request, for suit, he being a practising attorney, and was by him sued in his own name, without the knowledge or consent of Mark Reynolds, the expectation of Judge Fraser being that it would be sued in the name of Reynolds as assignee. On May 15, 1876, Mayrant, as administrator as aforesaid, obtained judgment on the bond against Paul Rees, and Mayrant settled said judgment with Paul Rees by taking the land back as the property of the estate of W. W. Rees, and the said Paul Rees then rented the same from the said Mayrant while he lived, and from

the defendants since his death, as of the estate of the said W. W. Rees, deceased;" but the said Paul Rees, at the time of this settlement, had no notice of the assignment of his bond and mortgage to said Mark Reynolds. It also appeared that Charles Mayrant died before the commencement of this action, and that the amount due on the bond of Mayrant to Reynolds exceeded the balance due on the bond of Paul Rees to Mayrant.

These allegations of the complaint, and the other facts above stated, were found by the Circuit Judge to be true, and he concluded as matter of law: I. That Paul Rees is fully discharged from all liability to the plaintiff on his bond aforesaid. II. That the plaintiff is entitled to a judgment of foreclosure and sale of the mortgaged premises for the purpose of paying the amount due on the bond of Paul Rees as ascertained by the judgment recovered against him by Mayrant, not, however, including the costs of that case. III. That plaintiff is entitled to a judgment for the costs of this action, to be paid from the proceeds of the sale of the said land, or if that should not be sufficient to pay the debt due on said mortgage, to be paid by the defendants other than Paul Rees, who should only pay his own costs.

From this judgment the defendants appeal upon numerous grounds set out in the record, which need not be repeated here, but there is no exception by any of the parties to the first conclusion of law as to the discharge of Paul Rees from any personal liability, and therefore that question is not before us for consideration.

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*So far as the exceptions impute error to the Circuit Judge in his findings of fact, it will be sufficient to say that there was testimony tending to support his several findings, and that they are not contrary to the manifest weight of the evidence. On the contrary, we think they are well supported by the testimony.

As to the exceptions based upon the incompetency of the testimony offered, they may be divided into two classes: First. Those based upon the provisions of section 400 of the code. Second. Those based upon the idea that the existence and contents of a record cannot be established by parol evidence. We are unable to perceive the pertinency of the objection based upon section 400 of the code. Judge Fraser, whose testimony was objected to on this ground, was not a party to the action, and had no interest in the matter, and we are unable to perceive any ground upon which his testimony as to what occurred between himself as the attorney of plaintiff's testator and Mayrant can be regarded as incompetent.

Second. It is true that the original record of the proceedings in the case of Mayrant v. Bradley and others was not produced, but its loss was fully proved, which, under well

settled rules, let in secondary evidence, which, in our judgment, was not only competent and relevant, but was amply sufficient to establish the existence of such a case and the result of it. The entries on the docket and the common pleas journal, together with the testimony of Judge Fraser and Mr. Blanding, who seem to have been the attorneys immediately charged with the case, conclusively show that there was such a case, and that it culminated in an order for the sale of a portion of the lands of the estate of W. W. Rees for the purpose of providing means to meet the wants of the estate. This case differs materially from that of *Brown v. Coney* (12 S. C., 146), relied on by appellants. In that case the court was asked to infer the existence of a judgment from certain fragments of a record supplemented by parol testimony. As was there said: "It is not pretended that there was any direct evidence whatever of any judgment or final order for the partition of the land in question, either by record or by parol. No such record was produced, and no witness testified that any such record had ever existed." Here, how-

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ever, there was evidence, secondary it is true, but upon proof of the loss of the original, competent, that there was an order of sale.

Assuming, then, as true the facts found by the Circuit Judge, we think his conclusion of law was unquestionably correct. Here is a case in which a third person advanced his money, in perfect good faith, to the administrator of an estate for the uses of said estate, and took as security a pledge of certain assets of the estate—the bond and mortgage of Paul Rees—which, according to the case of *Rhame v. Lewis* (13 Rich. Eq., 329), cited by the Circuit Judge, he had a right to do under the circumstances proved; and, in the absence of anything that would defeat such right, plaintiff's testator would clearly have the right to subject the mortgaged property to the payment of the money so advanced for the use of the estate by a foreclosure of the mortgage.

It is contended, however, that the settlement made by Mayrant with Paul Rees of the judgment recovered on his bond, which said Mayrant had been enabled to make by the incautious delivery to him by the agent of plaintiff's testator of said bond, in the absence of notice to Paul Rees of the assignment of said bond and mortgage, operated as an extinguishment of the mortgage. It is true that the payment of the mortgaged debt operates as an extinguishment of the mortgage, but there was no payment of the mortgaged debt in this case. The mortgagor simply surrendered to the original mortgagee the property given to secure the payment of the debt, and although the effect of this may very possibly be, as the Circuit Judge held,

to relieve the mortgagor, in the absence of notice of the assignment, from any personal liability on the mortgage debt, yet it certainly cannot have the effect of releasing the property originally given as security for such debt from liability for the payment of the debt to the party really entitled thereto.

As between Mayrant and the plaintiff's testator, the latter was unquestionably entitled, both in law and equity, to the debt secured by the bond and mortgage of Paul Rees, and any money or property received by Mayrant in satisfaction of such debt would, in his hands, or in the hands of those whom he represented, necessarily enure to the benefit of the plaintiff's testator, the person to whom the debt was really due. Reyn-

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olds having advanced money for the use of the estate of W. W. Rees, is entitled to have it refunded out of the property of the estate given to secure such advance by the legal representative of the estate.

Of course, we are not to be understood as saying that where a person lends money to the administrator of an estate, that any of the visible, tangible property of the estate may be mortgaged by the administrator to secure the payment of such debt. The distinction between the right of an administrator to pledge or alien any of such property, and his right to pledge or alien the choses in action constituting a part of the assets of the estate, is clearly pointed out in the case of *Rhame v. Lewis*, supra. Under the sale made by Mayrant as administrator, by the authority of the court, the legal title to the land covered by the mortgage passed out of the heirs and devisees of the said W. W. Rees into Paul Rees, and the property pledged by the administrator to secure the debt of Reynolds was not the land of the estate of W. W. Rees, but one of the assets of his estate, in the form of a chose in action, which, according to the case of *Rhame v. Lewis*, the administrator had a right to pledge for the uses of the estate. The land, therefore, which stood as security for the payment of the debt to Reynolds, must continue liable to the payment of that debt, in whosoever hands it may be, the rights of purchasers for valuable consideration without notice not being involved.

The appellants, in their thirteenth exception, complain that the Circuit Judge erred "in ignoring the testimony that, at the time Mayrant withdrew the bond and mortgage of Paul Rees from Judge Fraser, that he, Mayrant, had paid to the said Fraser more than the amount of the bond of Paul Rees on the obligation to which said bond was collateral, some of which payments are stated to have been made by Paul Rees." We do not understand that the testimony shows the fact to be as assumed in this exception. The precise time at which the bond of Paul Rees was delivered to Mayrant for suit by Judge Fraser does not appear, but it must have been either

on or before April 15, 1876, as that is the day on which it is alleged that suit was commenced on the bond. At that date the pay-

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ments endorsed on the bond of Mayrant to Reynolds did not amount even to the face of the bond of Paul Rees to Mayrant, and even the subsequent payments, one of which appears to have been made by Paul Rees and Lazarus Rees, do not appear to have been sufficient in amount to cover the amount of the bond of Paul Rees.

But, even granting the fact to be as assumed in the exception, we do not see how it would affect the case, except so far as any payments made on the bond of Mayrant to Reynolds may have been made by Paul Rees. For if Mayrant had paid to Reynolds on his bond an amount greater than the bond of Paul Rees, that would not operate as a satisfaction of the latter bond. There were several notes, besides the bond of Paul Rees, which were assigned to Reynolds as security for the payment of the bond of Mayrant; and until that bond was fully paid, Reynolds had a right to hold all of the notes and the bond of Paul Rees as collateral security for the payment of such balance, and could enforce all or any one of them so far as might be necessary for the payment of such balance. But of course any payment made by Paul Rees on the bond of Mayrant to Reynolds should operate as a credit on the mortgage debt of Paul Rees. As there seems to have been at least one such payment, in part at least, credited on the bond of Mayrant to Reynolds, we think the judgment appealed from should be reformed, so that in ascertaining the amount due on the mortgage debt credit should be given for any payments made by Paul Rees on the bond of Mayrant to the plaintiff's testator.

The appellants, in their fourteenth exception, complain that the Circuit Judge "erred in not holding that if the powers claimed for Charles Mayrant, administrator, were duly granted, that they were specific and limited and could not be departed from." This exception is couched in such general terms that we might well disregard it. What were the limitations upon the powers of the administrator, or in what respect such limitations were disregarded, are not stated; but we infer from the argument that appellants' contention is that the administrator was authorized to sell the lands for cash to relieve the pressing necessities of the estate, and that his sales on credit were unauthorized. The testimony does not show that

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the administrator was authorized to sell for cash only, and we are not at liberty to infer that such was the order. It may be that a sale of land for cash at that time would have been very disastrous to the interests of the estate, and it may have been much the best policy to have sold on a credit and use the proceeds in the form of choses in action to

raise the money needed, as was done. Be that as it may, however, we do not see any evidence that the administrator violated the terms of the order of sale, and hence we see no foundation for this exception, even if it had been taken in proper form.

The judgment of this court is that the judgment of the Circuit Court be modified as herein directed, and that in all other respects it be affirmed.

23 S. C. 449

TRIMMIER v. WINSMITH.

(April Term, 1885.)

[1. *Judgment* ⇨41, 46, 70.]

It is not a commendable practice for a clerk of court to take a confession of judgment in his own favor, but the debtor who makes such a confession cannot afterwards object to it on the ground that the clerk was a party in interest.

[Ed. Note.—Cited in *Moore v. Trimmier*, 32 S. C. 511, 518, 11 S. E. 548, 552.

For other cases, see *Judgment*, Cent. Dig. §§ 87, 108; Dec. Dig. ⇨41, 46, 70.]

[2. *Execution* ⇨98, 99.]

The high interest called for by some of the notes for which the confession was given, and the hard and exacting contract that was the consideration of another, cannot be interposed as objections to a renewal of the execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 196; Dec. Dig. ⇨98, 99.]

[3. *Execution* ⇨322.]

Land being offered for sale under a senior execution, the debtor, judgment creditors, and mortgagees (the mortgage being an intermediate lien) agreed that the proceeds of the sale should be applied to these liens in the order of their date, and it was so announced at the sale; such application was consented to, all parties being present, and an order was obtained from the Circuit Judge at chambers so directing. *Held*, that the sheriff properly applied the proceeds of sale, after paying the senior execution, to the mortgage, and the balance being thereby rendered insufficient to satisfy the junior executions, that they were unsatisfied.

[Ed. Note.—Cited in *Moore v. Trimmier*, 32 S. C. 519, 11 S. E. 548, 552.

For other cases, see *Execution*, Cent. Dig. § 955; Dec. Dig. ⇨322.]

[4. *Execution* ⇨98.]

A renewal execution should issue for the balance due upon the original, with interest from the date of the last credit on the principal debt.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 195-202, 607; Dec. Dig. ⇨98.]

Before Pressley, J., Spartanburg, October, 1884.

The opinion sufficiently states the case.

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*Messrs. J. S. R. Thomson and Duncan & Sanders, for appellant.

Messrs. Bomar & Simpson, contra.

September 28, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an application to renew the balance of an execu-

tion. The defendant answered that the judgment had been paid.

It appeared that on March 13, 1879, the defendant confessed judgment before the clerk to the plaintiff for the sum of \$1,659.77, upon which execution was duly issued. This judgment was made up of several items of indebtedness, one of which was a note for \$500, "given for services rendered by plaintiff in staying the sale of the defendant's lands advertised to be sold by the sheriff;" and F. M. Trimmier, the plaintiff, to whom the confession was made, was the clerk of the court before whom the confession of judgment was entered up.

There were liens upon the property of the defendant in the following order: 1. Judgment of Briggs. 2. Mortgage given to F. M. Trimmier and B. H. Moore to secure them as endorsers for defendant on a note to the National Bank of Spartanburg. 3. The aforesaid confession of judgment to Trimmier. 4. Judgment of D. H. Smith; and 5. Judgment of R. E. Cleveland. On December 1, 1879, the land of defendant in Union County was sold by the sheriff under the Briggs judgment for \$9,000, and at the sale it was, by direction of the parties, announced that the proceeds of sale would be applied to the liens in their order, including the mortgage named second in the order. The proceeds were so applied, the defendant expressly assenting, and the same being directed by order of Judge Wallace on the application of the defendant and B. H. Moore. By this application the senior judgment of Briggs and the mortgage were paid off in full, and a payment on the judgment of F. M. Trimmier of \$1,170.70, leaving a balance still due thereon of \$771.25, and for this sum Judge Pressley ordered the execution to be renewed.

From this order the defendant appeals on

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the following *grounds: I. Because his honor erred in not holding that the judgment was paid. II. Because his honor erred in not holding that there was no judgment upon which to base an execution. III. Because his honor erred in holding that the judgment was not paid. IV. Because his honor erred in allowing the execution to issue for the sum of \$771.25. V. Because his honor erred in allowing the execution to issue for any sum whatever.

It seems to us unusual, and not to be commended as a practice, for the clerk of the court to take and enter up a confession of judgment in his own favor as a creditor. The general rule certainly is that a judicial officer shall not render judgment upon a matter in which he has a personal interest—at least, not without the consent of the parties. (See the constitution, article IV., section 6.) But, in the case of the clerk of the court, it seems that no provision has been made for the discharge of such duty by any other officer. He is required "to sign officially all

judgments." Gen. Stat., § 742. Besides, his duties in entering up such a judgment are somewhat ministerial in character. The law prescribes fully and particularly what statement must be made by the defendant under oath, in order to have a judgment by confession; and this "statement and affidavit with the judgment rendered shall thereupon become the judgment roll." Code, § 385. The defendant made the necessary statement himself, and had the judgment enrolled, and it seems to us that he cannot now object that the plaintiff, being the clerk himself, had no right to consider his application and statement and enrol the judgment.

It is true that some of the notes embodied in the judgment bore high interest, and that of \$500 for services rendered in postponing a sale seems hard and exacting. But all objections of that kind should have been made when the judgment was confessed; and not having done so at that time, the defendant cannot do so now.

But, assuming that the defendant cannot object to the validity of the judgment, he further contends that it was paid by operation of law; that the sheriff had no right to apply any of the proceeds of sale to anything but executions; and if that had been done, the judgment now proposed to be renewed would have been paid in full; that the sheriff had

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no right to consider the "mortgage at all, especially as it was only to indemnify the mortgagees against loss as endorsers. But here again the proof was clear that the defendant consented to this application. Trimnier, the owner of the judgment, was one of the mortgagees, and all the parties, including the defendant himself, consented to such application. Indeed, at the sale the announcement was made that such application would be made, and it was also directed by the order of Judge Wallace.

We cannot say that the application was unauthorized. The mortgage was handed to the sheriff like an execution, and the parties agreed that it should be paid in its order. The lands were sold under the execution of Briggs, which was senior to the mortgage. "If the land be sold under an execution older than the mortgage, the purchaser takes it discharged of the mortgage." State v. Laval, 4 McCord, 336. As was said by Judge Butler, in the case of Cooper v. Scott (2 McMull., 155): "We think the sheriff was right in first satisfying the mortgages that were put in his hands, as they were older than the *li. fa.*'s in his office and operated as liens on some (all) of the property sold. The mortgagees were present, and, it seems, consented to release their lien by taking the proceeds of the property sold. It was competent for them to do so; and the sheriff, having acted as their agent, was justifiable in satisfying these claims in preference to the execution creditors," &c.

We see no error in the amount for which the execution was ordered to be renewed. It seems that the \$53 complained of was the sheriff's commissions; and the order of Judge Pressley said nothing about compound interest. He simply found that so much principal and interest was now due—the true amount; but when the renewed execution is issued, it should express the balance remaining unpaid by the application in the sheriff's office, together with interest from that time, viz., December 1, 1879, until paid.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. *453

*MASSEY v. DAVENPORT.

(April Term, 1885.)

[Wills *§* 461, 733.]

A will provided as follows: "I will and bequeath unto my children, herein named, after my decease and interment and the payment of all just debts, viz., M., A., E., B., and I., all my estate, real, personal, and all residue, to have, to hold, and to use for their benefit during the single life of M., A., and E., my daughters, and till my sons, B. and I., are of age. I further will and devise that as the within named sons shall become of age and the daughters marry, their respective interests in possession shall revert to the daughters remaining unmarried, so long as the said unmarried daughters shall choose to remain on the premises. I further will and devise that at the majority or marriage of all the within children named, my property shall be sold and equally divided among all my children and their bodily heirs or living issue of those deceased, if any there be." *Held*, that the word "or" in the last sentence was used in the sense of "and," and that partition could not be demanded while A. resided on the place and remained unmarried.

[Ed. Note.—Cited in Gibbs Machinery Co. v. Johnson, 81 S. C. 14, 61 S. E. 1027.

For other cases, see Wills, Cent. Dig. §§ 980, 1825; Dec. Dig. *§* 461, 733.]

Before Fraser, J., Greenville, July, 1884.
The opinion states the case.

Messrs. Stokes & Irvine, for appellants.
Mr. W. H. Perry, contra.

September 28, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. Tabitha Davenport departed this life leaving a will, which, among other things, devised as follows: "First, I will and bequeath to my children herein named, after my decease and interment and the payment of all just debts, namely, Mahala Ashmore, Amanda Davenport, Micajah Berry Davenport, Isaac Perry Davenport, and Emma Davenport, all my estate, real, personal, and all residue, to have, to hold, and to use for their benefit during the single life of Mahala Ashmore, Amanda Davenport, and Emma Davenport, my daughters, and till my sons, Micajah and Isaac, are of age. I further will and devise that as the

within named sons come of age and the

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daughters marry, their *respective interest in possession shall revert to the daughters remaining unmarried, so long as the said unmarried daughters shall choose to remain on the premises. I further will and devise that at the majority or marriage of all the within children named, my property shall be sold and equally divided among my children and their bodily heirs," &c.

The testatrix owned no property except a tract of land, and upon it the daughter Amanda resides, being still unmarried. All the children attained their majority, and two of them, the plaintiffs, instituted this proceeding for the sale and division of the proceeds of the land alleging that the time indicated by the will for such sale and division had arrived. This was denied, and the single question was as to the construction of the will, whether it was the intention of the testatrix that the land should be sold and divided as soon as all of the children came of age, or not until the daughters were all married also. Judge Fraser held that Amanda, being still unmarried and living as a single woman upon the land, it was not as yet subject to partition, and dismissed the complaint.

The plaintiffs appeal upon the following grounds: I. Because it is respectfully submitted that his honor erred in holding that, as Amanda Davenport is still unmarried and remains upon the land, it is not subject to partition. II. Because his honor erred in holding that, although the children are all of age, yet the land is not subject to partition now. III. That the intention of the testatrix, as expressed in her will and gathered from a proper construction of that instrument, was that said land should be sold and the proceeds divided among the children when the youngest attained the age of twenty-one years."

If there was no other provision in the will but that contained in the first paragraph, we suppose that there could be no doubt about the proper construction. It there appears that the testatrix did not mean that the land should be sold and the proceeds divided as soon as the sons came of age, for she directed that as they came of age their respective shares should "revert to the daughters remaining unmarried as long as the said unmarried daughters shall choose to remain on the premises." The words "unmarried daughters" undoubtedly embraced a single daughter.

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ter. *The only seeming obstacle in the way of this obvious construction is the supplemental provision. "And I further will and devise that at the majority or marriage of all the children named, my property shall be

sold and equally divided among all my children," &c.

It is contended that the use of the word "or" in this latter provision shows that it was the intention of the testatrix that the land could be sold and proceeds divided either upon the majority or marriage of all the children. Taking the whole will together, however, we do not regard this as the proper construction. It will be observed that there is only one provision in the will, that in reference to the land. The first part of the provision gives the use of the land to certain of the children of testatrix "during the single life of Mahala Ashmore and Amanda and Emma Davenport, and as the sons named should come of age and the daughters marry their shares should revert" to the daughters remaining unmarried; and then in the second part goes on to provide for the sale and division of the land.

Most naturally the intention was that the sale and division should be at the time and under the circumstances indicated in the first part—that is to say, after keeping the land unsold for the use of the daughters so long as any of them remained unmarried. But in the effort to make the different parts of the will conform, the draughtsman used the word "or" instead of "and." In order to make the direction for the sale correspond with the first and devising clause, it is necessary to consider the word "or" as employed in a conjunctive and not a disjunctive sense.

As Chancellor Johnston said, the decisions on the subject of "transposing the words 'or' and 'and' are not uniform, and do not appear generally to be governed by principle. This is wrong. Where there is nothing in the will to raise a contrary persuasion, the safest as well as the justest course is to assume that testators intend their words to be taken in their common and natural sense. * * * But where there is something to be inferred from the context of the will, something to guide us in the nature of the right about which the particular clause under consideration treats, or where there is a clear general intention which a literal construction of the particular clause would contradict or defeat.

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it *would be not only unjust, but a gross violation of the true principles of decision to disregard these indices of intention and execute the will literally according to its inaccurate terms. This would be little better than entrapping the testator by mere word catching." &c. See Shands v. Rogers, 7 Rich. Eq., 425, and authorities there cited. We think there is in this will "a clear general intention," which would be defeated by a literal construction of the last paragraph of the provision concerning the land.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 456

WHITE v. MOORE.

(April Term, 1885.)

[1. *Descent and Distribution* ⇨117.]

A note, resting upon vague and unsatisfactory proof, not established as an advancement.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 428; Dec. Dig. ⇨117.]

[2. *Descent and Distribution* ⇨117.]

An agreement that money advanced by a father to enable his son to obtain a medical education, should be regarded as an advancement, not established, there being no memorandum in writing, the son having been then probably a minor, and the proof not clear.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 428; Dec. Dig. ⇨117.]

[3. *Descent and Distribution* ⇨96.]

Money expended by a father for the professional education of his son is not an advancement. *Cooner v. May*, 3 Strob. Eq., 185.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 395; Dec. Dig. ⇨96.]

[4. *Descent and Distribution* ⇨93.]

A note signed by a son to his father as surety for the purchase of land, is a debt and not an advancement; so, too, had the son been himself the purchaser, and he therefore the principal debtor.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 389; Dec. Dig. ⇨93.]

[5. *Descent and Distribution* ⇨93.]

Where a son signs as surety a note given to his father for the purchase of land which is afterwards conveyed to the son, the land is not an advancement.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 389; Dec. Dig. ⇨93.]

[6. *Evidence* ⇨313.]

Parol proof of declarations made thirty years before is uncertain and unsatisfactory.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1167; Dec. Dig. ⇨313.]

7. After the debt of a mere surety is barred by the statute of limitations, is there any moral obligation resting upon him to pay it?

[8. *Payment* ⇨66.]

After twenty years a debt is regarded as paid. Where a distributee demands his share of an estate, he cannot be required to account for a note against him, twenty-four years old, found among the papers of the intestate, for the law will presume that it has been already paid.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 176-188; Dec. Dig. ⇨66; *Descent and Distribution*, Cent. Dig. § 424.]

Before Cothran, J., York, July, 1884.

The opinion sufficiently states the case.

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*Mr. G. W. S. Hart, for appellants.

Mr. W. B. Wilson, contra.

September 28, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. John White, Sr., departed this life intestate in December, 1876. Letters of administration upon his estate were granted to Jonathan Moore Janu-

ary 10, 1877. The intestate left a number of heirs, and among them, the plaintiffs, children of a predeceased son, Alexander White, who died in August, 1865. In settling the estate of the intestate the administrator refused to allow these children a distributive share of their grandfather's estate, and on November 2, 1882, these proceedings were instituted in the Probate Court to require the same paid to them. The administrator answered, that as he was informed, his intestate, John White, in his life-time, had "made advancements in money, land, and other property to his son Alexander, the father of petitioners, exceeding in the aggregate the portion distributable to any of the other children," &c. On the trial in the Probate Court three items of advancement were claimed: First. A tract of land in Union County. Second. The gift of a note for \$300; and, Third. The expenses incurred by the father in graduating his son Alexander as a doctor of medicine.

It appeared that about the year 1853 the intestate conveyed the land by deed to one Jonathan Rhyne, receiving as the consideration part cash and the remainder in the note of Rhyne, with Alexander White as surety, which said note is now in the hands of the administrator of the intestate, showing a balance unpaid. In September, 1859, Rhyne conveyed the land so purchased to Alexander White, his surety, who had become his son-in-law, taking his note for the purchase money. Upon this note Alexander made a payment, leaving still due a balance about equal to that on the note of Rhyne to the intestate, with Alexander as surety. Jonathan Rhyne was discharged in bankruptcy some time after 1865 and before the death of John White, and the note of Rhyne and Alexander White

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was not proved in bankruptcy. Alexander White died in 1865, and there is no evidence that the note was presented for payment in the settlement of his estate; nor does it appear in the inventory of the assets of John White's estate. The note was produced upon a reference in this case on February 13, 1883, by the defendant, Moore, and is endorsed with a single credit of \$470, January 8, 1859, received from Alexander White, "said sum to be credited on J. Rhyne's note on A. White."

Alexander, the eldest son of John White, was sent by his father to a medical college and was graduated as a doctor of medicine, completing his course at about the age of 22 or 23. Anderson Meacham testified that he once heard John say that Alexander agreed that if his father would make him a doctor, he would take it as his part of his father's estate. This was before Dr. White attended the lectures.

As to the note for \$300, the only proof was the statement of James Scoggins, that he

once heard a conversation between John White and wife of witness, in which, among other things, he said that he had once a note on Alexander for \$300, and that Alexander had come to his house and wanted him (John) to give it to him, who told him he could not do so, as he had already given him more than any of the other children, when Alexander got mad and said that he would never again go to his house while he lived. Alexander left the house, when the mother prevailed on him to call Alexander back and give him the note, which was done—that the note was more than his share, and he would have it to account for to the other children, &c.

The probate judge found as matter of fact that there was not sufficient proof of any of the alleged advances, and decreed that the petitioners were entitled to their father's share in the estate of John White. Upon appeal to the Circuit Court Judge Cothran affirmed the judgment of the Probate Court, and the defendant appeals to this court upon the following grounds:

1. Because his honor erred in not sustaining each of the exceptions taken to the decree of the Probate Court.

2. Because his honor erred as matter of fact in holding that the land conveyed by John White, the intestate, through one Rhyne, to the son, Alexander, was not an "advancement:"

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and *as matter of law, under the facts proved, that the land so conveyed was no advancement.

3. Because his honor erred in holding that the note of Alexander White to his father, unpaid at Alexander's death in 1865, and never presented and proved against his estate, was not an advancement to the extent of the amount due thereon.

4. Because his honor erred in holding that said note was extinguished by lapse of time, when the estate descended to the heirs at law of John White; and erred in extending the presumption of payment to the date of the commencement of this action, instead of limiting it to the devolution of the estate of the intestate at his death in 1876; and erred in considering the matter of such extinguishment in the absence of any exception by the petitioners to the decree of the Probate Court, wherein said debt is considered to be subsisting, no question thereon having been made at the hearing in either the Probate or Circuit Court.

5. Because his honor erred in holding that petitioners can recover a distributive share per stirpes, through their father, Alexander White, without taking into account and charging them with the indebtedness of their father to the estate, existing in full force at the death of the intestate; and erred in considering the moral obligation to pay the debt in connection with the petitioners, instead of with their father; and erred in holding that the moral obligation to pay the debt was not

to be considered after the lapse of twenty years from maturity.

6. Because his honor erred in holding that the sums expended by intestate for Alexander White in his medical education and outfit were not advancements; and erred in assuming the infancy of Alexander, at date of agreement with his father, to advance to him the extent of a medical education, no plea or proof of infancy having been interposed in the Probate Court; and erred in not holding that, even if an infant at date of agreement, his continuance after majority to avail himself of the benefit of the agreement was a complete and valid ratification of the agreement for the entire period.

7. Because his honor erred in not holding that the note for \$300, surrendered to Alexander by John White, was an advancement.

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*As to the note for \$300, both the probate and the Circuit Judges held that the proof was too vague and unsatisfactory to establish it as an advancement, and we cannot say that such ruling was error.

As to the expenses incurred in graduating Alexander as a doctor of medicine. There was some testimony as to alleged declarations of the intestate and of Alexander to the effect that if the father would make him (Alexander) a doctor, he would ask nothing more from his father's estate. But there was no memorandum in writing to that effect, nor time or place indicated where the parties met and entered into any such agreement. The testimony as to casual declarations said to have been made many years ago, when Alexander was young and probably a minor, was considered insufficient to establish an agreement with the requisite clearness. Besides, as stated in the Circuit decree, it has been held in this State that "money expended on the education of a child, whether professional or general, is not an advancement." *Cooner v. May*, 3 Strob. Eq., 185.

Then as to the tract of land in Union County. It does not clearly appear whether it is the land itself or the note for the purchase money which is claimed to be an advancement. If the latter, there can hardly be a question that the probate and Circuit Judges were right in not allowing it, for several reasons. The note was really not that of Alexander, but of Rhyne, with Alexander as surety. It was required to be paid, and was, in fact, partly paid. If the land had been conveyed directly to Alexander, and he alone had given the note for the balance of the purchase money, it would have been merely a debt. "A note given by a child to a parent is presumed to be not an advancement, but a debt." *Abb. Tr. Evid.*, 154.

Nor can the land itself be considered as an advancement. John White, the father, did not convey it to his son, Alexander, but he sold it for value to Rhyne, who, six years after, sold it to Alexander, who paid part of

the purchase money and gave his note for the remainder. It may possibly be that when Rhyne sold the land to Alexander it was understood that the balance of the purchase money to Rhyne might be paid by satisfying the remainder of Rhyne's note to John White.

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But Rhyne testified *that his note was to be paid, saying: "For land sold Dr. White he was to pay me, and I was to pay John White for amount due by me. I have never paid John White, nor has Dr. White ever paid me the entire amount. There is now enough due me from Dr. White on his note to pay amount owing by me to John White."

We agree with the Circuit Judge, who states, "There was some testimony as to declarations of the parties heard by witnesses, but unwritten words are, at best, but vanishing sound, * * * and when testified to after a lapse of thirty years, furnish an uncertain and unsatisfactory foundation on which to build. Hence my conclusion is, that in no sense can the land, or any of the transactions in regard to it, be justly held to be an advancement to Alexander."

But assuming that neither the bond nor the purchase money was properly an advancement by John White to his son, Alexander, it is still further insisted that the representative of Alexander (surety on Rhyne's note) certainly owed the balance of that note as a debt to his father's estate; and even if it is now too late to recover it at law, yet the debt still exists and the moral obligation to pay it still remains; and the children of Alexander are not entitled to their father's share in their grandfather's estate until that debt is accounted for upon the principle of equitable retainer announced in the case of *Wilson v. Kelly*, 16 S. C., 219. It is true, that case held that a discharge in bankruptcy operates like a successful plea of the statute of limitations, not as payment or extinguishment of the debt, but only as a bar to an action thereon. Hence, when a debtor has been discharged in bankruptcy, while the legal obligation to pay the debt is gone, the moral obligation remains, because the debt is still unpaid, and it constitutes a sufficient consideration to support a promise to pay the debt; for if the debt were paid or otherwise extinguished, there would be no moral obligation to pay it.

We think, however, this case differs from that of *Wilson v. Kelly* in several important particulars. The debt of Alexander White for the land was really to Rhyne. He owed nothing to his father's estate except as sure-

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ty. We are not aware that it *has ever been held that after the obligation of a mere surety has been barred by the statute of limitations or a discharge in bankruptcy there is left a moral obligation upon him, or, after his death, upon his representatives, to pay

the debt; and we hesitate to make a new ruling to that effect.

But if by the subsequent purchase of the land from Rhyne, Alexander may be considered as substantially the principal in the debt to his father, it is urged even in that case that recovery of the debt is not only barred by the statute of limitations, but by lapse of time it is paid and extinguished, leaving no moral obligation remaining to pay it. The presumption of payment began to run at the time of the last credit, January 8, 1859, during the life-time of the debtor, Alexander White; and, as we suppose not being suspended either by the death of Alexander White in 1865, or that of John White in 1876, continued to run on until February 13, 1883, when the parties claimed the benefit of the note in this case, being about twenty-four years; so that it would seem that the period necessary to raise the presumption of payment had expired.

We cannot doubt that, in respect to the moral obligation to pay, there is a difference between a debt barred by positive statute and one declared paid by lapse of time. The doctrine of payment by presumption is stated in *Angell on Limitations* as follows: "By analogy to the statute of limitations, an artificial presumption has long been established that when payment of a bond or other specialty was not demanded for twenty years, and there has been no circumstance to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years." "Payment in fact is the actual payment from the payer to the payee—payment in law is a transaction equivalent to actual payment." 2 R. & L. Law Dict., tit. Payment, 941. Or as stated by Judge Wardlaw in *Stover v. Duren*, 3 Strobb., 450 [51 Am. Dec. 634]: "The presumption of payment, which, in reference to debts not embraced by the statute of limitations, arises from the lapse of twenty years, is not a presumption of law—that is, a rule which the court itself may apply—but is a presumption of fact, recognized by law, from which a conclusion ought to be deduced by a jury. It

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is, however, one of those *strong presumptions which shift the burden of proof, which from frequent occurrence have become familiar to the courts, and which, being constantly recommended to juries from motives of policy, have acquired an artificial force and become as important as presumptions of law," &c.

Where the lapse of time is complete, the presumption of payment arises, and in that case, as we understand, it is not alone the recovery on the note that is barred, but the debt itself is paid and extinguished.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 463

CHALMERS v. JONES.

(April Term, 1885.)

[1. *Appeal and Error* ⇨1008.]

Where the only contest is as to the proper inference to be drawn from facts not disputed, this court may more freely interfere with the findings by the Circuit Judge than where the truth of the facts is involved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. ⇨1008.]

[2. *Payment* ⇨76.]

The true meaning may be shown of the word "dollars" found in a contract entered into in 1864; and in this case the circumstances show that it was intended to denote Confederate dollars.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 244; Dec. Dig. ⇨76.]

[3. *Payment* ⇨14.]

A contract shown to have been entered into with reference to Confederate currency must be sealed under the Corbin act where there is no other testimony; but testimony of the comparative values of other property at the same time and place may be introduced to show the real purchasing value of such currency.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 91-98; Dec. Dig. ⇨14.]

[4. *Partition* ⇨104.]

A lien for the purchase money under the act of 1791 attached only in cases of sale for partition of intestate's estates.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 341-351, 375, 377, 380-395; Dec. Dig. ⇨104.]

[5. *Partition* ⇨104.]

Where land was owned by two tenants in common, and one of them died intestate, after which, under a bill in equity, the land was sold for partition amongst the survivor and the distributees of the deceased, a lien attached for the payment of the purchase money, but only to the extent of the half interest of the intestate in the land.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 341-351, 375, 377, 380-395; Dec. Dig. ⇨104.]

[6. *Appeal and Error* ⇨987, 991.]

[Where the questions before the appellate court were both questions of fact and questions of law, the case being a case of equity cognizance, all of the questions mentioned must be considered on appeal.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3896; Dec. Dig. ⇨987, 991.]

Before Fraser, J., Newberry, February, 1884.

This was an action by E. P. Chalmers, clerk of the court, against L. J. Jones and G. S. Mower. The opinion states the case.

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*Messrs. Y. J. Pope and J. F. J. Caldwell, for appellants.

Mr. O. L. Schumpert, contra.

September 29, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. A certain tract or parcel of land situate in Newberry County was owned in the life-time of the

late Chancellor Job Johnstone by the said Job Johnstone and the defendant, Lambert J. Jones. Chancellor Johnstone died intestate in 1862, and shortly thereafter proceedings were instituted by his heirs for the partition of his real estate. In this proceeding partition was also sought of the tract above mentioned between the heirs of the said Job Johnstone and the said Lambert J. Jones under which this tract was sold, as it seems in 1864, Mr. Jones being the purchaser, on the completion of which purchase, he executed to the commissioner in equity a bond, with sureties, conditioned for the payment of \$700 on February 1, 1865, and \$700 on February 1, 1866, with interest on each from February 1, 1864. Upon this bond was entered a credit of the share of Mr. Jones, leaving unpaid the share of the heirs of Chancellor Johnstone.

For this balance the action below was brought in 1877, and the plaintiff sought to make the entire tract specifically liable under the act of 1791. After the commencement of this action, the land was conveyed to the defendant, Mr. Mower, who was then made a party. Two defences were set up—one by Mr. Jones, to wit, that the bond was given with reference to Confederate currency, and therefore should be sealed in accordance with the law as to such contracts; the other by Mr. Mower, who, in addition to the defence of Mr. Jones, which he adopted, denied the alleged lien under the act of 1791.

The case was referred to Mr. Culbreath, as a special master, who, after full testimony, reported on the question of fact, to wit, whether the land was sold with reference to Confederate currency, that it was not so sold, finding Mr. Jones indebted in the sum of \$1,761, due November 9, 1883. As to the issue of law, he held that the entire tract stood pledged, under the act of 1791,

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*for the payment of the purchase money. The case upon this report was heard by his honor, Judge Fraser, who sustained the special master both in his finding of fact and his conclusion of law, and he ordered that plaintiff have leave to enter judgment and issue execution for the amount stated in the report, with leave to apply for orders directing the sale of the land and the application of the proceeds to the bond, &c.

From this decree the defendants have appealed, assigning error to the judge in his finding of fact on the subject of the Confederate currency, and also in holding that the act of 1791 applied to the case—the defendant Mower claiming that in no event could the statutory lien attach to more than one-half of the land, to wit, that portion which belonged to Chancellor Johnstone. These, then, are the only questions before us, one being a question of fact, and the other a question of law. The case below being a case of equity cognizance, and therefore subject to

the appellate jurisdiction of this court, both of the questions mentioned are open and must be considered.

There is little or no contest as to the facts proved in the case, to wit, the time of the sale, the circumstances attending it, the giving of the bond in suit, and the other facts connected with the transaction, and the issue involved in the question of fact upon which the case turns, is not in reference to the facts and circumstances proved so much as it is in reference to the proper inference to be drawn from these facts. There is no doubt but that the defendant executed the bond in question in which he promised to pay the "dollars" mentioned therein, but the question of fact is, what was meant by this term "dollars"? was it employed to indicate Confederate dollars, or was it used in the sense of "lawful money"? Such being the question, the rule which usually restrains this court from interfering with the findings of fact, unless the error is manifest and patent, is not applied so stringently as where the truth of the facts claimed to be proved is involved.

Now, considering this question of inference under this relaxed rule, what is the result? In general, where the intent of parties to a contract is the matter to be ascertained, the terms used in the contract, interpreted ac-

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ording to their ordinary and usual *meaning, afford the best, most appropriate, and reliable means of reaching such intent. In fact, this course is required in most cases involving the construction of papers by one of the long established rules of construction. If this rule was applied here in its full force, the term "dollars" being well understood to mean "lawful money" in its ordinary sense, there could be no doubt as to the proper interpretation of this contract.

Owing, however, to the peculiar financial condition of this State, and of all the Southern States, during the recent war, with reference to the currency then in use, which currency was known to be the basis of many, if not of most, of the contracts entered into during that time, it became manifest at the close of the war that great injustice would be done if such contracts were enforced under the application of the rule above referred to. One of the first acts, therefore, of our first legislative assembly after the war (the convention) was an ordinance to relax this rule in cases of contracts made during the war, by which in such cases the intent of the parties as to the currency intended might be reached, not by the strict and grammatical interpretation of the word "dollars" and such similar words, as formerly, but by the surrounding circumstances and facts attending the transaction, to wit, the character of the consideration, its value, &c.

This contract, then, having been made during the war in the purchase of a tract of land, must be considered and interpreted

without regard to the ordinary meaning of the term "dollars" therein. At least that term, in its ordinary meaning, is not to control in defiance of other testimony showing a different intent. Now, it is true, as it appears, that the special master and the Circuit Judge applied this relaxed rule to the case. They discarded the ordinary meaning of the term "dollars," in the first instance, and went into a full examination of all the circumstances attending the sale, and also of the value of the land, numerous witnesses having been examined upon that question. But, notwithstanding this, they both reached the conclusion that the ordinary meaning of the term should govern, and that the parties meant good dollars, as contradistinguished from Confederate dollars.

Was this the proper inference from the admitted facts? It appears that Mr. Jones

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bought the land in 1864, at public sale, *the price being \$81.75 per acre. He and Chancellor Johnstone bought in 1854 at \$24.12 per acre, and we must assume that in 1854 the latter price was its value. Numerous witnesses were examined by the special master as to the value of the land, some of them valuing it before the war, some in 1864, during the war, and some afterwards. As is usual, these witnesses differed greatly in their valuations; those valuing it during the war, 1864, ranging from \$5 to \$60—out of six witnesses, the highest putting it at \$12 per acre, and four others at from \$50 to \$60. An average from the estimate of the ten would be \$26.70, a little more than Mr. Jones and Chancellor Johnstone gave for it in 1854. Under this valuation, we may safely assume that the value in good money at the sale in 1864 was about what it was when originally bought in 1854, to wit, \$24.12.

Now, Mr. Jones purchased at the commissioner's sale in 1864, at \$81.75, something more than three times its value as estimated by the average of the witnesses above. The master in his estimate seems to have been governed by the valuation of the commissioners in partition, made in 1862, who then returned it at about \$50 per acre. Taking either estimate, it is manifest that Mr. Jones contracted to give (if the term "dollars" be strictly construed) considerably more than the true value in good money—in the one case, more than three times; and in the other, nearly twice as much. Giving this fact its legitimate influence, is it not manifest that Mr. Jones at least was not contracting with reference to good money? Can it be properly inferred that he expected or intended to bid \$81.75 in good money for the land, when he must have known that in such money it was not worth one-third of that sum? This fact, accompanied with the other facts, to wit, that the sale took place during the war, when there was no other currency in use; when, according to the testimony, the

contracts then made in that community were generally met by Confederate currency; when no announcement was made at the sale that in this instance gold was expected—seems to us very strong in support of an inference that Confederate currency was the basis of this contract rather than gold. And such, in our opinion, should have been the finding below.

But even upon this finding, we do not think

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that the bond *here should be scaled according to the act known as the "Corbin act." This act determines the value of Confederate currency in the absence of all other testimony showing a different value; but where there is other evidence showing a different value at the time and place of the contract in question, such value should govern. See *Neely v. McFadden*, 2 S. C., 169, recognized in *Wilson v. Braddy*, 16 S. C., 522. Now, there is testimony in the case that the purchasing value of Confederate money in the community where this contract was made was much greater than that indicated by the Corbin act and at the time mentioned. In the sale of two tracts of land about that time, and in the same vicinity, the difference was not more than five to one. This would scale the debt to some \$16.35 per acre in gold, which, with premium on gold added, would perhaps bring the price to about what it sold before the war.

Or, if a more thorough examination was made as to the purchasing value of Confederate money at that time and place, as shown in the purchase and sale of the necessities of life, such as grain, flour, bacon, and the like articles, it would no doubt be developed that the purchasing power of the Confederate currency was even greater than that indicated by the two sales of land referred to. It would be manifestly unjust that this debt should be scaled under the Corbin act, as this would reduce the purchase money to a mere bagatelle; and yet it would also be unjust to require payment of the full amount bid in good money, as such could not have been the contract of the purchaser. A medium rule like that indicated above would, we hope, accomplish substantial justice, and we are pleased to find that it may be applied in accordance with law, on the return of the case to the court below for a new trial.

Next, did the act of 1791 give a lien upon this land, in whole or in part, for the purchase money? This act has been held in several cases to apply only to sales of real estate of intestates; or, at least, it has been held in three cases in this State, cited below, that the Court of Common Pleas derived its authority to sell lands for partition from this act, and from this act alone; and, further, that under this act it could order sales only in cases of intestacy. *Blocker v. Spann*, 2

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Nott & McC., 593; *Crompton v. Ulmer*, *Ibid.*,

429; *Witherspoon v. Dunlap*, 1 *McCord*, 546. Now, if this be the law of this State under the act of 1791 (and we do not understand that these cases have been overruled), inasmuch as the statutory lien which the plaintiff seeks to enforce here is found in this act, and nowhere else, constituting a part of it, and applying only to the sales which that act authorizes the court to make, it follows necessarily that this lien attaches in sales of land for partition of intestates' estates only.

We do not think that the case of *Pell v. Ball* (1 *Rich. Eq.*, 386) is in conflict with this. That was a case before the old Court of Equity, in which a sale for partition had been ordered below, and the estate not being an intestate estate, the question was raised as to the power of the court to order a sale in such case. The court held, Chancellor Harper delivering the opinion, that notwithstanding the fact that the English Court of Chancery had no power to direct a sale of lands for the purpose of partition, yet that our courts of chancery had assumed jurisdiction in such cases in various instances, even before the passage of the act of 1791, and he refers to the case of *Dinckle v. Timrod* (1 *De Saus.*, 109) as an authority that the court exercised this power long before the act of 1791. And he says that "before this act the court certainly had equal jurisdiction in every case of tenancy, or tenancy in common, as in that of intestate estates." Saying, further: "It is not questioned but that the jurisdiction has been exercised familiarly and habitually for the greater portion of a century, and I believe there is no lawyer at the bar or judge on the bench who cannot verify the prevalence of the practice."

It is true, in seeking a foundation for the jurisdiction of the court in such cases, he went on to discuss somewhat the act of 1791, and he said: "There are some other views which it is hardly necessary to take. The court may have extended the equity of the statute of 1791 in relation to intestate estates to all other cases of joint tenancy, and tenancy in common, according to a well known practice of the English courts, as being within the mischief, or cause of the making of the act." And he remarked, further, that the words of the act of 1791, to wit, "distributive share," were not necessarily confined to intestate estates, but were capable of a construction, which would embrace tenants in common.

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*It must be remembered that the court below in that case had ordered a sale, though the estate was not an intestate estate, and Chancellor Harper was seeking authority for the Chancery Court to order a sale in such case. And he concluded that it had authority, first from long practice, and second, perhaps, under the

equity of the act of 1791, and possibly from an expansion of the words "distributive share" therein, so as to include joint tenants and tenants in common. But there was no distinct ruling upon these latter points, and certainly no overruling of the three cases, *supra*, in which the Appeal Court had held that the act of 1791 applied only to sales in cases of intestacy, so far as the Court of Common Pleas could take jurisdiction.

This being the law, the statutory lien which that act provides can only attach in sales made for partition in cases of intestacy.

The main question, then, in this case is, was the sale below ordered in a case of intestacy? There is no doubt that Chancellor Johnstone died intestate as to this land, and that it was sold under a bill filed for the purpose of partition. It is true that Mr. Jones owned one-half of the land, and therefore, before Chancellor Johnstone's interest could be distributed among his heirs at law, it had to be separated from the interest of Mr. Jones. This, no doubt, might have been done by an independent bill between Mr. Jones and the heirs, and then Chancellor Johnstone's portion might have been partitioned by sale between his heirs by another bill. Suppose this had been done, would not the statutory lien have attached to the sale thus ordered? Most certainly, because the property was intestate property, and sold under the provisions of the act of 1791.

Now, has not this been done in substance? The parties did not see proper to institute a separate action for the separation of the interests of Mr. Jones and Chancellor Johnstone, but they embraced this land in the bill which was filed for the partition of the other real estate of Chancellor Johnstone, in which his heirs alone were interested. This bill may have been defective to the extent of thus embracing a separate matter as multifarious, or as misjoinder of actions, but no objection was made, and it proceeded to judgment and sale. So far as this particular land was involved, the object of the

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bill was to separate the interest of *Chancellor Johnstone from that of Mr. Jones, and then to distribute that interest among the heirs of Chancellor Johnstone, and the court, by the consent of all parties, having concluded that these ends could best be accomplished by the sale of the entire tract, so ordered, Mr. Jones getting his part by a credit on the bond which he gave as purchaser, and the remainder of the bond standing for the heirs at law.

Now, we have seen that it is the sale of intestate property only, upon which a lien attaches to the property sold for the purchase money under the act of 1791. Here the only portion of the property sold as intestate property was the half that belonged

to Chancellor Johnstone. This was sold for the purpose of distribution among his heirs. True, to reach this interest, the half belonging to Mr. Jones was also sold at the same time, no one objecting; but Mr. Jones's half was not intestate property; and while under the terms of the act the lien must attach to the half interest of Chancellor Johnstone, yet we cannot see how it could attach to that of Mr. Jones. There may be difficulty in applying this doctrine to the land in question, but that matter is not before us.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded to be enforced in accordance with the views herein above, with the privilege on the part of both plaintiff and defendant to introduce testimony (if so advised) as to the purchasing power of Confederate money at and about the time and place of the sale of the land in question here.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN. I concur in the result. Upon the point sent back, the inquiry should be, what was the relative value of Confederate money to national currency at the time and place of sale? Such relative value to be ascertained "by the application of the act of 1869, aided, controlled, or qualified by the evidence as to such value." See *Parker v. Wilson*, 5 S. C., 493.

23 S. C. *472

*BUSBY v. MITCHELL.

(April Term, 1885.)

[1. *Religious Societies* ⌘20.]

Where land was conveyed to be held in trust for the erection of a church and academy for the benefit of a Lutheran congregation, the church council could not transfer to others who were not Lutherans, or to a town council, any portion of the land for the establishment of an academy or school.

[Ed. Note.—For other cases, see *Religious Societies*, Cent. Dig. §§ 130-143; Dec. Dig. ⌘20.]

[2. *Estoppel* ⌘93.]

A school-house was built upon this land in large part by subscriptions solicited from persons that were not Lutherans, and by an appropriation from the town council, and this school-house having been burned another was built in like manner. *Held*, that this did not estop the Lutheran congregation from asserting their right of property in this building.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 264-275; Dec. Dig. ⌘93.]

[3. *Charities* ⌘29; *Religious Societies* ⌘21; *Schools and School Districts* ⌘5.]

Nor were the congregation or their officers estopped by the appointment [how appointed does not appear] of others than Lutherans to be trustees, and the application by such trustees for a charter for the school, such trustees not having interfered with the management of the school,

which was conducted by the pastor of the Lutheran church.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 60; Dec. Dig. ¶ 29; *Religious Societies*, Cent. Dig. § 145; Dec. Dig. ¶ 21; *Schools and School Districts*, Cent. Dig. § 6; Dec. Dig. ¶ 5.]

Before Pressley, J., Lexington, February, 1884.

The opinion states the case.

[For subsequent opinion, see 29 S. C. 447, 7 S. E. 618.]

Messrs. Meetze & Muller and W. T. Gary, for plaintiffs.

Messrs. L. F. Youmans and B. W. Bettis, Jr., contra.

October 2, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On January 16, 1874, Rufus M. Shealey executed a deed, whereby he conveyed a certain parcel of land, containing about four acres, situate in the County of Lexington, near the town of Leesville, to S. Bouknight, D. C. Shealey, S. F. Hendrix, J. S. Derrick, S. L. Black, J. W. Hair, and J. C. Bodie, who were appointed a committee to erect a Lutheran church at Leesville, "provided the said committee shall erect a building for a congregation to worship in as a Lutheran church; and after said building is erected and a society formed, the right shall then vest in the Lutheran church, that is, to the council or vestry, as the case may be, to them and their successors in office forever, for the benefit of said

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Lutheran congregation *at Leesville, as it is intended to convey this lot for a church and academy, and also one acre of the same, at the northwest end, for the erection of a teacher's or professor's house, if required for that purpose, and as agreed upon by the vestry or wardens of said congregation."

It is conceded that these conditions have been complied with by the erection of a church building, the formation of a society by the congregation worshipping as a Lutheran church, and that the plaintiffs, who were duly elected to the several offices of pastor, elders, and deacons, form the church council of the said church known as "Luther Chapel," and as such "are vested with the care, management, and control of said Lutheran church and congregation, in the nature of trustees in all matters, both temporal and spiritual, and have especial care and control of all the property of said society."

It seems that the Rev. Mr. Busby, in addition to his duties as pastor of said church, was engaged in teaching a school in the town of Leesville, and that in the latter part of the year 1878, or first of 1879, a school-house was built on the lot above mentioned, in which a school was carried on very successfully by Mr. Busby as teacher until No-

vember, 1880, when the building was destroyed by fire, and another school-house was built on the same spot, and the school again carried on with success by Mr. Busby as teacher until June, 1883. Both of these school houses were paid for by funds subscribed by citizens of the town of Leesville and vicinity, including Lutherans as well as others, a large portion being furnished by the town council of said town. It also appears that trustees were appointed for said school, but exactly how they were appointed does not very distinctly appear.

On October 29, 1881, on the petition of sundry persons, some of whom were members of the Lutheran church and others not, a charter was obtained from the clerk of the court for Lexington County, incorporating certain persons, then acting as trustees of the school, under the name and style of "The Trustees of Leesville English and Classical Institute of Lexington County," for the purpose "of organizing, governing, and conducting an English and classical institute in the County of Lexington, in the State of South Carolina," in which charter the board of

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trustees *were authorized to fill any vacancy that might occur in their board by death, resignation, or otherwise. The petition for this charter was prepared by Mr. Busby at the request of the trustees. It does not appear that the trustees had much, if anything, to do with the management of the school until August, 1882, which seems to have been carried on entirely by Mr. Busby, he relying upon the tuition fees for his compensation; but the patronage having largely increased, it became necessary to have an assistant, and in August, 1882, an arrangement was made between the trustees and Mr. Busby, whereby they were to take the tuition fees and guarantee to him a salary of \$600 and his assistant \$450, only a portion of the trustees, however, assuming the payment of these salaries.

This arrangement seems to have worked satisfactorily to all parties until about March 1, 1883, when a difficulty arose which induced Mr. Busby to tender his resignation, which the trustees declined to accept. On the contrary, the arrangement previously entered into was cancelled, the school was turned over to Mr. Busby and his assistant, giving them full control and charge of the same, and the accounts for tuition were given up by the trustees to Busby and his assistant, they being required to refund to the trustees the amount paid by them on said salaries, which was done, and on March 1, 1883, a majority of the board formally resigned their office as trustees. From that time until the close of the scholastic year in June, 1883, the trustees do not appear to have in any way interfered with the school or its management. When the school closed in June, Mr. Busby announced that the school would be reopened in the following Septem-

ber, and very soon afterwards left on a visit to Virginia.

During his absence, the defendants claim that the board of trustees was reorganized by filling the vacancies occasioned by the resignation of a majority of the trustees, whereby the defendants in this action, except the Messrs. Watson, none of whom are Lutherans, became the trustees of the school. On July 14, 1883, the defendants, without authority from the officers of the Lutheran church, took possession of the school-house, took off the locks, put on new ones, and posted a notice on the building, warning all persons that "this house has this day been

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closed by order of the *board of trustees of Leesville English and Classical Institute, and all parties whomsoever are warned not to enter it without obtaining permission to do so from said board of trustees," which notice was signed by the defendant, D. D. D. Mitchell, as chairman, and the defendant, Joab Edwards, as secretary of said board. Soon afterwards said board appointed the defendants, Rev. J. E. Watson and E. O. Watson teachers, who were carrying on a public school in said school-house at the time this action was commenced, the said board claiming to have accepted the resignation of Mr. Busby, which in March previous had been tendered and declined.

In December, 1883, the plaintiffs filed their complaint, in which they demanded judgment: 1st. For the possession of said school-house; 2d. For damages; 3d. That the defendants be enjoined from the further use and occupation of said school-house, and from in any manner interfering therewith; 4th. For general relief. Judge Kershaw, to whom the application for a temporary injunction was made, held that "the trusts of the deed require the property should be held for the benefit of the said Lutheran congregation 'for a church and academy,' and it was not in the power of the council of the said church, in whom the property vested, to divert it from the purpose of the trust as expressed in the deed, and convert the same into a school, to be held and conducted by another body, not for the Lutheran church, but the public of Leesville, and in opposition to the authorities of said church." He therefore granted an injunction as asked for until the further order of the court.

The case came on for trial before Judge Pressley, and on May 8, 1884, he rendered a decree in which he found as matter of fact "that there was an understanding or implied contract between the town council of Leesville and the officers of the Lutheran church that the town council should have the right to build their school-house on the church lot; * * * that such contract gave them the right to the house, even though the title to the lot may remain in the church; that the members of the Lutheran congregation knew of the action of its officers, and took no legal

measures to prevent its consummation, nor did they even give notice of any opposition to it; * * * that it was implied in that

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*contract that the Rev. Levi E. Busby was to be the teacher of the said school, and that the trustees have not the right to remove him except for good cause." He therefore rendered judgment, that the school-house is the property of the trustees of the Leesville school; that the injunction granted by Judge Kershaw be dissolved; that the trustees of the school be permitted to take and retain possession of the said school-house; and that the Rev. Levi E. Busby be restored to his former position as teacher until good cause be shown for his removal.

From this judgment both parties appeal; the plaintiffs alleging various errors in the findings of fact by the Circuit Judge, and of law in not finding that it was not in the power of the church council to divert the property from the purposes of the trusts as declared in the deed from Shealey above mentioned; and the defendants alleging error in the finding of fact that it was implied in the contract between the town council of Leesville and the officers of the Lutheran church that the Rev. Levi E. Busby was to be the teacher of said school, and in the conclusion of law that the trustees had no right to remove him except for good cause.

We concur with Judge Kershaw in the view which he took of this case. The property conveyed by the deed of Shealey was to be held in trust for the Lutheran church at Leesville, not only for the purpose of a church, but also for an academy. The deed declares this purpose in explicit language: "It is intended to convey this lot for a church and academy." There is no discretion vested in the church council as to whether or not the property should be used for both of these purposes, but, on the contrary, there was just as much obligation that the property should be used for an academy for the benefit of the Lutheran church as that it should be used for a church. The only discretion conferred upon the church council or vestry was as to the appropriation of one acre at the northwest end of the lot for the erection of a teacher's or professor's house. The deed, after using the language last above quoted, proceeds as follows: "And also one acre of the same at the northwest end for the erection of a teacher's or professor's house, if required for that purpose, and as agreed upon by the vestry or wardens of said congregation." This language plainly shows that it was only

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the last mentioned purpose *that was left to the discretion of the church council, but that the requirement that the property conveyed should be used for the erection of a church and academy for the benefit of the Lutheran congregation at Leesville, was imperative. This being so, it follows necessarily that the

church council had no more authority to transfer to others, alien to the Lutheran faith, any portion of the property for the establishment of an academy or school, than they would have had to transfer any portion of it for the establishment of a church to be owned and controlled by those who were of a different faith from that of the Lutherans.

Under this view of the case it becomes unnecessary to inquire, except so far as the question of estoppel is concerned, whether the conclusion of fact reached by the Circuit Judge, "that there was an understanding or implied contract between the town council of Leesville and the officers of the Lutheran church, that the town council should have a right to build their school-house on the church lot," upon which his judgment mainly rests, can be maintained; for even if the church council had undertaken to convey such right to the town council in the most formal manner, they would have had no authority so to do.

It is contended, however, that the Lutheran church, represented by their officers, the plaintiffs in this case, are estopped from setting up the claim which they now make because "the members of the Lutheran congregation knew of the action of its officers and took no legal measures to prevent its consummation, nor did they even give notice of any opposition to it." The "action of its officers" here alluded to is that from which the Circuit Judge inferred that there was such an implied contract with the town council as that above referred to. There certainly is no evidence of any express agreement between the church council and the town council like that mentioned; on the contrary, the testimony shows that whenever any member of the church council was applied to for the purpose, such application was met with a decided refusal, as is shown by the testimony of Busby, Rawls, S. P. Derrick, and Hiltwanger; and it is not pretended that either the church council or the Lutheran congregation took any action as organized bodies even looking to any surrender of their rights.

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*What we understand to be relied upon for the purpose of raising the estoppel is the fact that subscriptions were solicited and obtained from others than Lutherans, especially from the town council of Leesville, for the purpose of aiding in building the first school-house and rebuilding it after the fire, and the further fact that others than Lutherans were made members of the board of trustees, who applied for and obtained a charter for the school. As to the subscriptions, it does not appear that they were made or induced by any express understanding that the subscribers were thereby to acquire any right of property in the building, and the most that can be said is that some subscribed under the impression that they would thereby acquire such right; but, on the con-

trary, it appears from the testimony on the part of the plaintiffs that these subscriptions were asked for as donations or voluntary contributions.

To raise an estoppel it should have been made to appear that the owners of the property knew at the time that these subscriptions were made, not as voluntary donations, but with a view to acquire an interest in the property; for we can very well understand that the Lutheran congregation, having a flourishing school, taught by their pastor, might have supposed, in the absence of any information to the contrary, that the community generally would be willing to contribute means to provide a building for the school, which was non-sectarian in character, and in the prosperity and efficiency of which the public generally would be interested. For certainly it was a very great advantage to the town of Leesville and its vicinity to have such a school as that carried on by Mr. Busby was represented to be, even though it should be exclusively owned and controlled by Lutherans. It may be that the town council had no legal right to appropriate funds derived from taxation in aid of a school owned and controlled by a particular religious sect, and that may be one circumstance indicating that the town council supposed that they were thereby acquiring a right in the property, but we do not regard it sufficient to show conclusively that the Lutheran congregation were aware that such was the purpose of the subscription, especially when no such purpose was declared at the time the subscription was made; and, on the contrary,

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the testimony *shows that all these subscriptions were taken just as subscriptions are usually taken in a community to aid in building a church or academy.

The other fact relied upon to raise the estoppel, to wit, the appointment of others than Lutherans as members of the board of trustees and the application by them for a charter, was not sufficient, in our judgment, to call for any action on the part of the Lutheran church. Exactly how these trustees were appointed does not very distinctly appear, but the testimony shows that until August, 1882, they took little or no part in the management of the school, and even after that, and until the close of the school in June, 1883, the Rev. Mr. Busby seems to have had the entire control and management of the school. As long as this was the case there was nothing to excite the apprehensions of the Lutheran congregation, or to call for any action on their part. They might very well have been willing to have the support and influence of others brought to their aid as trustees of their school, as well as to have the benefits of a charter, especially as these others had, as they supposed, made liberal voluntary contributions in aid of their school, which had proved an ornament to the

town and of great value to the community generally. But in all this there was nothing to estop the Lutheran church from asserting their rights when they subsequently found that by the unauthorized action of the defendants in July, 1883, their property was seized, their rights not only ignored, but denied, and their school passed into the hands of those alien to their faith, and they excluded from any control or management thereof.

We think, therefore, that the plaintiffs are entitled to be restored to the possession of the school-house in question, with the right to the control and management of said school.

Of course, under the view which we have taken of the case, the question presented by the defendants' appeal cannot arise, and need not be considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

23 S. C. *480

*GLOVER v. FARR.

(April Term, 1885.)

[1. *Action* ⚭22.]

At a sale for partition of an intestate's estate, A purchased a tract of land, and a few days afterwards B purchased an adjoining tract of the same estate. A then sold to C, who, finding that B was in possession of, and claimed under his deed, a strip of land which C claimed to be covered by the deed to A and by A's deed to him, instituted an action, stating these facts in his complaint, and demanded judgment that the mistake in B's deed be corrected, that the boundary line be properly designated, and that B be required to surrender to C the possession of the disputed strip of land. *Held*, that this was a plain action at law for the recovery of real property, and that the court below erred in treating it as a case in chancery.

[Ed. Note.—Cited in *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 147, 70 S. E. 396.]

For other cases, see *Action*, Cent. Dig. §§ 124-139, 143, 145; Dec. Dig. ⚭22.]

[2. *Equity* ⚭43.]

The principle that the Court of Equity has the right to put a purchaser into possession of land sold under its orders, does not apply where dispute arises between one purchaser and the vendee of another purchaser, at the same sale, as to the boundaries of their respective purchases.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 134; Dec. Dig. ⚭43.]

[3. *Equity* ⚭47.]

Nor could the plaintiff, holding the older deed, invoke the interposition of a Court of Equity upon the ground that there was a mistake in the deed made to defendant by the officer of the court: he has a plain and adequate remedy at law, to wit, an action for the recovery of the land.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 153-155; Dec. Dig. ⚭47.]

[4. *Action* ⚭37.]

As the matters alleged in the complaint make out such an action, the complaint should not be dismissed, although it demands only equi-

table relief. The character of an action is not determined by the relief demanded; it depends upon the facts alleged.

[Ed. Note.—Cited in *Godfrey v. E. P. Burton Lumber Co.*, 88 S. C. 143, 70 S. E. 396.]

For other cases, see *Action*, Cent. Dig. §§ 311-319; Dec. Dig. ⚭37.]

[5. *Appeal and Error* ⚭1178.]

The court below having erred in treating this action at law as a case in chancery, the cause was remanded to the Circuit Court for a trial by jury.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4604-4620; Dec. Dig. ⚭1178.]

6. *Petition for rehearing refused.*

Before Pressley, J., Beaufort, March, 1883.

This was an action by Sarah E. Glover and Joseph Dewees against W. W. Farr, Edward P. Farr, and C. J. C. Hutson, commenced prior to March, 1880. One of the exceptions upon which the case came to this court was in these words: "Because his honor held that the court had jurisdiction further in the cause." All other matters are fully stated in the opinion.

Messrs. J. W. Moore and W. J. Verdier, for appellants.

Mr. William Elliott, contra.

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*October 12, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. William Heyward at one time owned a plantation situate in Beaufort County, and composed in part, with other tracts, of two tracts, one known as Bellefield and the other as Goodhope. In 185— he sold Goodhope to one Mrs. McNeil, and subsequent to this he sold Bellefield to one James Bolan, who, after his purchase of Bellefield, bought Goodhope from Mrs. McNeil. These two tracts were coterminous at one point, Goodhope bounding Bellefield on the north. James Bolan died in August, 1865, seized and possessed of considerable real estate composed of six tracts, Bellefield and Goodhope being two of the six, and leaving of force a last will and testament, by which he devised his real estate to his grandchildren, appointing certain parties therein named his executors, only one of whom, Thomas S. Behn, qualified, who, in 1866, filed a bill in the then Court of Equity for the partition of this real estate between the parties entitled under the will of his testator.

In this proceeding the commissioners in partition having returned that said real estate could not be advantageously divided, and having recommended a sale, an order of sale was obtained in 18— directing said sale to be made by Charles J. C. Hutson, referee. The commissioners had returned that the lands consisted of six tracts, containing in the aggregate 6,347 acres, to wit: Old House and Preference, 895 acres; Bellefield, 1,460

acres; Goodhope, 1,215 acres; Sealy Hill, 653; Tallahassee, 1,450 acres; and Tar Kihu, 664 acres, as ascertained from plats thereof, which they had inspected, and which plats, it seems, had been made in a survey directed by the executor, who gave instructions as to the lines, said executor informing the surveyor that the original plats of these several tracts "had been taken by the Yankees during the war," and therefore could not be used. As to the line between Bellefield and Goodhope, the surveyor stated that he had been informed by the executor that a certain canal was the line between the two, the centre of which he regarded as the line, which he followed until he struck a double canal, when he ran the line between them until one of these gave out, when he continued the line until it intersected with Howard's line, which was the termination of the

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line between Bellefield and *Goodhope. The plats thus made were turned over to the executor.

On hearing the return, the Circuit Judge ordered the lands to be sold in whole tracts, or parcels, at public auction, or by private contract, on such terms and at such times as the referee, with consent of counsel, should determine. In pursuance of this order, the referee advertised the lands, by their respective names, as containing the number of acres mentioned, but with no mention of the plats or recent surveys; and in his report of sales made to the court, he stated that he had sold at public auction, on the first Monday in December, 1877, the tract called Bellefield, containing 1,461 acres, to Mrs. Sarah E. Glover, for the sum of \$1,200; that having obtained no satisfactory bid for Goodhope, containing 1,215 acres, he had since sold said tract, to wit, on January 13, 1879, at private sale, to William W. Farr, for \$600.

In the conveyance from the referee to Mrs. Glover of Bellefield, the tract was described as containing 1,461 acres, bounded north by lands of William C. Howard and estate of James Bolan, east by lands of the estate of James Bolan, south and west by lands of Joseph Glover; no mention being made of the survey and plat above referred to. The plat, however, as it appears, was delivered with this deed to an agent of Mrs. Glover. This deed was executed and delivered on January 10, 1879, three days before the sale of Goodhope to Farr, which was executed on January 13, 1879, and in which the premises were described as bounded north by the Honey Hill road, east by lands of the estate of C. C. Dupont, south by lands of the estate of James Bolan, and west by lands of W. C. Howard, containing 1,215 acres, and known as Goodhope; all of which will more fully appear by reference to a plat of the same attached, and made by Oliver P. Law, surveyor, on February 3, 1871.

Mr. Hutson, the referee, testified that he

"sold Bellefield to Mrs. Glover, the plaintiff; sold it according to the description in the deed. * * * Mrs. Glover was not at the sale; was represented by her agent. That he had plats of all the places sold, which had been given to him by Mr. Behn, the executor. As he made title, he turned over the plats.

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Had the plats at *the court house in a roll. Sold at Beaufort court house, and does not remember if purchaser looked at plat; thinks no one did; may have done so. Advertised by acreage of plats. Sold by name of Bellefield." Mrs. Glover retained possession of Bellefield for some five years, when she sold to the plaintiff Dewees, executing a conveyance to him in the terms and with the boundaries as conveyed to her. Farr took possession of Goodhope immediately after his purchase, and has continued in possession ever since.

Some two years after Dewees bought from Mrs. Glover, finding that Farr was in possession of a certain portion of land which he claimed was within the original boundary of Bellefield, he instituted the action below, claiming that Mrs. Glover had purchased Bellefield according to its original boundary, without regard to the subsequent survey and plat, of which she knew nothing, and that in the same way Mrs. Glover had conveyed to him; that it was a mistake in the referee to convey Goodhope to Farr by the plat which covered a portion of Bellefield after the sale of Bellefield to Mrs. Glover, and he prayed that this mistake should be corrected (the original suit for partition being still upon the docket), so that the proper boundaries of the two tracts should be given in the deeds, and that in accordance therewith the defendants should be required and decreed to surrender to the plaintiff Dewees so much of Bellefield as he, the said W. W. Farr, claims to hold under his title from the referee, &c.

The defendants answered, denying that Bellefield was sold to Mrs. Glover simply by its name and without notice and regard to the plat thereof. They denied, further, that any mistake had been made by the referee in the deed of Goodhope to W. W. Farr; and they claimed that Goodhope was purchased according to the plat, which covered the land in dispute, and that plaintiff's deed did not cover said land. They therefore prayed that the complaint be dismissed, and that defendants have judgment for their costs.

The case was referred to Mr. Charles E. Bell, who, after taking full testimony, all of which is reported, found as conclusions of fact: "1. That referee Hutson did not make a mistake in the boundaries to Goodhope,

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as given in his deed of the same to *defendant, William W. Farr. 2. That the lands in dispute are not part of Bellefield, sold by referee Hutson to Sarah E. Glover. 3. That

the lands in dispute are part of the plantation Goodhope, sold by referee Hutson to defendant, W. W. Farr. 4. That defendants, William W. Farr and Edward P. Farr, are not, nor is either of them, in possession of any lands belonging to Bellefield, within the ascertained limits thereof." And as his conclusion of law, he recommended "that the complaint be dismissed, but without prejudice to the legal rights, if any, of the plaintiffs."

When the case came to be heard on this report by his honor, Judge Pressley, a question was raised as to the jurisdiction of the court. Upon this question, the judge said: "I am satisfied that this court, having sold Bellefield to plaintiffs and Goodhope to one of the defendants, has jurisdiction to put such purchaser into peaceable possession of the land he bought." He further said: "On the law points, I am well satisfied that the court, in selling the lands of Bolan for partition, intended to sell the plantations known as Bellefield and Goodhope separately. That nothing in the proceedings of the court gave notice to bidders that the boundaries were to be changed, or had in any manner been affected by the act of the surveyor, who, without knowing the boundaries, made plats of the separate plantations and fixed their acreage unadvisedly."

He further found that so much of the north canal in dispute, between its junction with the Bellefield back-water and the point below Rolling Dam where it intersected with the canal from Goodhope back-water, was a part of Bellefield; that so much of the land as had been worked as Buzzard Roost, on the Bellefield place north of this canal, should be assigned to Bellefield. But inasmuch as there was doubt in the testimony whether there was also a Goodhope Buzzard Roost, of which, in the opinion of the judge, there was no reliable testimony as to its boundary, he felt compelled to send the case back, for further testimony on that point.

And he adjudged and decreed, "that so much of the conveyances of Bellefield and Goodhope made by the referee under former decree of this court as sets forth the bound-

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aries between *them, or the number of acres, or refers to the erroneous plats then delivered by the referee, together with the said plats, be, and are hereby, annulled, set aside, and declared void, so that said conveyances shall be held and stand good only as conveyances respectively of the plantations Bellefield and Goodhope." Further, "That the north canal in dispute from its junction with Bellefield back-water down to a point below Rolling Dam where it is intersected by the canal from Goodhope back-water be, and it is hereby, assigned to Bellefield as the sole property of its owner." And further, "that the question of the boundary line north of said canal, between Bellefield and Goodhope,

be recommitted to referee for further testimony, and especially on this point, that he take testimony and report whether the Scriven or Howard deeds and plats called for Bellefield (Pumpkin Hill) or Goodhope on its eastern line; and if both be called for, then how much of either to be fixed by the surveyor. The said referee shall also cause said surveyor to examine the water system of Goodhope reserve, and to delineate on their plats heretofore made all ancient canals, if any whereby the land in dispute could have been flowed from said reserve. And if any of the laborers who worked Goodhope whilst it was the separate property of Mrs. McNeil can be found, let the referee take their testimony as to the boundary up to which they worked. The testimony already reported is to stand good without further report thereon by the referee. He is to report only on the additional testimony to be taken as herein stated."

From this decree the case is before us on appeal by the defendants. Several questions have been raised in the appeal, but from the view which we have taken of the case, the only one which it is proper to decide now is that involving the jurisdiction of the court. The case below seems to have been regarded by the plaintiffs, and so held by the Circuit Judge, to be a case in chancery, the plaintiffs founding their action upon an alleged mistake in the deed, from the referee, of Goodhope to the defendant, W. W. Farr, which mistake they sought to have corrected, and therefore to have surrendered to them the land in dispute, which, as they alleged, by the suggested mistake had been incorporated in said Goodhope deed; and the Circuit Judge

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sustaining *the jurisdiction of the court, on the ground that the Court of Equity "having sold Bellefield to the plaintiffs and Goodhope to one of the defendants, it had jurisdiction to put the purchasers into peaceable possession."

We will consider first the question of jurisdiction as held by the Circuit Judge. It appears that the real estate of James Bolan was ordered to be sold in separate tracts, and that they were thus sold, Bellefield and Goodhope, by their respective names. Bellefield was sold to Mrs. Glover at public sale some days before the sale of Goodhope to the defendant, W. W. Farr. The deed of Bellefield was executed to Mrs. Glover at once, calling for adjoining lands as boundaries, and Mrs. Glover was in legal possession of all that her deed covered before the sale of Goodhope to Farr. After the sale of Bellefield to Mrs. Glover Goodhope was sold at private sale to Farr, who received a deed with plat, which embraced the land in dispute. It does not appear, however, at what time the defendant, Farr, took actual possession of this particular portion. But, in any event, it was after the sale to Mrs. Glover

and after Mrs. Glover was in legal possession if her deed embraced it, and also after the two sales had been reported, confirmed, and ended by the court.

This is not a case, then, where the land of one who is a party to a proceeding is sold by order of the court, and he refuses to yield possession, thereby necessitating the aid of the court to eject him in behalf of the purchaser. But it is a case where two tracts of land have been sold at separate times and to separate purchasers, neither being in possession at the time, and where, after the purchase, and after the execution of their respective deeds, one takes actual possession of a portion of land claimed by the other, each founding his claim on his deed. In such a case it is clear that the right of the parties would depend upon the deeds. If both deeds embraced the land (which would involve a question of location), the oldest would govern; but if only one embraced it, then that would control. This, however, would not be a case in chancery for the equity side of the court, but it would be an ordinary case of law for the recovery of real estate, the litigants founding their respective claims on the deeds which they held.

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*If either the executor or the heirs at law of James Bolan, or his devisees, or any other person being a party to the partition suit in which these lands were ordered to be sold, had been in possession when the sale took place, and after said sale had refused possession to the purchaser, then the principle under which the Circuit Judge acted would have been applicable. But in a contest like that before the court, which has arisen since the sale between the purchasers, and upon facts occurring since, we fail to see its pertinency. Besides, years have elapsed since Mrs. Glover bought from the referee, she has since sold to the plaintiff, Dewees, and the action below is really an action between Dewees and W. W. Farr, in which Dewees claims a portion of land that Farr is cultivating. It is admitted that both parties claim from a common source. The questions are, were the two tracts sold according to original boundaries—one or both? Do both deeds cover the land in dispute? If so, which is the oldest? These are questions for a jury, and not for chancery. And unless a jury trial was waived, of which there is no evidence, we do not see how the court below could assume jurisdiction on its equity side.

The complaint, however, alleges a mistake in the deed to the defendant, Farr, and invokes equity jurisdiction for the correction of this mistake. It would be competent for the court to exercise jurisdiction in a case involving a mistake, where the mistake occurred between the parties to the instrument sought to be corrected. It will be observed, however, in this case that the plaintiffs do not seek to correct the deed to Mrs. Glover under which the plaintiff, Dewees, claims.

No error is alleged in that deed. On the contrary, it is claimed that this deed is right, and that it embraces the land in dispute, as it conveys Bellefield, which, according to its original boundaries, contained the land in dispute. Nor does the defendant, W. W. Farr, seek to correct any mistake in his deed as between him and his grantor. But the plaintiffs seek to correct a mistake between the referee and the defendant, W. W. Farr, in a business matter to which they, the plaintiffs, were not parties, and had no connection therewith, except that they, too, some days previous to the sale of Goodhope to said defendants, had bought Bellefield from said referee.

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*We do not see upon what ground equity can take cognizance of such a mistake at the instance of the plaintiffs, even if the mistake was apparent. Certainly the plaintiffs could not invoke equitable interposition, unless they have been injured by the mistake. Do the facts alleged in the complaint show any injury to the plaintiffs growing out of the alleged mistake? The plaintiffs claim that they bought original Bellefield, and that the disputed land lies within its original boundary; that the deed to Mrs. Glover, which was executed and delivered before the deed to the defendant, Farr, covers this land. If this be true, why correct the mistake in the subsequent deed to Farr of Goodhope? Is not the title to Mrs. Glover perfect without the correction sought? Her deed is the oldest, admittedly, and is from the same party under whom Farr claims. And if the facts alleged as the basis of the action can be sustained, we see no difficulty in plaintiffs' way. Have they not a plain and adequate remedy at law in an action for the recovery of real estate? It would seem so, and consequently there is nothing in the case of an equitable feature authorizing equity jurisdiction.

But does this demand a dismissal of the complaint? We think not. The case in all of its features, except the prayer, is a case at law. The main facts alleged in the case, when stripped of their surroundings, amount to nothing more than that the plaintiff, Dewees, is the legal owner of the land in dispute, and that the defendants are in possession thereof, refusing to surrender. These are the facts necessary to be alleged in an action for the recovery of land. And the action, with the exception of the prayer for relief, is, in fact and substance, an action for the recovery of the land in dispute, but the prayer for relief is no part of the action. The character of an action is not determined by the relief demanded; it depends upon the facts alleged.

The error below has been in disregarding the facts and being governed by the relief prayed. The questions whether Bellefield and Goodhope were sold with their original boundaries—one or both—and if so, whether the land in dispute was within the one or

the other: and, if within the boundary of Bellefield, whether the deed to Mrs. Glover was the oldest deed, are all questions of fact involved in the greater question of title.

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And being questions of fact involving title to real estate, they were questions for a jury, and should have been tried by a jury. The mistake made below, both by the parties and the court, as we apprehend, was in regarding the case as an equity case, and having it heard as such, when it should have been heard and tried as a law case and by a jury. This mistake can be corrected by remanding the case for a jury trial, and to this end—

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded to calendar 1 of the court below for a jury trial, unless a jury be waived, with the privilege on the part of the plaintiff to amend by striking the name of Mrs. Sarah E. Glover from the record, if so advised: and, if both sides consent, that the testimony taken and reported in the case by the referee be submitted to the jury, with such other competent testimony as may be offered.

In this case there was a petition by plaintiffs for a rehearing upon the ground that appellants had waived a trial by jury by submitting, without objection, to a trial by the court, and that they were not entitled to a jury trial, because a reference had been ordered.

November 28, 1885. The following order was passed

PER CURIAM. The real issue made by the pleadings in this case was title to the land in dispute, which was a question for the jury. True, the parties had a right to waive a jury trial, and had this been done, and had the issue been tried by the judge, there would have been no error, as the case would still have been a law case, tried, however, by the court by consent of the parties. But this was not the question tried below; on the contrary, the main question tried was whether the deed of defendant should be reformed in accordance with the prayer of the complaint, and the parties put into possession as the reformed deed might demand. This was converting the law case made in the pleadings into a chancery case, not properly in the pleadings, which this court thought was error. In this view it made no difference as to the result, whether or not a jury was waived. The petition is dismissed.

23 S. C. *490

*BIEMANN v. WHITE.

(April Term, 1885.)

[Vendor and Purchaser ⇨ 232.]

Where a party purchases a strip of land separated by a ditch from the main tract of his

vendor, pays the purchase money, takes possession, and cultivates it as his own, but receives no title deed, his possession is sufficient notice to a subsequent purchaser actually ignorant of this equitable title.

[Ed. Note.—Cited in *Graham v. Nesmith*, 24 S. C. 295; *Sweatman v. Edmunds*, 28 S. C. 63, 5 S. E. 165; *Daniel v. Hester*, 29 S. C. 149, 7 S. E. 65; *Tant v. Guess*, 37 S. C. 500, 16 S. E. 472.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 542; Dec. Dig. ⇨ 232.]

Before Kershaw, J., Oconee, November, 1883.

This was an action by H. D. A. Biemann against W. B. White for the recovery of a strip of land lying between the old run of Conneross Creek and a ditch cut for said creek. It was commenced September 16, 1881. By consent the issues were heard by the court. In rendering the judgment stated in the opinion, the Circuit Judge said:

As between the parties to this alleged agreement, there can be no question, upon proper proof of the agreement, that the defendant could set up and maintain such defence and have his equitable title perfected. This is equally true as between the defendant and any purchaser from Robert Mathewson, with notice of the equitable claim of defendant, even though such purchaser had paid a full consideration for the land. Upon the evidence of the plaintiff, he purchased the land in dispute from defendant in good faith for a valuable consideration, and without notice of any claim, equitable or otherwise, in favor of the defendant. This witness further testifies that before his purchase of said land, and in contemplation of purchasing it, he consulted his attorney, and on his examining the records of the proper office, and informing plaintiff that nothing appeared on record to affect the title to the land, except the dower of Mrs. Cobb, widow of Mathewson's grantor, plaintiff bought the land and took titles for the same. The plaintiff further testifies that before the contract of purchase was executed and conveyance taken, he went on and looked over the land.

The defendant to this claim of a bona fide purchase for valuable consideration without notice offers no evidence, nor attempts to produce any evidence of actual notice to plaintiff, but relies on constructive notice arising from the possession and cultivation

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of the land by the defendant for several years. A number of our decisions hold the principle that "possession is notice" (*Massey v. McIlwain*); but in all cases this possession must be of a character to inform the mind of a reasonable man either that such person was actually in possession, or at least must be of a character to put any one about to lay on inquiry.

The facts, as adduced by defendant's own testimony and that of his witnesses, are that the strip or lot of land in dispute adjoins

both the lands of defendant and the land purchased by plaintiff. No one lived on the strip of land, but defendant had cultivated it as his own, and paid no rents since the alleged contract of purchase or exchange from Mathewson in 1873. There is no evidence to show that there was any possession of a character to inform the plaintiff or put him on inquiry as to the claim of defendant, and in the absence of proof of this character on the part of the defendant, and upon the proof on the part of the plaintiff, that he, before purchasing the land, resorted to the usual and recognized mode to ascertain the character of the title held by his grantor, I am of opinion the plaintiff should recover the land in dispute, the location and boundaries of which are described in plaintiff's title, as included in the tract conveyed to plaintiff by Robert Mathewson.

Mr. J. J. Norton, for appellant.
Messrs. Keith & Verner, contra.

October 17, 1885. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The contest here is over a small parcel of land located in Oconee County, embracing four acres. It appears that it formerly belonged to one Robert Mathewson, under whom the plaintiff claims, and was a part of a larger tract then owned by the said Mathewson. In 1873, however, the defendant, appellant, purchased this parcel which was separated from the main tract by a ditch carrying the run of Conneross Creek. The defendant at this purchase in 1873 received no titles, but he paid the purchase money, and has been in possession by annual cultivation since his said purchase.

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*In 1880 Robert Mathewson conveyed to the plaintiff the tract of land to which the parcel in dispute had been attached. It is admitted that at the time of the plaintiff's purchase, he had no knowledge of defendant's possession or claim, equitable or otherwise. It was also in evidence that the plaintiff, before his purchase, went and looked over the land and consulted his attorney as to title; that said attorney examined the records and reported that there was nothing on record to affect the title to the land except a claim of dower. He then bought, and received a conveyance from Mathewson. Under this state of facts, the action below was brought to recover the four acres alleged by plaintiff to be a part of the main tract, and covered by his deed.

The case was tried by his honor, Judge J. B. Kershaw, without a jury, who decreed that plaintiff recover the land with damages, by way of rents, to wit, \$45.37½, and costs. The Circuit Judge, while recognizing the general doctrine that "possession is notice" in rebuttal of a claim founded upon the principle

of bona fide purchase for a valuable consideration without notice (*Massey v. McIlwain*, 2 Hill Eq., 421), yet failed to apply it here, because, as stated by him, "There was no evidence to show that there was any possession of a character to inform the plaintiff, or put him on inquiry as to the claim of defendant, and in the absence of proof of this character on the part of the defendant, and upon the proof, on the part of the plaintiff, that he, before purchasing the land, resorted to the usual and recognized mode to ascertain the character of the title held by the grantor, he was of the opinion that the plaintiff should recover, and so decreed."

In the recent case of *Sheorn v. Robinson* (22 S. C., 32), this court had occasion to examine this doctrine, and it was there determined upon the authority of several cases therein cited, sustained fully by Mr. Pomeroy in his *Equity Jurisprudence*, section 615, upon authority which he cites, that possession of land under a contract of purchase has the full force of a deed recorded as to subsequent encumbrancers and purchasers, and this, too, whether such subsequent purchasers or encumbrancers "had actual notice or not." And in that case this court said: "The ground upon which the recording of a deed operates as notice, whether the fact of record be

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known or not, is that it is always in *the power of the subsequent purchaser, by searching the records, to ascertain whether or not there has been a previous conveyance; and if he fails to make the necessary examination, it is his fault, and his rights must be determined by the facts within his reach on the subject of the record. So, too, it is an easy matter for a purchaser of land to ascertain at the time of his purchase whether his vendor or some one else is in possession, and if he fails to do so, he should take the consequences." And, further: "One in possession under an equitable title has nothing that he can record, and possession open and unconcealed is the only mode by which he can give notice to the world of his rights." &c.

Here it appears that the defendant purchased in 1873. He went into possession immediately, and has cultivated the land ever since. It was separated from the Mathewson main tract by a distinct ditch. The plaintiff, before purchasing, went over and examined in person the tract under negotiation between himself and Mathewson. He could easily, it seems to us, have inquired of Mathewson as to the boundaries of the land, and especially does it seem that he should have inquired as to the portion which, as we have said, was cut off from the main body by the ditch carrying the run of Conneross Creek. We think that the case of *Sheorn v. Robinson*, supra, is conclusive of this case, and we refer to that case and the authorities there cited.

It is the judgment of this court that the judgment of the Circuit Court be reversed.

Mr. Justice McGOWAN concurred.

Mr. Justice McIVER. I concur, because I think the question in this case is concluded by the decision in *Sheorn v. Robinson*.

Judgment reversed.

23 S. C. *494

*JONES v. HUDSON.

(April Term, 1885.)

[1. *Estoppel* ⇨79.]

Where, in a cause, with all parties in interest before the court, a person is recognized as trustee of land under a lost deed, and is authorized to make sale of any portion of such land, and reinvest the proceeds for the same uses, and he accordingly makes sale and conveyance, for value, of a part of this land, the cestuis que trust cannot afterwards aver against his deed, nor disturb rights bona fide acquired thereunder.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 211; Dec. Dig. ⇨79.]

[2. *Trusts* ⇨203.]

Nor was the purchaser bound to see to the proper application of the proceeds.

[Ed. Note.—Cited in *Webb v. Chisolm*, 24 S. C. 491; *Campbell v. Virginia-Carolina Chemical Co.*, 68 S. C. 445, 47 S. E. 716.

For other cases, see *Trusts*, Cent. Dig. §§ 273-276; Dec. Dig. ⇨203.]

[3. *Trusts* ⇨203.]

This deed, absolute in form, having been taken and recorded under an agreement that the purchaser should reconvey to the trustee, if repaid the consideration money, with interest, in thirty days, it is not clear that the trustee or cestuis que trust could, eleven years afterwards, claim a reconveyance on tender of the money.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 273-276; Dec. Dig. ⇨203.]

[4. *Trusts* ⇨203.]

But this purchaser having mortgaged this land as an indemnity to two of his sureties, the mortgage having been foreclosed, and the property sold and purchased by one of the mortgagees, who had no notice of any other outstanding claims against the property until the day of sale, the rights of the trustee and his cestuis que trust, a mere equity, could not be enforced against this last purchaser, who, under the mortgage, was a bona fide purchaser for valuable consideration without notice.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 273-276; Dec. Dig. ⇨203.]

[5. *Mortgages* ⇨167.]

A second purchaser for value without notice from a first purchaser who was charged with notice, is a bona fide purchaser, and entitled to protection as such.

[Ed. Note.—Cited in *London v. Youmans*, 31 S. C. 150, 9 S. E. 775, 17 Am. St. Rep. 17; *McGee v. Jones*, 34 S. C. 151, 13 S. E. 326; *Foster v. Bailey*, 82 S. C. 381, 64 S. E. 423.

For other cases, see *Mortgages*, Cent. Dig. § 390; Dec. Dig. ⇨167.]

Before Fraser, J., Greenville, July, 1884.

The opinion states the case. The Circuit decree was as follows:

It is by no means clear that the validity

of the order of sale was in any way dependent upon John M. Jones being a trustee. These questions, however, while raised by the exception, were not pressed in the argument of counsel. The order to reinvest the proceeds of sale was not a condition of the sale, but was only a direction to the trustee, and which he could have been compelled by proper means to carry out. It may be, however, that the knowledge beforehand of the misapplication of the funds intended by the trustee, tainted the whole transaction as between him and William A. Hudson. If the contest here was between him, Emmala B. and Eliza-

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beth E. Jones and William A. Hudson, I think that the latter could claim no greater rights than those of a mortgagee.

It is not necessary, however, to determine this question; the dispute is not with William A. Hudson, but with William H. Austin, who claims the land as a subsequent purchaser, bona fide and for valuable consideration, and without notice of the equities between the original parties. Now, William A. Hudson held under a legal title, valid on its face and duly recorded, without any notice on the record that the deed was any other than it purported to be on its face. Holding this he made a mortgage of this land to the defendants, William H. Austin and Mrs. Ann F. Hudson, to secure them against a liability assumed by them as trustees under guardianship bond, given by the said William A. Hudson.

No question is raised as to the bond being signed by the trustee and the mortgage given at the same time, but it is claimed that these trustees can only date their consideration from the payment of the amount for which they might become liable as trustees, which was not until after the sale was made under the mortgage, under which the defendant, William H. Austin, purchased. Neither William H. Austin nor Mrs. Ann F. Hudson had any notice of any of the equities of the plaintiffs at the time they took the mortgage, or at any time before the order for sale under the mortgage.

A mortgagee is a purchaser who will be protected as well as one who claims the legal title. *Haynsworth v. Bischoff*, 6 S. C. 159. The assumption of an irrevocable liability is a sufficient consideration to support this defence. *Pom. Eq. Jur.*, § 747. In cases where sureties take collaterals to secure and protect themselves, the sureties have a right to collect the securities and foreclose the mortgage before paying the debts. *Hellams v. Abercrombie*, 15 S. C. 110 [40 Am. Dec. 684]. A second purchaser without notice from a first purchaser with notice, will be protected. *Pom. Eq. Jur.*, § 754; 1 *Story Eq. Jur.*, § 308. The title now held by the defendant, Austin, must be referred to the mortgage, and is entitled to all the protection which a deed of that date would have given.

Besides all this, it seems to me that there

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has been great laches *on the part of all the plaintiffs in allowing this property to stand so long in the apparent ownership of William A. Hudson, by which means he has been able inextricably to involve innocent third parties in heavy losses, if it now turns out that he was not entitled to mortgage the land.

It is therefore ordered and adjudged, that the complaint be dismissed with costs.

Mr. W. H. Irvine, for appellants.

Messrs. Wells & Orr, contra.

October 23, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for the recovery of a small tract of land, containing five acres. At one time it was the property of the late General Waddy Thompson, who, some time between March and November of the year 1850, conveyed this parcel as part of a larger tract to his son-in-law, John M. Jones, in trust for the sole use and benefit of his daughter, Eliza W., wife of the said Jones, and such issue as she might have at her death. But the precise terms of the deed are not known, as it was handed back to the donor, but not for the purpose of being cancelled. It was never returned or placed on record. On November 11, 1850, the said Thompson executed another deed of trust, whereby he gave to the said Jones in trust for the use and benefit of the said Eliza W. and her issue certain negro slaves, and also the lands above mentioned, but in referring to the lands he says: "For which I have already executed to her a deed of conveyance."

In December, 1851, the said Eliza W. Jones died, leaving as her only issue two daughters, the plaintiffs, Emmala B. and Elizabeth E. Jones, and on November 10, 1856, the said Waddy Thompson executed another deed, or declaration of trust, to the said Emmala B. and Elizabeth E. to said lands, to them and the heirs of their bodies living at their deaths, wherein he constituted himself the trustee. But this deed or declaration of trust was afterwards, in 1882, set aside by order of Judge Cothran, and "the first deed declared valid and of full force and effect."

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*On January 27, 1867, the said John M. Jones, as trustee, instituted a proceeding against the said Emmala B. and Elizabeth E. Jones, his daughters, stating that said lands were unprofitable and failed to support his cestuis que trust, and praying that he be authorized and empowered to sell and dispose of any part of said lands for the uses and purposes therein mentioned. Elizabeth E. Jones, being a minor, was regularly represented by a guardian ad litem, and after reference and proper inquiry, the prayer of

the petition was granted by Judge Orr, who passed an order February 3, 1869, giving the said John M. Jones, as trustee, "the power to sell and convey and make good titles to all or any portion of the said lands, and that the funds arising from any such sales shall be reinvested for the cestuis que trust, subject to the conditions in the original deeds," &c.

Under and by virtue of this order the said John M. Jones, as trustee, from time to time disposed of considerable portions of these lands, and by virtue thereof on June 5, 1872, executed to the defendant, Hudson, a deed of the five acres in dispute, expressed to be for the consideration of \$105. This deed was regularly recorded July 8, 1872. Hudson, the donee, included this little tract in a mortgage given to Ann F. Hudson and William H. Austin August 11, 1877, to hold them harmless as his sureties on a certain bond. This mortgage was afterwards foreclosed by the sale of the lands, and at that sale the defendant, William H. Austin, became the purchaser of the five acres aforesaid.

Conceding this perfect chain of paper title from John M. Jones as trustee, the plaintiffs, Emmala B. and Elizabeth E. Jones, daughters of the trustee, claimed that their father, John M. Jones, had no right as trustee to sell the land; but if he had, that the conveyance by him to Hudson was in fact only a mortgage to secure the \$105, and that the mortgagees, Ann F. Hudson and William H. Austin, had notice of that fact; and that in October, 1883, before this suit was brought, the said John M. Jones tendered to the said William A. Hudson, the aforesaid \$105, and the interest thereon, and therefore they were entitled to recover the said tract of land. At the time John M. Jones executed the deed to Hudson, something was said about the conveyance being a mortgage to secure the aforesaid \$105.

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*The evidence is not in the Brief, but the master, S. J. Douthitt, Esq., made a full and exhaustive report, in which he says that "John M. Jones being pressed for money to pay the taxes on the real estate which he held in trust for his daughters, endeavored to borrow money of the defendant Hudson on a mortgage of a portion of said lands. Hudson declined to loan on a mortgage, but agreed to let him have \$100 if he would execute and deliver to him a deed of the land in question, which Jones finally agreed to. Hudson, on June 5, let him have \$100, and charged him \$5 for surveying the land and drawing the papers, and on the same day Jones, as trustee, executed and delivered to Hudson a deed to said land in consideration of \$105. Hudson, at the same time, gave Jones an instrument of writing whereby he stipulated and agreed that if Jones paid him \$105 in thirty days thereafter, he would not place said deed on record, but would reconvey the land to him. Jones did not pay the

money within the thirty days, and the deed was put on record, as stated, July 8, 1872.

* * * At the time the mortgage was executed to Austin and Ann F. Hudson, they had no notice that Jones claimed that said deed was a mortgage," &c. The master further states that Jones testified that he had given Austin notice of the claim that the deed to Hudson was only a mortgage, but that this was denied by Austin. It was not, however, alleged that such notice was given at or before the time the mortgage was executed, nor even before the decree of foreclosure, but on the very morning of the sale, ordered in the decree of foreclosure.

The cause came on for trial by Judge Fraser, who ruled that William A. Hudson held under a legal title, valid on its face and duly recorded: that even if the conveyance, absolute in form, was really a mortgage between the original parties, neither William H. Austin nor Ann F. Hudson had any notice of the alleged equities of the plaintiffs at the time they took their mortgage, or at any time before the order for sale under the mortgage, and therefore Austin, the purchaser at the sale, was a bona fide purchaser for valuable consideration: and dismissed the complaint. From this decree the plaintiffs appeal upon the following grounds:

1. "Because his honor erred in finding as a fact that Austin had no notice of the nature

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of the transaction as to the transfer of the land from Jones to Hudson, when the proof seems convincing that Austin was specifically notified of the nature and particulars of said transaction, and that the conveyance was intended merely as a security for a loan, and that Austin purchased with full knowledge of the rights and equities of the plaintiffs.

2. "Because his honor erred in holding that it would now be too late for Emmala B. and Elizabeth E. Jones to claim as against strangers dealing with the property, when the proof shows that neither of said parties signed said conveyance to Hudson, nor knew of the subsequent possession of the land by Hudson, or of his mortgaging it to Ann F. Hudson and Austin, until a few weeks before the commencement of this suit.

3. "Because it was error to hold that John Jones was authorized to sell the land under the order of the Court of Common Pleas, February 6, 1869, whether the said Jones reinvested the fund or not.

4. "Because the said Jones, under the deed of General Thompson creating the trust, was trustee only during the life of his wife, Eliza Jones, who died on December 8, 1854. His trusteeship, therefore, terminated long prior to the transaction with Hudson.

5. "Because the conveyance by Jones to Hudson, being in reality only a mortgage, and intended by the parties as such, and Hudson having knowledge of the way in which Jones intended applying the money ad-

vanced by him, vitiated the transaction for all purposes whatever.

6. "Because the decree is in other respects contrary to the law and justice and the evidence of the case."

The objection is made in the first place, that John M. Jones was not trustee at all, and had no right whatever to sell and convey the land. In disposing of property, the first bona fide deed is irrevocable, and gives it beyond the reach of subsequent attempted modifications by the donor. By the first deed of General Thompson, signed, sealed, and delivered, although afterwards mislaid, John M. Jones was appointed trustee and the rights of the parties fixed. Whatever may have been the precise terms of that deed, not clearly

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known, the matter was brought before the court in 1869, and Judge Orr made an order which recognized John M. Jones as trustee, and expressly empowered him "to sell and convey and execute good and sufficient title to all or any portion of the tract of land referred to in the trust deed as in his judgment may be to the interest of the cestuis que trust," &c.

This order was made in a case in which all the parties were before the court; indeed, it was made at the instance of John M. Jones, expressly for the benefit of the other plaintiffs. It was made after proper reference and inquiry, was never appealed from, but acquiesced in from that time (1869) until this action was brought in 1883, a period of more than ten years. Under these circumstances, it must be considered that the order was tantamount to a new arrangement by the parties themselves. It is true, as argued, that the daughters did not actually sign the deed to Hudson, but the order, by which they were bound, gave their father the right to sell for them. Through this order they held out in the most solemn manner that John M. Jones was trustee, with the right to sell and make good titles; and we agree with the Circuit Judge that it is now too late for them to aver against it, or to disturb rights bona fide acquired under it. See *McNish v. Guerd*, 4 Strob. Eq., 78.

It does not appear that the proceeds of sale were reinvested as directed by the order. But that duty was imposed upon the trustee, and we do not understand that the performance of it by him was a condition precedent to the validity of the conveyance. It seems that the money was needed to pay the taxes due on the trust property. As a general rule, certainly it is not the duty of a purchaser from a trustee, with power to sell and make title, to see to the application of the proceeds. See *Living v. Peyton*, 2 De Saus., 375; *Redheimer v. Pyron*, Speers Eq., 134; *Laurens v. Lucas*, 6 Rich. Eq., 217. Assuming, then, that Jones was trustee, and had the power to sell, it follows that the legal title passed from him to Hudson, and

thence to Austin, through the mortgage and the foreclosure sale under it.

But it is earnestly urged that the transaction between Jones and Hudson was not an absolute conveyance of the land, but a mortgage to secure the payment of money advanced.

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ed. and the *plaintiffs are entitled to have it so declared, and upon the payment of the debt and interest secured (which was tendered before the action was commenced), they may redeem the land. It is not at all clear that at this late day, after such laches, the plaintiffs could establish any such right against the defendant Hudson. The money was to be returned within a certain time, which was not done. But if the plaintiffs had such right against Hudson, it does not follow that they have the same right as against all persons holding under him. Innocent parties, in ignorance of the facts which constituted the secret vice, may have become involved. The right supposed to have existed against Hudson was a mere equity, arising from his knowledge of certain facts, but that equity cannot prevail against a purchaser of the legal title without notice of those facts. The plea of purchaser without notice is a counter and higher equity. "If a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection." Pom. Eq. Jur., § 754; Story Eq., § 407. And see *Black v. Childs*, 14 S. C., 312; *Dopson v. Harley* [6 Rich. Eq. 176, note], reported in a note to *Brown v. Wood*, 6 Rich. Eq., 176, in which Chancellor Johnstone says: "Whenever, in tracing a title in defendants, you come upon an innocent purchaser having no notice, from that moment the title is considered secure in equity; under which principle, a purchaser with notice from one without notice is protected in this court."

Did Austin have notice of the secret vice, the alleged agreement between Jones and Hudson, that the conveyance, absolute in form, was in fact merely a mortgage to secure the money advanced? The testimony is not in the Brief, but both the master and the Circuit Judge concurred in finding that he did not. The defeasance given by Hudson was never recorded, while the deed absolute in form was on the record. Hudson was in possession, using the land as his own, and had been for eight years. There is no allegation even that Ann F. Hudson and the defendant Austin had notice, when they took their mortgage from William A. Hudson, on August 11, 1877, or when the decree of foreclosure was rendered, or at any time before the morning

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of *the day (sales-day, July, 1880) on which the land was sold by order of the court.

Even if there was no conflict in the testimony as to what occurred on that occasion, and notice of the claim of Jones as to the

mortgage was then given to Austin, we think it came too late, and was not sufficient. "A mortgagee of lands is a purchaser within the meaning of the rule which protects a purchaser for valuable consideration without notice." *Haynsworth v. Bischoff*, 6 S. C., 159. "Where the defeasance is not recorded, the obvious effect of the record of the deed alone is to make the grantee the apparent absolute owner of the estate, and the person who holds the defeasance may be barred of all right of redemption by a sale by the mortgagee to one who buys in good faith and without notice of such defeasance. As to third persons, the absolute conveyance is not defeated or affected unless the defeasance is also recorded." 1 Jones Mort., §§ 548 and 549.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

23 S. C. 502

FARR v. GILREATH.

(April Term, 1885.)

[1. *Wills* ⇨681.]

A testator by his will declared: "I give unto my son R., in trust for my daughter M., the lots that I live on in the town of G. If my daughter M. should die leaving no child, it is my wish that her trustee should sell the property in his hands and divide the proceeds of the same equally between my surviving children, or the heirs of their bodies. But in case she should have a child or children, and they live to come of age, then the property belongs to the child or children at the death of their mother." *Held*, from the intent of the testator and the duties imposed upon the trustee, that the fee in these lots of land was devised directly to the trustee, and that the trust was not executed.

[Ed. Note.—Cited in *Smith v. Smith*, 24 S. C. 314; *Carrigan v. Drake*, 36 S. C. 365, 15 S. E. 339; *Pope v. Patterson*, 78 S. C. 343, 58 S. E. 945.

For other cases, see *Wills*, Cent. Dig. § 1612; Dec. Dig. ⇨681.]

[2. *Wills* ⇨634.]

The interest here given to testator's "surviving children" was a contingent remainder.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1496; Dec. Dig. ⇨634.]

[3. *Wills* ⇨693.]

Upon the happening of the contingency, the surviving children were not entitled to the land itself, but to "the proceeds of the same." The land then became personalty, and these remaindermen, having no title thereto, could not recover it from one to whom the trustee had con-

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*veyed; but if such conveyance was void, they might follow the land, as impressed with a trust, into the hands of the purchaser, and demand a sale, so that they might receive the proceeds.

[Ed. Note.—Cited in *Mattison v. Stone*, 90 S. C. 149, 72 S. E. 991.

For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. ⇨693.]

[4. *Judicial Sales* ⇨48.]

It is the policy of the law to sustain judicial sales when it can be done without violating principle or doing injustice.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 88; Dec. Dig. ⇨48.]

[5. *Executors and Administrators* ⚭335.]

Contingent remaindermen in esse and without reach are necessary parties to a proceeding to sell the land in which they have such an interest, and if not parties, they are not bound by the judgment. *Moseley v. Hankinson* (22 S. C., 323) approved, and some points of difference between that case and this stated.

[Ed. Note.—Cited in *Covar v. Cantelou*, 25 S. C. 35, 40; *Clyburn v. Reynolds*, 31 S. C. 113, 9 S. E. 973; *Faber v. Faber*, 76 S. C. 161, 56 S. E. 677.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1381; Dec. Dig. ⚭335.]

[6. *Wills* ⚭693.]

The daughter M., a paralytic and childless widow, filed her bill against R., the trustee, to require the sale of this property, the income from which was alleged to be inadequate to her support, and to reinvest the proceeds. The court so ordered, and the trustee sold. *Held*, that the postponement by testator of the sale until M.'s death being wholly for her benefit, the power of sale given by the will to the trustee might be accelerated by the tenant for life, and she having, by her proceedings in court, substantially joined with the trustee in his sale and deed, the purchaser took a good title under this power.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. ⚭693.]

[7. *Wills* ⚭693.]

One of the remaindermen having instituted an action against the trustee to recover a portion of the proceeds of the property so sold, and having received a portion, she thereby elected to confirm the sale.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. ⚭693.]

[This case is also cited in *Mauldin v. Mauldin*, 85 S. E. 61, as to facts.]

Before Fraser, J., Greenville, July, 1884.

The case is thus stated by the master:

The master, to whom it was referred to take the testimony in the above entitled action and return the same to the court, together with his conclusions of fact therefrom, and also his conclusions of law, with leave to report any special matter, begs leave to report that he has held references and taken the testimony herewith filed, and from the same he respectfully submits the following report. As conclusions of fact, he finds—

1. That Dr. Burwell Chick departed this life in 1847, leaving his last will and testament in full force and effect, in the fourth clause of which he gave to his son, Reuben S. Chick, in trust for his daughter, Maria H. Thompson, among other things, the property in dispute; and in the twelfth clause of his

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will he *says: "If my daughter, Maria H. Thompson, should die leaving no child, it is my wish that her trustee should sell the property in his hands and divide the pro-

ceeds of the same equally between my surviving children or the heirs of their bodies. But in case she should have a child or children, and they live to come of age, then the property belongs to the child or children at the death of their mother."

2. The said Reuben S. Chick accepted said trust and the real estate mentioned in the fourth clause of said will remained in his possession undisturbed until November 3, 1871, when the said Maria H. Thompson instituted a proceeding in this court against her said trustee, and him only, demanding, for certain reasons therein mentioned, that said real estate, or a portion thereof, be sold. The matter was referred to a special referee, and on the coming in of his report, the court ordered, adjudged, and decreed, that said real estate be sold by said trustee on the terms specified in said decree; and further ordered, that before the first installment fell due, or before it was collected, that the trustee give a bond in the sum of four thousand dollars to the clerk of this court for the faithful performance of his duties in the discharge of his trust.

3. In pursuance of said decree, the trustee, on March 4, 1872, sold said real estate at public outcry, and on March 22, 1873, filed his bond, duly approved, with the clerk, as required by said decree.

4. At the sale of said real estate a portion thereof was purchased by one A. L. Herron, who was subsequently adjudged a bankrupt, and the real estate purchased by him was sold by his assignee on January 8, 1877, in three separate parcels, and the lot in controversy was purchased by the defendants, who paid the said assignee for the same.

5. Reuben S. Chick departed this life in 1877, and subsequently thereto Pettus W. Chick was appointed trustee of the said Maria H. Thompson, and assumed charge of the trust estate. The said Pettus W. Chick died, and some time thereafter the said Maria H. Thompson instituted a proceeding

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in the Court *of Common Pleas for Newberry County against Sarah E. Chick, as executrix of Reuben S. Chick, and Betsy Chick, as executrix of Pettus W. Chick, demanding an accounting of them for the trust estate which went into the possession of their respective testators. On hearing the pleading in the said cause, the court, on June 5, 1879, ordered the said Sarah E. Chick to turn over to the master of Newberry County, as receiver, all choses in action and evidences of indebtedness belonging to said trust estate. The complaint in this cause was amended on August 4, 1879, making *Wilhelmina B. Chaplin*, *Louisa V. Farr*, and *Caroline Hodges*, who were the remaindermen, parties defendant. On February 14, 1880, under this proceeding, W. A. McDaniel was appointed trustee of said trust estate,

*This fourth clause was as follows: "I give unto my son, Reuben S. Chick, in trust for my daughter, Maria H. Thompson, the following property, to wit, Harry, Lewis, John, Judy, and her children, Martha and Willis, Tilda and her child Sofa, negro slaves; also the lots that I live on in the town of Greenville; also the tract of land I bought of D. Goodlett, laying on Richland Creek."—REPORTER.

who filed his bond and assumed the duties of trustee in July, 1880. Maria H. Thompson died on August 2, 1882, and Louisa V. Farr was appointed administratrix of her estate, and as such she was, on November 28, 1882, substituted as plaintiff in the case, which is still pending.

6. On October 5, 1880, Louisa V. Farr filed her complaint against Thomas S. Moorman, as executor of Elizabeth D. Chick, deceased (who was executrix of Reuben S. Chick), Wilhelmina B. Chaplin, and others, in which reference is made to the trust estate of Maria H. Thompson, by saying that the estate of Reuben S. Chick is responsible therefor.

7. Under this proceeding, a receiver was appointed for the estate of Reuben S. Chick, who filed a creditor's bill, and an order was passed requiring the creditors of Reuben S. Chick to establish their claims before him as master for this court. In pursuance of this order, W. A. McDaniel, as trustee, presented the claim of the trust estate, but the same has never been fully established, owing to an accounting yet to be had in the case first above mentioned. The suits are still pending.

Out of the proceeds of the sale of the real estate of the said A. L. Herron, bankrupt, his assignee, by order of court, paid over to the executrix of Reuben S. Chick one thousand dollars, and to Messrs. Earle & Blythe, attorneys for Maria H. Thompson, six hundred dollars. He also advanced to the said Maria H. Thompson three hundred and fifty

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dollars to pay for a lot of *land, and took a mortgage thereon to secure the same. He also let her have eighteen 20-100 dollars to pay for sash and blinds for a house built on said lot, and advanced to her in cash fifteen dollars. The balance remaining in his hands as assignee, to wit, seven hundred and thirty-eight 91-100 dollars, he paid over to W. A. McDaniel as trustee, out of which the said trustee paid to Louisa V. Farr, one of the plaintiffs herein, the sum of two hundred and thirty-seven 50-100 dollars, on account of her share in said trust estate, and for which he took two separate receipts. He also paid on account of the burial expense of the said Maria H. Thompson ninety-three 80-100 dollars, which was done at the instance of Louisa V. Farr, and who agreed that if the other parties in interest did not assent to it, she would be responsible for the same. The balance of the money is still in the hands of the said W. A. McDaniel as trustee.

8. When the property was sold by Reuben S. Chick as trustee, that portion of it purchased by the said A. L. Herron was in a dilapidated condition, and one hundred and fifty dollars a year would have been a fair rental for it. After Herron bought, he spent at least one thousand dollars on that portion

now owned by the defendant in the way of improvements and thereby improved it considerably, and since it was purchased by the defendant two hundred and fifty dollars a year would be a fair rental for it.

9. The defendant paid a fair price for the property, and thought the title to it was good. He has also improved the property considerably.

10. Reuben S. Chick, Pettus W. Chick, and Maria H. Thompson all died leaving no issue of their bodies, and Louisa V. Farr, Wilhelmina B. Chaplin, and Caroline Hodges were the only children of Dr. Burwell Chick who survived Maria H. Thompson. Caroline Hodges has since died leaving no issue of her body, but left her last will and testament, executed in the presence of two subscribing witnesses, which was admitted to probate in the State of Arkansas, where she resided at the time of her death. In her said will the said Caroline Hodges bequeathed her entire estate, both real and personal, to her husband, Asa Hodges, one of the plaintiffs herein.

As matters of law the master finds:

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*1. That under the 4th and 12th clauses of the will of Dr. Burwell Chick, deceased, the trustee, Reuben S. Chick, was clothed with the legal fee in the lot of land in dispute. It was not simply a power of sale, but a devise of the fee for the purpose of the sale. Executors of Ware v. Murph. Rice, 55 [33 Am. Dec. 97]; 2 Jarm. Wills, *295, and notes.

2. That under the 12th clause of said will the remaindermen took no interest whatever in said land as land, but only in the proceeds. It was a case of equitable conversion. Perry v. Logan, 5 Rich. Eq., 202.

3. That the plaintiff, Louisa V. Farr, having received a part of her share in the proceeds of the land, has made her election, and there can be no reconversion, for where the direction is to convert land into money, one co-owner cannot elect to take his share in land; all must elect or none. Fletcher v. Ashburner, 1 Lead. Cas. Eq., 659.

4. That the surviving children of Dr. Burwell Chick took, under the 12th clause of his will, a remainder dependent upon a double contingency, first, upon the failure of the life-tenant to have a child living to attain the age of twenty-one years; and, second, upon their surviving the life-tenant; and this remainder never became vested until after the sale of the land, and attached to the proceeds.

5. That in the case of Maria H. Thompson against Reuben S. Chick, trustee, the court certainly had jurisdiction; that it also had before it all parties necessary for the purposes of the suit. The trustee represented the legal title, and the court acted upon that, and the sale under its decree passed a good fee simple title to the purchaser, which has been duly transmitted for valuable consideration to the defendant herein. Van Lew v. Parr, 2

Rich. Eq., 321; *Rofil v. Fisher*, 3 Rich. Eq., 1 [55 Am. Dec. 627]; *Williman v. Holmes*, 4 Rich. Eq., 475. The case seems to have been carefully considered and the discretion of the court wisely exercised.

6. The equities of the defendant are at least as high as those of the plaintiffs. The purchaser at the sale paid a full price, and, relying upon his title, greatly improved the property. The defendant succeeded to all of his equities, and has himself made improvements. The plaintiffs have the fund and the bond of

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the trustee to look to; the defendant has nothing, and where equities are equal, the law will prevail. Therefore the legal title of the defendant must stand. The master therefore concludes as matter of law, that the plaintiffs can take nothing by their suit.

The Circuit decree was as follows:

It is not necessary to consider whether the plaintiffs or any of them have received any portion of the fund arising from the sale of the land, of which they now complain, or are now pursuing in another action against the trustee and his sureties, or their representatives, the fund arising from said sale.

The leading question in the case is as to the validity of a sale of this land by the trustee under an order of this court, made under proceedings commenced November 3, 1871, and in which only the trustee and the tenant for life were made parties. The quantity and quality of the interests in the land will be determined by a proper construction of the 4th and 12th clauses of the will of Burwell Chick, which are set out in the report. I have examined very carefully the authorities which have been cited in argument of the cases. The time at my disposal will not permit me to enter into any elaborate review of them, and I do not know that it will be profitable to do so. I will therefore state my conclusions as briefly as I can.

"The power of the court to sell trust estates is not doubted." *Gibbes v. Holmes*, 10 Rich. Eq., 491. The interest of these plaintiffs under these clauses of the will was not vested, but contingent. The distinction as laid down by Mr. Justice McIver in *Faber v. Pollee*, 10 S. C., 387, is "that in the one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate as well as the right to the possession of such estate is not only deferred to a future period, but is dependent upon the happening of a future contingency." If the life-tenant died leaving no child, then these plaintiffs would take, otherwise not; and their interest under this will was certainly a contingent one when this sale was made during the life of Mrs. Thompson.

Under a will, the word heir is not necessary to carry the fee, and the devise to the trustee was sufficient of itself to give him

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the fee in this land; and if it were not, the power to sell was sufficient, and would have been sufficient even under a deed, on the ground that equity always enlarges the estate of the trustee so as to make it sufficient to support the trusts. There is nothing in the will which gives these plaintiffs any legal estate in the land. They had an interest only in the proceeds of sale, and the trustee held the fee. When the Court of Equity exercises its jurisdiction, to direct a sale of land held in trust, all that is necessary to make a valid title under its order is to have the fee represented, and even the first remainderman in fee is sufficient.

In *Williman v. Holmes*, supra, 493, Chancellor Dargan, in summing up the authorities, thus announces the principle: "That where the person entitled to the first estate of inheritance is a party before the court, he is to be regarded as the representative of all those contingent interests which are dependent and are to succeed his estate; and, consequently, a decree against such a party will affect and bind those who succeed him." In the case in which that order was made, which is here claimed to be invalid, the whole fee was represented by the trustee. This would have been sufficient before the code, which has, as it were, reaffirmed the rule in section 134, which gives a trustee of an express trust the right to sue, "without joining the persons for whose benefit the action is brought," and the same rule must necessarily apply to defendants. The case of *Hodges v. Chick* (10 Rich. Eq., 178) does not touch the question raised here. In that case there was some question as to the distribution of the proceeds of sale made by the trustee under the power of sale given by the will, and in the settlement of that all the parties interested in the fund had a right to be heard.

I therefore hold that the sale of the land claimed in this action under the order of the court, above referred to, was valid, and passed the whole fee to the purchaser, who took the land freed and discharged of all claims in favor of these plaintiffs.

It is therefore ordered and adjudged, that the exceptions be overruled, and report of the master confirmed, and that the complaint be dismissed with costs to be paid by the plaintiffs.

The plaintiffs appealed on the following exceptions:

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*1. Because, it is respectfully submitted, that his honor erred in holding that the sale of the land claimed in this action under the order of the court, made under proceedings commenced November 3, 1871, by Maria H. Thompson against Reuben S. Chick, her trustee, was valid, and passed the whole fee to the purchaser, who took the land freed and discharged of all claims in favor of the plaintiffs.

2. Because his honor erred in holding that under the will of Burwell Chick there is nothing which gives the plaintiffs any legal estate in the land in question, and that they had an interest only in the proceeds of sale, and that the trustee held the fee.

3. Because that his honor erred in holding that the plaintiffs in this action, who were interested, were not necessary parties to the said snit of Maria H. Thompson against Reuben S. Chick, and that the tenant for life and the trustee, Reuben S. Chick, were the only necessary and proper parties to said snit.

Messrs. Stokes & Irvine, G. M. Chaplin, and Clark & Williams, for appellants.

Messrs. T. Q. and A. H. Donaldson, Perry & Heyward, and Wells & Orr, contra.

October 23, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was brought to recover possession of a half acre lot in the city of Greenville. The testimony is not in the Brief, but the report of master Douthit is so full and clear that it will only be necessary to give such an outline as will make the opinion intelligible.

* * * * *

Considering, as we should, the fourth and twelfth clauses of the will together, and making a small transposition by placing the last paragraph of clause twelve in its natural and proper position as part of the disposing clause, the whole provision would read as follows: "I give unto my son, Reuben S. Chick, in trust for my daughter, Maria H. Thompson, and at her death to such child or children as may live to come of age, the following property, &c. But if my said daughter should die

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leaving no child, it is my wish that her trustee should sell the property in his hands and divide the proceeds of the same equally between my surviving children or the heirs of their bodies," &c. It is manifest that Mrs. Thompson and her children were naturally the first objects of the testator's bounty, and the provision that, in case of her death without a child, the property should be sold and the proceeds equally divided among his other surviving children, was merely secondary. Keeping this in view, it seems to us that several points contested are so clear as to make it unnecessary to enter into the intricate and involved doctrines of contingent and springing uses mooted in the learned argument at the bar.

There can be no reasonable doubt that the testator intended to dispose of his whole interest in the property, leaving no part of it intestate. We think that such intention was effectually carried out, and that the fee in the land was devised directly to the trustee. It is true that the word "heirs" is not used, but our statute (Gen. Stat., § 1861) makes the use of words of limitation in a will un-

necessary. Every devise shall be considered as a gift in fee simple, unless such a construction be inconsistent with the will of the testator, expressed or implied.

But apart from the statute, the rule is that lands devised to a trustee, upon certain trusts, gives such estate as is commensurate with the purposes of the trust. The duties imposed upon this trustee made the fee necessary to support them. He was required to hold the title for Mrs. Thompson during her life, and if she died without children, "to sell the property in his hands and divide the proceeds equally," &c. The trust was by no means a naked power to sell, but a devise of the property to the trustee for certain purposes, and in one event (which has happened) to sell and distribute the proceeds, &c. "The distinction is between a devise to executors to sell, as if the testator says: 'I devise my land to my executor to be sold;' and a devise that the executor shall sell, as when the testator says: 'I desire or direct that my lands be sold by my executors.' In the first case the fee passes to the executors; in the last the fee passes to the heir, to be divested whenever the power is executed by the executors." *Executors of Ware v. Murph, Rice*, 55 [33 Am. Dec. 97]; 3 Jarm. Wills (5 Am. edit.) 52, 53, and notes.

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*Nor do we think that the trusts were executed by the statute of uses. A passive trust, or one where the trustee has no active duty imposed upon him, is executed by the statute of uses; but the statute does not execute the trust in case there is some duty to be performed or act to be done by the trustee, made necessary by the scheme of the will, and for the performance of which it is necessary that the legal estate should not pass from the trustee by operation of the statute. *Willman v. Holmes*, 4 Rich. Eq., 475; *Iorr v. Hodges*, Speers Eq., 593; 3 Jarman, 52, and notes. Or, as stated by Chancellor Harper in *Posey v. Cook* (1 Hill, 413): "Perhaps the rule might be more accurately expressed to say that where the intention is that the estate shall not be executed in the *cestui qui use*, and any object is to be effected by its remaining in the trustee, then it shall not be executed," &c. Besides, as to the interest of these plaintiffs, the property was to be considered more personally, as we shall see hereafter.

We cannot doubt that the interest of the plaintiffs, under the will of their father, Dr. Chick, was contingent. As to the character of the interests, it seems to us that the case of *Faber v. Police* (10 S. C., 376), cited in the decree below, is absolutely conclusive. It was there held that "a devise to trustees for the use of A. during his life, and after his death in trust for his lawful issue living at the time of his death, and if he should die leaving no issue (there being none), then over to his residuary devisees and legatees, gives to the remaindermen not a vested, but a con-

tingent remainder." Considered at the time of the testator's death, when the will took effect, the interests of the plaintiffs were dependent upon a double contingency: First, that Mrs. Thompson should die without children; and, second, that the remaindermen should survive her. It cannot be necessary upon this point to do more than quote a portion of Mr. Justice Melver's remarks in the case of *Faber v. Police*: "According to the elementary writers a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a per-

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son not in being, or not *ascertained; or if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is, that in the one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period; while in the other the right to the estate, as well as the right to the possession of such estate is not only deferred to a future period, but is dependent upon the happening of some future contingency." &c.

It will be observed that in no event is the land itself devised to the plaintiffs, but "the proceeds" of sale directed to be made by the trustee. In such case it is well settled that, by the equitable doctrine of constructive conversion, the property is considered as personalty, and not as realty. "Money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this in whatever manner the direction is given. * * * It follows, therefore, that any person claiming property under a will or settlement directing its conversion must take it in the character which such instrument has impressed on it, and its subsequent devolution and disposition will be governed by the rules applicable to property of this kind," &c. 2 *Jarm. Wills* (5 Am. edit.) 170, and notes, where all the authorities are collected; and among them *Perry v. Logan*, 5 *Rich. Eq.*, 202.

We do not consider this as one of the cases in which the beneficiaries may elect to take the property in specie which was ordered to be sold. Not to advert to the fact that there has already been "a de facto" conversion the general rule is, that where the conversion is imperatively directed, it is regarded as taking place at the time of the testator's death, although the time fixed by him for the sale for that purpose be distant. The words of the will: "It is my wish that her trustee shall sell the property in his hands

and distribute the proceeds equally," &c., amount to a positive direction that in the event contemplated, the property should not go over in specie, but be converted at all events "out and out." *Mathis v. Gudlin*, 8 *Rich. Eq.*, 79; *Wilkins v. Taylor*, *Id.*, 291; *North v. Valk*, *Dudley's Eq.*, 212. The lands,

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as such, were *not devised to the plaintiffs, but the proceeds thereof as personalty, and therefore they are not devisees, but legatees. Having no title to the land itself, they cannot at law recover it from Gilreath, the defendant, who is in possession with the legal title from the trustee. So far as the recovery of the land is concerned, this would seem to be conclusive against the plaintiffs.

But it is urged that even if the claim of the plaintiffs is a mere equity for an account of the proceeds of sale, yet as *cestuis que trust* they may come into court to have the land now sold in order to get at "the proceeds;" that the sale made prematurely during the life of Mrs. Thompson being void, and the order of the court not binding on them, as they were not parties to the proceeding, they may follow the land into the possession of a purchaser at that void sale, who, though having the legal title from the trustee, purchased with constructive notice of the will containing the trust, which still attaches to the land. This makes the question whether the sale made under the orders of the court in the case of *Thompson v. Chick*, Trustee, is binding upon the plaintiffs, who were not made parties. The sale was after due notice, open, fair, and for full value. There is no reason to doubt that the parties acted in good faith without suspecting any defect. It was what is known as a judicial sale, in which the court is, in some sense, the vendor. From the confidence which the public reposes in the judgments of the courts, which should not be lightly weakened, it is wise policy to sustain such sales when it can be done without violating principle or doing injustice. It is true, there are some cases in which the judgment of the court operates on the property itself, in rem, without any nice regard to the parties personally before the court, but such cases are exceptional. The general rule certainly is, that those who are not parties are not bound by the judgment.

This court has lately held in the case of *Moseley v. Hankinson*, Trustee (22 S. C., 323), that contingent remaindermen in esse and within reach, are necessary parties to a proceeding to sell land. It is true, in that case the interest of the remaindermen was in the land itself, which was the subject of the proceeding, while in this they only have an interest in the proceeds, after sale by the trustee. But, in respect to the necessity of the

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*remaindermen being parties, we cannot see such a distinction between the cases as would warrant us in holding differently in this case. As we understand it, the rule pro-

ceeds on the general principle that all persons in esse should be made parties who have a substantial interest in the subject matter, without reference to what may be the precise character of that interest.

The case at bar, however, does differ from that of *Moseley v. Hankinson* in one important particular. In that case *Fortune*, the trustee, had no power to sell; and of course the sale rested solely on the order of the court, which was held not to bar the remaindermen who were not made parties. But in this case the will gave the trustee express power to sell, which he could exercise without any authority whatever from the court. The trustee did make the sale, which was in all respects according to the express terms of the trust, except that it was made during the life of Mrs. Thompson, instead of at her death. Leaving out of view entirely the order of the court, this scintilla of irregularity is the sole ground relied upon to avoid the sale and recover the land, with all the improvements which have been placed upon it.

No doubt the general principle is, that such powers must be strictly executed, but there is one rule of interpretation which, as it seems to us, covers the case, and was not referred to by the Circuit Judge, probably for the reason that, in his view, it was unnecessary. Mr. Perry lays it down as follows: "A power of sale, like all other powers, can be executed only in the mode and manner prescribed in the instrument of trust, as where the trust is to sell after the death of the tenant for life, * * * a sale before the time is bad, although made by the decree of the court or act of the legislature. But the execution of the power of sale may be accelerated by the tenant for life surrendering the life estate, or by joining with the trustee in effecting the conveyance; for the postponement of the sale being for the benefit of the tenant for life, such tenant may, by executing the deed of conveyance, waive such benefit. If, however, the postponement of the sale is not for the benefit of the tenant for life, but for the benefit of the remaindermen, as by preserving real security for them, or with the expectation of securing a rise in value for them, the sale of the estate cannot

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be accelerated, even with the concurrence of the tenant for life." See 2 *Perry Trusts* (3d edit.), § 783, and authorities in notes.

In regard to the intention of the testator on the point indicated, we have no doubt whatever. As we construe the will, Mrs. Thompson was the first object of the testator's bounty, and the postponement of the sale of the land until her death was entirely for her benefit, and without reference to enhancing the value of the limitation over to the remaindermen, who were only secondary, and might never take. It is manifest that the testator intended Mrs. Thompson to enjoy the property in specie during her life,

but in case she should die without child or children, that it should never pass over in that form to the remaindermen. The sale was made in the life-time of Mrs. Thompson, at her earnest request and for her benefit, in fact, to enable her to live on the interest of the purchase money, which, being a feeble lady, she could not do on the land itself, as she could not make it remunerative.

It is true that Mrs. Thompson did not actually sign the deed to the purchaser, but in instituting the proceedings for its sale, she did what, in our judgment, was equivalent to it. She consented to the sale and urged it, and in so doing substantially joined with the trustee in executing the deed of conveyance, which, under the rule above stated, amounted to a waiver of her exclusive right to enjoy the land in specie, and accelerated the execution of the power of sale. The life tenant waived the peculiar privilege given to her by the testator, and concurred in making title to the purchaser; the effect of which was to allow the sale at an earlier day, and the plaintiffs, more remotely connected with the property, have no just cause to complain, but must be remitted to the proceeds of sale.

Indeed, so far as Mrs. Farr is concerned, we agree with the master that she elected to confirm the sale made when she instituted proceedings to recover the purchase money, and actually received a part of it. "So an acceptance of part of the purchase money by the cestui que trust may be a confirmation of a sale made in breach of the trust," &c. 2 *Perry Trusts*, § 852, and notes.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

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*BLAKE v. WALKER.

(April Term, 1885.)

[1. *Municipal Corporations* ⚡57.]

The City Council of Spartanburg, as a municipal corporation, has no powers except such as are conferred by its charter in express terms, or such as are necessary to carry out the powers granted, excepting (if, indeed, it be an exception) the inherent power in all elective bodies of judging of the qualification and election of their members.

[Ed. Note.—Cited in *City of Florence v. Brown*, 49 S. C. 334, 26 S. E. 880, 27 S. E. 273; *Luther v. Wheeler*, 73 S. C. 90, 52 S. E. 874, 4 L. R. A. (N. S.) 746.

For other cases, see *Municipal Corporations*, Cent. Dig. §§ 144, 148; Dec. Dig. ⚡57.]

[2. *Intoxicating Liquors* ⚡36.]

Under the local option law (Gen. Stat., § 1753), all elections are to be conducted according to the law governing municipal elections in the town or city where held; and under the charter of the city of Spartanburg (17 Stat., 435, § 5), the managers are to count the votes and declare the election, such managers to be appointed by the council "to conduct the election." Therefore, the declaration by the mana-

gers of the result of a local option election could not be reviewed by the City Council.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. ☞ 36; Elections, Cent. Dig. § 208½.]

[3. *Intoxicating Liquors* ☞ 36.]

The act of 1868 (14 Stat., 108), authorizing an ultimate decision of municipal elections by boards of aldermen, cannot apply here, as there was no contest before the managers; and that act having been dropped from the General Statutes of 1872, is not now law.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. ☞ 36.]

[4. *Intoxicating Liquors* ☞ 36.]

The council here were required to act upon the declaration of the result by the managers, and not upon the determination by the council of how the majority voted.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. ☞ 36; Municipal Corporations, Cent. Dig. § 702.]

[5. *Intoxicating Liquors* ☞ 36.]

The conduct of an election does not literally include a declaration of the result, but the word "conducted" in the local option law had a wider meaning, and in its application to the city of Spartanburg was intended to embrace also a declaration of the result.

[Ed. Note.—Cited in *Sezars v. Parrott*, 54 S. C. 36, 31 S. E. 677, 865.

For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 43, 44; Dec. Dig. ☞ 36; Municipal Corporations, Cent. Dig. § 702.]

[This case is also cited in *Maxwell v. Tolly*, 26 S. C. 80, 1 S. E. 160, without specific application.]

Before Wallace, J., Spartanburg, December, 1884.

The appeal in this case was from the following interlocutory order of injunction:

The complaint in this action alleges, in substance, that under an act approved February 9, 1882, and entitled "An act to provide a local option law for the incorporated cities, towns, and villages of this State," a number of citizens of the city of Spartanburg, equal to one-third of the number of votes cast in the next preceding municipal election in that city, signed a petition and delivered it to the City Council, in which they asked that the question of "license" or "no license" should be submitted to an election by the voters of the city. In accord-

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ance with the prayer of the petition, the election was ordered to be held on November 29, ensuing, and three managers were appointed by the City Council to conduct it. The election was held at the time appointed, and upon the closing of the polls the managers proceeded immediately to count the votes. They found in the ballot-box and counted 336 for "no license" and 334 for "license," and declared the election in favor of "no license" accordingly. They notified the mayor of this result and adjourned.

The complaint further alleges that notwithstanding these facts, the mayor and aldermen proceeded on December 5, next, after November 29, 1884, on which day the said election was held, to pass an ordinance for

issuing licenses for the sale of spirituous and malt liquors for the year 1885, and that under said ordinance did issue licenses to several persons to sell liquor in the city. The object of the complaint is to obtain a judgment of the court, that the City Council be enjoined from granting further licenses, and that the persons to whom licenses have been granted be restrained from selling liquor under them.

A motion was made by plaintiffs' counsel for an order requiring the defendants to show cause why they should not be enjoined from proceeding to grant licenses under the ordinance above referred to. The motion was granted, and the defendants made return on the day fixed in the order, viz., December 29, last past. They say in substance, that after the election ordered by them on the question of "license" or "no license" had been held, and the result had been certified to them by the managers, a petition signed by certain electors of the city and sworn to was presented to the council, in which it was alleged that at the said election certain persons named in the petition, who were not qualified voters of the city, had been allowed to vote; and, therefore, the petitioners prayed that the City Council would investigate the election. In pursuance of the prayer of this petition, the council heard evidence touching the allegations contained in the paper, and after full hearing adjudged and determined that a majority of the voters of the city had voted in favor of "license." That the City Council then passed the ordinance providing for granting licenses, and did grant licenses to sell liquor to their co-defendants herein. The return of the defendants other than the

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City Council rest, in their return, upon essentially the same grounds as the City Council.

It appears from the foregoing statement that the plaintiffs claim that the declaration by the managers of the election was final, and bound the City Council; and that the defendants claim that the City Council had the legal right to investigate the election, and thus ascertain the true result and declare it as they found the facts to be. Thus the leading question in the case is evolved. Was the declaration of the election by the managers final and conclusive? or did the City Council have the legal right to investigate the election and declare a different result from that declared by the managers?

I do not desire to go into an exhaustive discussion of the interesting issues, obvious upon the face of the pleadings, upon this preliminary motion. To entitle the plaintiffs to the relief sought now, in advance of a trial upon the merits, a *prima facie* case need only appear. To this end a brief examination of the law governing municipal elections in the city of Spartanburg is indispensable. Section 8 of the act under which the election was held, which act is known as the local option

law, and to be found in 17 Stat., §95, is as follows: "All elections under this act shall be conducted according to the laws now governing the municipal elections of the city, town, or village in which they are held." This language suggests that the laws governing municipal elections of the different municipalities of the State may not be the same, and a slight examination will show this to be the fact, the difference, however, consisting in matters of detail.

It is important here, therefore, to ascertain the laws governing elections of the city of Spartanburg. The charter of the city, approved December 24, 1880, provides for the elections with much detail and particularity, so much so as to induce the belief that the charter was intended to cover the whole subject. It provides the time of holding the elections, for the registration of voters, the disposition of the registration lists, the qualifications of voters, the administration of oaths, the counting of the votes, the declaration of the election, the notice of the result to the mayor, and the notification by him to the persons elected. Section 5 of the said charter is

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in the following words: "The said *election shall be held in some convenient place in said city, from 8 o'clock in the morning until 4 o'clock in the afternoon, and when the polls shall be closed the managers shall forthwith proceed to count the votes and declare the election, and give notice in writing to the mayor then being, who shall, within two days thereafter, give notice, or cause the same to be given, to the persons elected," &c. Section 6 of the same charter provides "that in case a vacancy shall occur in the office of mayor or alderman by death, resignation, or otherwise, an election shall be held to fill such vacancy by order of the mayor and aldermen," &c.

It will be observed that by the 5th section quoted above the duty is imposed upon the managers to count the votes and declare the election, and give notice in writing to the mayor, who, within two days, must give notice to the persons elected; the obvious construction of this language is that the managers are not only to conduct the election, but also declare the election and announce the choice of the electors. They are then required to communicate this fact officially, not to the City Council, but to the mayor; and the mayor is required, not to investigate the election, but to inform the persons elected of their election; no duty in this connection is imposed upon the City Council, and upon the mayor is imposed only the purely ministerial duty of informing the persons chosen. It is therefore plain that no power to investigate the election is granted to the City Council by the city charter.

It is argued, however, that the power of the City Council to investigate any municipal election is supported by section 5 of "an act

to provide for the election of the officers of the incorporated cities and towns in the State of South Carolina," ratified September 25, 1868 (14 Stat., 108). That act affords upon its face very strong evidence, when taken in connection with the condition of civil affairs of the State at the time of its enactment, which is matter of history, that it was intended to meet an existing exigency and then expire, and that its object has been accomplished long ago. It was re-enacted in 1872 in the general statutes, probably because some of the officers elected under it were still in office, and to repeal it then would perhaps have destroyed their tenure. The section of that act relied on, or as much of it as is material to the issue here, is as follows: After

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providing for *the counting of the votes by the managers, and the communication of the result to the mayor, etc., "the managers of election shall decide contested cases, subject to the ultimate decision of the board of aldermen or wardens, when organized, except when the election of a majority of the persons voted for are contested, or the managers charged with illegal conduct, in which case the returns, together with the ballots, shall be examined and the case investigated by the acting board of aldermen, who shall declare the election, and their decision shall be binding upon all parties."

In elections held under this act, the managers heard contests in the first instance, and the newly elected board of aldermen could hear appeals from their judgment; or if the election of a majority of the persons voted for or the managers were charged with illegal conduct, the existing board of aldermen were invested with power to hear and determine originally. None of these conditions exist in the present case. There has been no hearing of a contest by the managers and an appeal to the council. A majority of the persons voted for have not had their election contested, nor are the managers charged with illegal conduct, but only the named voters. The conditions which this act made necessary to give the City Council the power to investigate the election not existing, there is nothing left upon which to raise the power.

As has already been stated, this act of 1868 was re-enacted in 1872 in the General Statutes. The act is found entire in the General Statutes of 1872, beginning at page 39, except the paragraph quoted above from section 5, which is entirely omitted. That the omission was intentional can be collected from the fact that the act itself was only provisional, and that no more elections were to be held under it, and the body of the act was preserved only to support the tenure of those officers who had been elected under it. In addition to this, the Supreme Court, in the case of *State v. Acting Board of Aldermen of Charleston* (1 S. C., 40), had held that the acting board of aldermen, un-

der that clause, had no power of judicially deciding an election, but could only declare the result; and it had been held long ago in this State, first in *Johnston v. Charleston* (1 Bay., 441), and afterwards in *State v. Schmierle* (5

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Rich., 301), that all elective *bodies, including elective municipal bodies, had an absolute right to decide upon the election of their own members. So that it was useless to give to the new board, when organized, an appellate jurisdiction from the judgment of the managers in a matter in which they already had an absolute conclusive original jurisdiction. The reason of the omission is therefore obvious.

The act, then, of 1872, without this clause under consideration, taken in connection with the law upon the subject as declared by the courts in the cases last above referred to, covered the whole ground of the original act of 1868, and was manifestly intended to embrace the whole subject-matter of that act, and that act is thereby repealed in all its parts. *Sedg. Stat. Law*, 104, 105. If it should be insisted that the re-enacted statute of 1872 has still any vitality, the charter of the city of Spartanburg having exhaustively covered the same ground in regard to elections with that statute, it is clear that the provisions of the charter were intended to repeal, and under the principles just above referred to did repeal, that act as to the city of Spartanburg.

It thus appears that the only law applicable to elections in the city of Spartanburg is the charter of that city, except the decisions in *Johnston v. Charleston* and *State v. Schmierle*, *supra*. A municipal corporation is a creature of statute. All its powers are derivative. It has no power unless expressly granted by the legislature of the State, or implied, because necessary to carry expressly granted powers into effect. The charter of the city of Spartanburg, as has been already seen, imposes no duty upon the City Council in connection with the declaration of an election, and imposes only a slight ministerial duty—that of notifying the persons elected—upon the mayor; and this charter, as we have seen, is the only statute applicable to the matter. This would be sufficiently decisive of the matter for the purposes of this motion but for the two cases above referred to as deciding that an elective municipal body has an inherent power to decide upon the election of its own members. Our courts have gone no further than this, and the cases rest upon a principle that will not support the doctrine that, because they can judge of the elections of their own members, they can judge of all municipal elections.

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*I think, therefore, that it is not necessary to extend this discussion further upon this motion, and that it sufficiently appears that there is enough in the plaintiffs' case to jus-

tify a continuance of the injunction until the case can be heard upon its merits.

It is ordered, that the defendants, the mayor and aldermen of the city of Spartanburg, be restrained and enjoined from issuing or granting, in any form, to any one, license or licenses to sell any kind of liquor, spirituous or malt, in the city of Spartanburg, and that the persons named in the complaint in this action as having obtained licenses to sell malt and spirituous liquors from said city council be restrained and enjoined from selling such liquors, upon the plaintiffs entering into a sufficient bond, to be approved by the clerk of the court, in the sum of five hundred dollars, conditioned to pay such damages as may be sustained by reason of this injunction. It is further ordered, that this order remain of force until the further order of this court.

From this order defendants appealed upon exceptions which made the points considered by this court.

Messrs. D. Johnson, Jr., and R. W. Shand, for appellants.

Messrs. C. P. Sanders, Bomar & Simpson, J. S. R. Thomson, and E. H. Bobo, contra.

October 27, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. [Omitting the statement which appears in the order of the court below.]

The conclusion reached by the Circuit Judge is so fully vindicated by his clear and conclusive reasoning that it is scarcely necessary for us to add anything to what he has so well said. The City Council of Spartanburg, as a municipal corporation, has no powers except such as are conferred by its charter in express terms, or such as are necessary to carry out the powers granted. The only exception to this, if indeed it be an exception, is the inherent power, in all elective bodies, of judging of the qualifications and elections of their members, as held in *Johnston v. The Corpo-*

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ration of Charleston, 1 Bay., 441, and **State v. Schmierle*, 5 *Rich.*, 299. But this exception manifestly does not cover the present case, for here there is no question either as to the qualification or election of any member of the City Council of Spartanburg.

The question here arises under the terms of the act commonly called the local option law, above referred to, and must be determined by the provisions of that act. By one of the provisions of that law (*Gen. Stat.*, § 1753) "all elections under this chapter shall be conducted according to the laws now governing the municipal elections of the city, town, or village in which they are held." Hence to determine the mode of conducting the election which is here in question, we must first ascertain what was the law governing municipal elections in the city of Spartanburg at the time this election was

held. That law is to be found in the charter of the city (17 Stat., 434). The fifth section of that act provides "the said election shall be held at some convenient place or places in said city, from 8 o'clock in the morning until 4 o'clock in the afternoon; and when the polls shall be closed, the managers shall forthwith proceed to count the votes and declare the election, and give notice in writing to the mayor then being," &c.; and in the last sentence of this section the following language occurs: "The mayor and aldermen for the time being shall appoint one or more boards of managers, three managers for each board, to conduct the election," &c.

There is no provision in this act, or in any other that we are aware of, which authorizes the City Council to review the action of the managers. It is true that there was a provision in the act of 1868 (14 Stat., 106) providing for the election of the officers of incorporated cities and towns in this State by which the decision of the managers was subject to the ultimate decision of the boards of aldermen or the wardens when organized, except in certain cases which need not be specified here; but as shown by the Circuit Judge this provision was dropped when the act was incorporated in the General Statutes of 1872, and cannot now be regarded as law; and even if it can be so regarded, yet it would not help the appellants here, for there is no pretence that there was any contest of this election before the managers, and hence there was no case for the ultimate decision of the City Council.

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*It is contended, however, and this seems to be the main point upon which the appellants rely, that the local option law only provides that the election shall be conducted according to the law governing a municipal election in the town or city where such election is held, and that this does not include a determination of the result of the election, which must be done by some other authority than that of the managers; and, inasmuch as the act does not in terms confer this authority upon any one, it must necessarily be exercised by the city council, as their action, in granting or refusing licenses, depends upon the result of the election. It may be very true that when the city council, or a board of county commissioners, is authorized to grant licenses or subscribe for the stock of a railroad upon certain conditions, as, for example, upon condition that a majority of the citizens of the city or county shall vote for such license, or in favor of such subscriptions, it is necessarily implied that the city council, or the board of county commissioners, as the case may be, are authorized to determine whether the required conditions have been complied with, where no other mode of ascer-

taining whether the required conditions have been complied with has been provided, as is held in *The State v. Columbia*, 17 S. C., 84, and *The Board of Commissioners of Knox County v. Aspinwall*, 21 How., 539 [16 L. Ed. 208]. But where the act does provide another mode of determining whether the conditions have been complied with, as, for example, the result of the election, then this principle does not apply, and the result must be determined in the mode prescribed by the act.

The practical inquiry, therefore, is whether the local option law does provide a mode of ascertaining the result of the election. We think that the act, properly construed, does provide that the managers shall declare the result of the election, and, therefore, that the City Council of Spartanburg had no authority to canvass the votes and declare the result. It is true that the act does provide that the election should be conducted according to the law governing municipal elections in the city of Spartanburg, and it may be true that, according to a strict and literal construction of the word "conducted," it would not embrace a declaration of the result; but

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if there is anything else in the act *tending to show that the legislature did not intend to use this word in its limited sense, then it is the duty of the court to give effect to such intention.

Now, it seems to us clear that the legislature intended to apply the same law regulating the municipal election to the election provided for in the local option act, and that this act must be read as if the provisions of the fifth section of the charter of the city of Spartanburg had been incorporated into it. So reading it, we think it manifest that the legislature did not intend to use the word "conducted" in its strict and limited sense, but intended it also to embrace the declaration of the result. As we have seen, the fifth section of the charter of the city expressly provides that "when the polls shall be closed, the managers shall forthwith proceed to count the votes and declare the election, and give notice in writing to the mayor"; and in the latter part of the same section it provides: "The mayor and aldermen for the time being shall appoint one or more boards of managers, three managers to each board, to conduct the election," showing plainly that the word "conduct" was not there used in its limited sense, but was intended to embrace also the declaration of the result: the duties of the managers are first prescribed, amongst which is the duty to declare the result of the election, and then the persons appointed to perform these duties are spoken of as persons appointed to conduct the election.

The judgment of this court is that the order appealed from be affirmed.

23 S. C. 526

CALVO v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO.

(April Term, 1885.)

[1. *Master and Servant* ⇐185.]

A locomotive engineer and a section-master of track-workers are not fellow-servants in the sense that the railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 410; Dec. Dig. ⇐185.]

[2. *Master and Servant* ⇐185.]

Where an engine is thrown from the track and the engineer injured through the negligent violation of the rules of the company by a section-master, the company is liable to the engineer, the section-master being a representative of the company.

[Ed. Note.—Cited in *Boatwright v. Northeastern R. Co.*, 25 S. C. 133; *Coleman v. Wilmington, C. & A. R. Co.*, 25 S. C. 450, 60 Am. Rep. 516; *Jenkins v. Richmond & D. R. Co.*, 39 S. C. 512, 18 S. E. 182, 39 Am. St. Rep. 750; *Whaley v. Bartlett*, 42 S. C. 472, 20 S. E. 745; *Richey v. Southern Ry.*, 69 S. C. 392, 48 S. E. 285; *Brabham v. American Telephone & Telegraph Co.*, 71 S. C. 57, 50 S. E. 716; *Shirley v. Abbeville Furniture Co.*, 76 S. C. 455, 57 S. E. 178, 121 Am. St. Rep. 952.

For other cases, see *Master and Servant*, Cent. Dig. § 390; Dec. Dig. ⇐185.]

[3. *Master and Servant* ⇐168.]

[Cited in *Hicks v. Southern Ry. Co.*, 38 S. E. 731, to the point that, if the negligence complained of is that of a fellow servant, the plaintiff must show that the master was negligent in employing such fellow servant.]

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 334, 335, 337-340, 349; Dec. Dig. ⇐168.]

[This case is also cited in *Jenkins v. Richmond & D. R. Co.*, 39 S. C. 513, 18 S. E. 182, 39 Am. St. Rep. 750, as to facts.]

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*Before Wallace, J., Richland, November, 1884.

This was an action by Horace E. Calvo for damages, commenced in February, 1884. The opinion states the case.

Mr. J. M. McMaster, for appellant, upon the point decided by the court, cited 18 S. C., 271, 275; 78 Va., 745; 112 U. S., 377; 93 Ill., 302; 6 Heisk., 347; 110 Mass., 240; 48 Me., 113; 38 Wis., 298; 45 Ill., 197; 58 Id., 272; 77 Id., 391; 2 Duval, 114; 37 Mich., 205; 52 Ill., 461; 62 Mo., 326; 63 Id., 397; 9 Heisk., 27, 866; 64 N. Y., 12; 49 Id., 521; 3 Fost. & F., 622; 11 R. I., 152; 78 Pa. St., 25; 2 Thomp. Negl., 985; *Pierce R. R.*, 376; *Shear. & Redf. Negl.*, §§ 100, 102; *Whart. Negl.*, § 222.

Mr. J. H. Rion, contra, cited 15 Rich., 204; 117 E. C. L. R., 579; 2 H. & C. Exch., 109; 109 U. S., 483; *Wood M. & S.*, § 425; *Shear. & Redf. Negl.*, 109; 2 *Rorer Rail.*, 1193; 18 *Reporter*, 814, 831, 114; 19 Id., 95; 86 Pa. St., 432; 10 Cush., 228; 31 Ohio St., 196; 17 Id., 197; 5 Am. & Eng. R. R. Cas., 516; 2 Id., 97; 70 Me., 60; 129 Mass., 268.

October 27, 1885. The opinion of the court was delivered by

Mr. Justice MELVER. The plaintiff, who is a locomotive engineer, brings this action to recover damages for an injury sustained while serving the defendant in that capacity. It seems that on March 22, 1881, the defendant was directed to take an extra freight train from Columbia to Charlotte, which train was to be run under the signals of a passenger train which preceded him. On reaching a point between Cornwall and Chester plaintiff's engine was thrown from the track, whereby he received the injuries complained of. It appears that one Wooten, a section-master and supervisor of the track-laying force, had taken up the track at that point for the purpose of repairs, and that this was the cause of the disaster.

The testimony tended to show that Wooten disregarded the signal carried by the preceding passenger train, which indicated that it was followed by another train, and did not

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wait for the *passage of such train, as required by the rules of the company, before taking up the track; and also neglected to place the proper signal to warn an approaching train that the track was not in condition to be used, as required by another rule of the company.

At the close of the testimony, the defendant's counsel submitted a motion for a nonsuit, "on the ground that the defendant was not liable for the injury, for it was the result of the negligence of a fellow-servant, viz., that the plaintiff, Calvo, was a fellow-servant with Wooten, the section-master." The motion was granted, though upon what ground is not stated in the order granting the motion, but as there was certainly some evidence of the negligence of Wooten, we will assume that it was upon the ground that the plaintiff and Wooten were fellow-servants and that, therefore, the company was not liable, as this seems to be assumed in the argument.

So that the only question for us to determine, is whether a locomotive engineer and a section-master are fellow-servants in the sense that the company would not be liable to one for the negligence of the other. The question as to who are fellow-servants in this sense has given rise to no little conflict of opinion, and the decisions elsewhere are conflicting. The only cases in this State where this question has been distinctly considered are *Gunter v. Graniteville Manufacturing Co.* (18 S. C., 262 [44 Am. Rep. 573]), followed by *Lasure v. Graniteville Manufacturing Co.* (Ibid., 275), and recognized in *Couch v. Charlotte, Columbia & Augusta R. R. Co.* (22 S. C., 557). It is there determined that in order to ascertain whether a given employee is the representative of the master, or a fellow-servant with other employees, "the true test is

whether the person in question is employed to do any of the duties of the master; if so, then he cannot be regarded as a fellow-servant or co laborer with the operatives, but is the representative of the master, and any negligence on his part in the performance of the duty of the master thus delegated to him, must be regarded as the negligence of the master."

So that the practical inquiry in this case is, whether Wooten, the section-master, was the representative of the defendant. Was he employed to do any of the duties of the com-

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pany? If so, *then the company is liable to the plaintiff for any injuries he may have sustained by reason of the negligence of Wooten. But if not, then the company would not be liable. As we understand it, the main duty of the section-master is to keep the track in order so as to insure, as far as practicable, the safety of the trains continually passing over it. Now, it is well settled that it is the duty of the master, not only to provide his servants, in the first instance, with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair, and any negligence in the performance of such duty, whether done by the master in person, or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence.

In the case of corporations this duty, as well as all others, must necessarily be committed to subordinate agents, and the fact that these subordinate agents, as in the present case, are subjected, in the performance of such duty, to the supervision of other and higher officers, cannot affect the question. The fact that the section-master is under the supervision of the roadmaster, and he, in turn, is under the supervision of the general superintendent, does not alter the nature of the duty which he is employed to do. The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty, is the negligence of the company.

These views are fully supported, not only by Gunter's Case, supra, and the authorities therein cited, but also by other cases. In *Lewis v. St. Louis & Iron Mountain Railroad Co.* (59 Mo., 495; S. C. 21 Am. Rep., 385), it was held that the company was liable to a brakeman for injuries sustained by reason of negligence of the section-master, to whom

was committed the duty of keeping the road-bed in proper repair, in performing that

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*duty. The court held that they were not fellow-servants, and that the negligence of the section-master was the negligence of the company. The court, after laying it down as an established rule that it is the duty of a railroad company to keep its road-bed in proper repair, so as to insure, as far as practicable, the safety of those who may use it, whether passengers or servants, and after saying that this duty was committed to the section foreman, or master, used this language: "It is true, in one sense, the section foreman, whose duty it was to superintend the track and keep it clear and safe, was a fellow-servant, as all are, to a certain extent, fellow-servants, who are engaged in the same business or enterprise; but he represented the company in the line of his duty—he was the company in that regard—and his negligence was the company's negligence, in a matter in which it owed a duty and obligation to its servants."

In *Davis v. Central Vermont Railroad Company* (55 Vt., 84; S. C. 45 Am. Rep., 590), it was held that where a fireman was killed by the washing out of a culvert, caused by the negligence of the company's bridge builder in constructing and of the roadmaster in repairing the culvert, although they were ordinarily skilful and careful in their several employments, the company was held liable, upon the ground that it was the duty of the company to provide and maintain a safe road-bed, and the negligence of the subordinate, to whom this duty was committed, was the negligence of the company. This is the language used by the court: "The bridge-builder and road-master, while inspecting and caring for the defectively constructed culvert, were performing a duty which, as between the intestate and defendant, it was the duty of the defendant to perform. Their negligence therein was the negligence of the defendant."

The case of *Moon v. Richmond & Alleghany R. R. Co.* (78 Va., 745; S. C. 49 Am. Rep., [401]) was very much like the one now under consideration. It was there held that a section-master and train hand, or brakeman, were not fellow-servants in the sense that would exempt the company from liability for injuries sustained by the train hand by reason of the negligence of the section-master. The court said: "where a company delegates to an agent or employee the perform-

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ance of duties which the law *makes it incumbent on the company to perform, his acts are the acts of the company—his negligence is the negligence of the company"—and then went on to show that it was the duty of a railroad company to provide and maintain a suitable and safe roadway for the use of its trains. See, also, the case of *Gilmore v.*

Northern Pacific Ry. Co. (15 Am. & Eng. Railway Cas. 304), where many authorities upon the subject are collected in a note.

Under the view which we have taken of this case, the question whether the rule which exempts a master from liability for injuries sustained by one of his servants, by reason of the negligence of a fellow-servant, should be abrogated, which was so elaborately argued by the counsel for appellant, does not arise, and has not, therefore, been considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

23 S. C. 531

DARWIN v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO.

(April Term, 1885.)

[Reported and annotated in 55 Am. Rep. 32.]

[1. Railroads \hookrightarrow 276.]

While a railroad company cannot be said to owe no duty to one who unlawfully intrudes himself upon its engines or cars, it does not owe to him the same duty that it owes to a passenger, or even to one of its employes.

[Ed. Note.—Cited in *Littlejohn v. Richmond & D. R. R. Co.*, 49 S. C. 17, 26 S. E. 967; *Martin v. Southern Ry.*, 51 S. C. 163, 28 S. E. 303; *Smalley v. Railway Co.*, 57 S. C. 251, 35 S. E. 489; *Burns v. Southern Ry.*, 63 S. C. 57, 40 S. E. 1018; *Haltiwanger, Adm'x, v. Columbia, N. & L. R. R.*, 64 S. C. 24, 41 S. E. 810; *Elkins v. South Carolina & G. R. R. Co.*, 64 S. C. 560, 561, 43 S. E. 19.

For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. \hookrightarrow 246.]

[2. Railroads \hookrightarrow 276.]

If a stranger takes his seat upon the pilot of the engine of a construction train, in sight of the engineer, and in that position is killed by a collision with a car upon the track, this would show no negligence by the company; and action for damages being brought by the administrator of the deceased against the company, a non-suit should be granted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 884; Dec. Dig. \hookrightarrow 276.]

[3. Railroads \hookrightarrow 282.]

The proof by plaintiff of gross contributory negligence on his part does not authorize a non-suit; contributory negligence is a matter of defence, and presents a question of fact to be solved by a jury.

[Ed. Note.—Cited in *Petrie v. Columbia & G. R. R. Co.*, 29 S. C. 319, 7 S. E. 515; *Donahue v. Railroad Co.*, 32 S. C. 302, 11 S. E. 95, 17 Am. St. Rep. 854; *Whaley v. Bartlett*, 42 S. C. 469, 20 S. E. 745; *Proctor v. Southern Ry.*, 61 S. C. 187, 39 S. E. 351; *Keys v. Wimsboro Granite Co.*, 72 S. C. 104, 51 S. E. 549; *Lyon v. Charleston & W. C. Ry.*, 77 S. C. 344, 58 S. E. 12.

For other cases, see Railroads, Cent. Dig. §§ 910-923; Dec. Dig. \hookrightarrow 282.]

[4. Railroads \hookrightarrow 276.]

When a trespasser places himself upon the pilot of an engine, and is permitted by the engineer, in violation of the rules of the railroad company, to remain there, and is killed, the company is not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. \hookrightarrow 276.]

[5. Railroads \hookrightarrow 278.]

Where a trespasser gets, without authority, upon the most dangerous place on a railroad engine and is killed, he is guilty of contributory negligence, and no recovery of damages for his death can be obtained against the company, even if the company had been guilty of negli-

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gence, and although the engineer knew the person was in such place of danger and did not warn him off. In the case of a passenger, the rule would be different.

[Ed. Note.—Cited in *Elkins v. South Carolina & G. R. R. Co.*, 64 S. C. 559, 43 S. E. 19.

For other cases, see Railroads, Cent. Dig. §§ 891-900; Dec. Dig. \hookrightarrow 278.]

[6. Negligence \hookrightarrow 80.]

Contributory negligence ceases to be a defence only where the injury complained of is shown to have been done willfully or purposely, or is the result of such gross negligence as would imply wantonness or recklessness.

Mr. Chief Justice Simpson and Mr. Justice McGowan concurred in the result.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 84, 85; Dec. Dig. \hookrightarrow 80.]

Before Cothran, J., York, November, 1884.

This was an action by John A. Darwin, as administrator of Peyton A. Darwin, who was a boy of seventeen years of age at the time of his death on the leased road of the defendant company. The opinion fully states the case.

Mr. J. H. Rion, for appellant.

Mr. W. B. Wilson, contra, cited 19 Ill., 499; Shear. & Redf. Negl., §§ 35, 36, 65, 79; 4 Ind., 97; 10 Mees. & W., 546; 16 Conn., 421; 11 East., 60; 9 Ind., 399; 6 Id., 416; 2 Day. (Ky.), 114; 3 Ohio St., 195; 18 N. Y., 259; 95 U. S., 441; 3 Allen, 178; 20 N. Y., 430; 44 Penn., 376; 4 Exch., 244; 5 N. Y., 48; 8 Id., 222; 11 Id., 432.

November 2, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On June 27, 1884, the plaintiff's intestate was killed on the Chester & Lenoir Narrow Gauge Railroad under the following circumstances, and this action is brought by the plaintiff, as his administrator, against the defendant company, lessees of said railroad, to recover damages occasioned by such killing. The engineer in charge of a construction train uncoupled his engine from the train to which it was attached and went down the road for a supply of water, the deceased going with him on the engine. Returning, Darwin was riding on the pilot of the engine, and when it reached the cars it collided with them and Darwin was crushed between the engine and the cars, causing his immediate death.

There was some testimony tending to show

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that at the time of the collision the engine was running faster than usual when coupling; and a railroad engineer who was examined as a witness testified that the speed of the locomotive at the time of the collision must have been at least four miles an hour, too fast for

approaching a train of cars for coupling. The engine was in good order, and when examined, immediately after the accident, the brakes were found to be wound up tight. The pilot is the most dangerous place for one to ride on, and one of the printed rules of the company, put in the hands of every engineer on the road, was that the engineer should not allow any one, except the fireman or road master, to ride on the engine under penalty of discharge. There was no positive testimony that the engineer knew that Darwin was on the engine at the time of the accident, though two colored women standing on the side of the track opposite the point where the collision took place testified that the engineer could have seen him. This is a very brief statement of the testimony, which is set out in full in the record.

On the close of the testimony for the plaintiff, the defendant's counsel moved for a non-suit upon two grounds. 1. Because "there was no sufficient proof of any negligence" on the part of the company. 2. Because "the undisputed proof of the plaintiff established beyond a reasonable doubt that the deceased had been guilty of gross contributory negligence." The motion was refused, and the defendant offering no testimony, the case went to the jury.

The defendant, amongst other things, requested the judge to charge "that if the jury find that the engineer was violating the rules of the defendant in allowing the deceased to ride upon the pilot of the engine, then the defendant is not liable for the killing." This request was refused, "because there was a neglect of duty upon the part of the defendant shown; for it was the duty of the company to employ engineers who are faithful in the discharge of duty." The next request was "that the defendant is not liable for the result of the unauthorized act of the engineer, done against its rules, and resulting from the voluntary act of the one killed." This request was also refused, for the same reason as that given above.

The judge was next requested to charge

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"that even if the jury are satisfied that in this case the defendant is responsible for the acts of the engineer, and the engineer was guilty of great negligence and want of care, yet the plaintiff cannot recover if the deceased was also guilty of contributory negligence; that is to say, that he did not observe proper care under the circumstances." To this request the Circuit Judge responded as follows: "This, gentlemen, brings in the exception under which this case comes to you, and on account of which I refused the non-suit asked. If the defendant, by its agent, knew that this young man was there, and did not take proper care not to injure him, then the defendant is responsible for the result."

The last request was in these words: "That if the deceased failed to observe proper care

under the circumstances, the plaintiff cannot recover." To which the judge responded as follows: "I refuse this for the same reason as the last request to charge. If deceased was in a place of danger, and the agent allowed him to remain there, and by carelessness ran into the cars and killed deceased, then the company is liable. * * * Suppose you come to the conclusion that the engineer, not using due care and proper caution, knowing that the young man was in that place of danger, and by his neglect and want of proper caution caused the death, then the company is liable. It was the duty of the agent, seeing him in that place of danger, to warn him off; and seeing he did not get off, to use such care and caution in the management of his engine so as not, if practicable, to injure the lad. If he failed so to do, the company is liable. In the Jones Case, which you heard read from Otto, the point is this, that the engineer did not know, as the agent did in this case, that the cars were on the track in the tunnel, forming the obstruction."

The jury having rendered a verdict for the plaintiff, defendant appeals, alleging error in refusing the motion for non-suit upon both of the grounds taken, and in refusing the requests to charge as above stated.

It is essential to bear in mind, throughout the consideration of this appeal, that this is not the case of a passenger, or even of an employee, who is understood to assume the risks incident to his employment, who has been injured on defendant's railroad; but it is a case of a bald trespasser who, without law-

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ful authority, *intruded himself upon defendant's engine, and was there injured. It must be manifest that a railroad company does not owe the same duty to a trespasser that it does to a passenger or one of its employees, though we do not go to the extent of holding, as some of the cases (Duff v. Alleghany R. R. Co., 91 Penn. St., 458; S. C. 36 Am. Rep., 675; and Cauley v. Pittsburgh, Cincinnati & St. Louis Railway Company, 95 Penn. St., 398; S. C. 40 Am. Rep., 664) seem to do, that a railroad company owes no duty to one who trespasses upon its tracks or unlawfully intrudes himself upon its engines or cars. No one can safely disregard the ordinary instincts of humanity and shield himself from responsibility for an injury done, even to a trespasser, by its wanton or reckless disregard of such instincts.

So far as we are informed, there is no case in this State which defines the measure of duty which a railroad company owes to one who unlawfully intrudes upon its engines or cars. The nearest approach to it is the case of Carter v. C. & G. R. R. Co. (19 S. C., 20 [45 Am. Rep. 754]), in which the action was brought to recover damages for an injury sustained by a trespasser upon the track of the defendant company. In that case, the court, in speaking of one of the requests to

charge, used this language: "So, too, although the second part of the request may have been good technical law, to wit, 'that if the deceased was upon the track of the defendant without lawful authority, and using it for his own convenience, he was a trespasser, and the company were under no obligation to take precautions against possible injuries to trespassers,' yet this principle could not have shielded the defendant from such injury as may have been produced by its negligence, if any, in every case without exception. It would, no doubt, require a much stronger case to make out negligence as to a trespasser than is required in ordinary cases, but we have found no case which goes to the extent of declaring that a trespasser has no protection." Citing 2 Thomp. Negl., 1162, in notes.

Now, the rule, as laid down in *Gunter v. Graniteville Man. Co.*, 15 S. C., at page 456, in reference to the liability of a master for an injury sustained by one of his servants by reason of the negligence of a fellow-servant, is that the master is not liable unless he has been guilty of negligence in selecting or su-

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pervising such fellow-servant. The court there uses this language: "Where an injury has happened to a servant or employee, the master's liability is fixed as follows: * * * If it results from defective machinery or the negligent act of a co-servant with the injured party, he is not responsible unless the proof shall go further and show that the master's negligence or want of reasonable care in purchasing and overlooking his machinery, or in employing and supervising his servants, was the cause of his having defective machinery in use and negligent servants engaged." Assuming, in this case, that the disaster which resulted in Darwin's losing his life was caused by the negligence of the engineer, yet if Darwin had been a fellow-servant of the engineer instead of a trespasser, under the rule just stated the plaintiff could not recover against the company unless the proof went further and showed negligence either in the employment or the supervising of the engineer.

And shall the company be held to owe a higher duty to a trespasser than it does to one of its servants? Shall it be held responsible in damages to a trespasser when, under the same state of facts, it would not be responsible to one of its employees? In this case there is not the slightest evidence that the company had been guilty of any negligence in employing the engineer, or that it knew, or had any reason to suspect, that he was negligent in the discharge of his duties. Nor was there any testimony tending to show that the company had been negligent in supervising the conduct of the engineer; on the contrary, the testimony shows that stringent orders, under a heavy penalty, had been placed in the hands of all of its engineers, doubtless designed to prevent just such acci-

dents as here occurred. Of course, we need scarcely add that this rule would not apply in the case of a passenger to whom the company owes a much higher duty. Even, therefore, if it be assumed that there was evidence of negligence on the part of the engineer, we do not see the slightest evidence of any negligence on the part of the company, and hence the non-suit ought to have been granted upon this ground.

The second ground upon which the non-suit was claimed cannot be sustained under the

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case of *Carter v. C. & G. R. R. Co.*, *supra*. Contributory negligence is a matter of defense, and presents a question of fact to be solved by a jury.

The first and second requests were, as we have already shown in discussing the question of non-suit, improperly refused in this case, where the question is as to the liability of the company to a trespasser. The fact that the engineer was negligent in this particular instance was no evidence that he was habitually so, and much less was it any evidence that the company knew it, or that it had been guilty of negligence in employing him. All misconduct must have a beginning, and, so far as the testimony shows, this was the first and only act of negligence on the part of the engineer. Certainly there was no testimony tending to show that the company, at the time the engineer was employed, or afterwards, knew or had any reason to suspect that he was, or was likely to be, negligent in the discharge of his duties. While, therefore, the reason given by the Circuit Judge for refusing these requests might have been sufficient if the question was as to the liability of the company for an injury sustained by a passenger, we do not think such reason sufficient in a case of this kind.

The other requests to charge which were refused involve the law as to contributory negligence. The rule upon this subject is laid down in the case of *Gunter v. Graniteville Man. Co.*, *supra*, in the following language: "The question in all the cases seems to be, has the damage or injury complained of been occasioned entirely by the negligence or improper conduct of the defendant, or, notwithstanding such improper act of defendant, would the injury have been avoided but for the negligence or want of ordinary care of the plaintiff? In the former case, the plaintiff is entitled to recover. In the latter, the defendant is entitled to the verdict. * * * In other words, the courts cannot undertake in these cases to solve the problem how far such party may have contributed to the unfortunate result and by this means assess the damages on each pro rata. The only question that can be considered is, has the defendant entirely caused the injury? If so, he is responsible. If, however, the injury could have been avoided by reasonable or proper care on the part of the plaintiff, then the defendant is held harmless."

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*This is an authoritative statement of the rule, and, what is more, it is well sustained by reason. It certainly would be very unjust to allow a person who has sustained an injury by the negligence of another to recover damages for such injury when it is made to appear that he himself contributed by his own negligence to the cause of such injury, or when by proper care on his part he might have avoided it altogether. This would, in effect, be giving one compensation for his own default, and would amount to the offer of a premium for negligence or want of proper care of one's own person.

In *Railroad Co. v. Jones* (95 U. S., 439 [24 L. Ed. 506]), the plaintiff, who was employed by the company in repairing its roadway, while being transported from his place of work by a train to which was attached a box car for the hands to ride in, was riding on the pilot of the engine, when by a collision with other cars in a tunnel which had become detached from another train, was severely injured, and brought his action for damages. The defence was contributory negligence. The court said: "One who by his negligence has brought an injury upon himself cannot recover damages for it. * * * But where the defendant has been guilty of negligence also in the same connection, the result depends upon the facts. The question in such cases is (1) whether the damage was occasioned entirely by the negligence or improper conduct of the defendant; or (2) whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary care and caution that but for such negligence or want of care and caution on his part the misfortune would not have happened. In the former case, the plaintiff is entitled to recover; in the latter, he is not."

This case is identical in principle with the one now under consideration, for it will be found upon examination that the points of difference pointed out by the Circuit Judge and the counsel for respondent were not regarded as material by the court. The distinction alluded to by the Circuit Judge, that there the engineer did not know, as the engineer did in this case, that the cars were on the track in the tunnel, forming the obstruction, does not very clearly appear in the case; and, on the contrary, the court uses this language: "The facts with respect

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to the cars *left in the tunnel are not fully disclosed in the record." But, even assuming that the engineer did not know that the cars were in the tunnel, this fact could only bear on the question of defendant's negligence, and the court said expressly that "for the purposes of this case, we assume that the defendant was guilty of negligence."

So the language quoted by respondent's counsel that "the plaintiff was on the pilot at the time of the accident without the knowledge of any agent of the defendant,"

while it is found in the opinion of the court, is in that portion of it where the learned justice is stating the testimony adduced by the defendant, and does not occur in that part of the opinion where the question of contributory negligence is discussed. On the contrary, it is there said: "The knowledge, assent, or direction of the company's agents as to what he (alluding to the plaintiff) did is immaterial." Again it is said: "The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his (the plaintiff's) part. Without the latter the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit. The case is thus clearly brought within the second of the predicates of mutual negligence we have laid down." Accordingly it was held that the plaintiff was not entitled to recover.

The case practically decides that where one voluntarily places himself in a position on a railroad train known to be dangerous, he cannot recover damages from the company for injuries sustained by a collision upon the ground of contributory negligence, even though his position was known to the agents of the company, and the collision was occasioned by defendant's negligence. This decision, therefore, fully sustains the view which we take of the case now under consideration. Indeed, the present case is much stronger than the one just cited. Here the deceased was on the engine without authori-

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ty, where he had no right to be, *and voluntarily placed himself in a position which the evidence shows was the most dangerous place he could have selected, and in so doing was clearly guilty of contributory negligence. The unfortunate result was due to his own unlawful and reckless act; and even if the defendant had also been guilty of negligence, he should not be permitted to recover damages for an injury to which he himself contributed, although the engineer may have known that he was in such a dangerous place and did not warn him off.

In the case of a passenger the rule would be different, for in such case it is the duty of the company, through its conductor, to look after the comfort and safety of the passengers, and if one of them is known to be in a dangerous position on the train, it would be the duty of the conductor to warn him of his danger; and if he failed to do so, it might be regarded as equivalent to the consent of the company, through its agent, to carry safely such passenger, even in such

dangerous position. But to a trespasser the company owes no such duty. The company is not bound to assume, or even expect, that trespassers will intrude themselves into dangerous places upon their trains, and is therefore under no obligation to provide for their safety by warning them of the danger of their unlawful and reckless acts; but in the case of passengers, whom the company does expect and invite to travel upon their trains, they are under obligation to look after their safety, and if such duty is neglected by their agent appointed for that purpose, they would be liable for the damages resulting from such neglect.

In *Flower v. Penn. R. R. Co.* (69 Penn. St., 210, found in 8 Am. Rep., 251), an engine, tender, and one car ran from the station where the train had stopped down to a water tank, in charge of the fireman, who asked a boy about ten years old standing there, to put in the hose and turn on the water. While the boy was climbing upon the tender to comply with the request, some detached cars belonging to the train came down with ordinary force and struck the car next to the tender, whereby the boy was thrown down and crushed to death, and the court held that the company was not liable. In the opinion it is said: "The true point of this case is, that in climbing the side of the

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tender *or engine, at the request of the fireman, to perform the fireman's duty, the son of the plaintiff did not come within the protection of the company. To recover the company must have come under a duty to him, which made his protection necessary. * * * Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection. * * * The only apology for his presence there is the unauthorized request of one who could not delegate his duty, and had no excuse for visiting his principal with his own thoughtless and foolish act."

In *Eaton v. Delaware, L. & W. R. R. Co.* (57 N. Y., 382, reported also in 15 Am. Rep., 513), plaintiff was invited by the conductor of defendant's coal train to ride on the train, which was never used to transport passengers, and, on the contrary, by the printed regulations of the company, of which, however, the plaintiff had no notice, passengers were forbidden to ride on coal trains. While on the train the plaintiff was injured through the negligence of the employees of the company; held, that the company was not liable. The court said that the unauthorized act of the conductor in inviting the plaintiff to ride on the train could not be attributed to the company so as to create the relation of carrier and passenger, and thereby impose upon the company the duty of care in the transportation of the plaintiff; that he could only be lawfully on the train by an authorized act of the conductor. "It is not necessary to con-

sider whether he was a trespasser. It is enough to hold that a duty to be careful toward him could only spring up on the part of the defendant by an act on the conductor's part, coming within the scope of his authority."

In *Everhart v. Terre Haute & Ind. R. R. Co.* (78 Ind., 292; S. C. 41 Am. Rep., 567), the plaintiff, who was not in the employ of the company, at the request of one of its employees, got on a slowly moving car and applied the brakes. While so occupied he was injured by a collision with other cars, caused by the negligence of other employees, and it was held that he had no remedy against the company. The court said that he was not "in any better condition, legally, than if he had been a mere intermeddler, undertaking to perform the service without request or direction from any one, because, as we have seen, he

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*was not requested or directed to get upon the car and apply the brake by any one having power from the defendant to authorize him to do so. The defendants owed him no duty, either as an employee, passenger, or traveller upon a highway crossed by the railroad."

In *New Orleans, Jackson, &c., R. R. Co. v. Harrison* (48 Miss., 112; S. C. 12 Am. Rep., 356), the conductor of a train ordered a boy, fifteen years of age, not in the service of the company, to uncouple the cars, notoriously a dangerous duty, especially to an inexperienced person, and he was injured by the negligence of the defendant's servants. Held, that he could not recover from the company, the court saying, amongst other things: "If uncoupling the cars was voluntary by Harrison, it was an act of most extraordinary rashness and folly, and one which contributed directly to the injury. It is not the degree of his carelessness, however, which exonerates the company, but the question to be determined is, whether his negligence contributed to the injury of which he complains. It is enough to defeat him if the injury might have been avoided by his exercise of ordinary care, and this rule is based upon grounds of public policy, which require, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected of him."

From these cases it will be seen that the fact that it was known to the conductor or other officer in charge of a train that the person injured had, by his own recklessness, placed himself in a dangerous position, does not affect the question, and that such fact cannot have the effect of overcoming the defence of contributory negligence. It is true that there are cases, many of which were cited by respondent's counsel, tending to establish an exception to the general rule as to contributory negligence, to the effect that the plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury,

if the defendant after becoming aware of the plaintiff's danger, could, by the exercise of ordinary care and diligence, have avoided injuring him; but no such exception has been recognized by the courts of this State, by the Supreme Court of the United States, or by many of the States. In *Gunter's Case*, cited

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above, the defendant must have been aware of the danger to which the plaintiff was exposed in operating the loom in the condition in which it was, and yet it was laid down without qualification or exception that if the negligence of the plaintiff contributed to the injury, she could not recover, notwithstanding the negligence of the defendant.

It seems to us that the correct rule is laid down in *Pennsylvania Company v. Sinclair* (62 Ind., 301; S. C. 30 Am. Rep., 185), where the cases pro and con are collected in a note—that contributory negligence ceases to be a defence only where the injury complained of is shown to have been done wilfully or purposely; or, we would add, where it was the result of such gross negligence as would imply wantonness or recklessness.

We think, therefore, that the Circuit Judge erred in refusing to charge the two last requests of defendant, and that the mere fact that the engineer knew that the deceased was in a place of danger and did not warn him off, would not make the company liable, if the deceased, by his own negligence, recklessness, or want of care, contributed to the injury which he sustained.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Mr. Chief Justice SIMPSON and Mr. Justice MCGOWAN concurred in the result.

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KING v. FRASER.

(April Term, 1885.)

[1. *Appeal and Error* ⇨1022; *Partnership* ⇨218.]

Whether an agreement between A and B, under which A was to receive "as compensation for his services one-half of the net profits, after paying all expenses," was such a partnership as entitled A to claim an interest in property purchased and paid for by B and conveyed to him alone, was a question of fact; and the finding by master and Circuit Judge upon this point was affirmed, it not being unsustained by the evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇨1022; *Partnership*, Cent. Dig. §§ 49, 426–428; Dec. Dig. ⇨218.]

[2. *Mortgages* ⇨173.]

Under the registry act of 1876 (16 Stat., 92; Gen. Stat., § 1776), a mortgage recorded after the time (40 days) allowed by that act, acquires a lien from the date of its record, and

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will, from that date, have priority as to the mortgaged lands over the general debts of the mortgagor not having liens, including such as were contracted without notice to the creditors, between the date of the execution of the mortgage and the date of its record. Mr. Justice McIVER, dissenting.

[Ed. Note.—Cited in *South Carolina Loan & Trust Co. v. McPherson*, 26 S. C. 431, 434, 435, 436, 438, 2 S. E. 267; *Bloom v. Simms*, 27 S. C. 92, 3 S. E. 45; *Carraway v. Carraway*, 27 S. C. 576, 582, 5 S. E. 157; *Mowry v. Crocker*, 33 S. C. 440, 441, 12 S. E. 3; *Perkins v. Loan & Exchange Bank*, 43 S. C. 45, 20 S. E. 759; *Avery & Son v. Wilson*, 47 S. C. 93, 25 S. E. 286; *Turpin v. Sudduth*, 53 S. C. 310, 31 S. E. 245, 306; *Armstrong v. Carwile*, 56 S. C. 463, 470, 472, 35 S. E. 196; *McGhee v. Wells*, 57 S. C. 288, 35 S. E. 529, 76 Am. St. Rep. 567; *Armour & Co. v. Ross*, 78 S. C. 299, 58 S. E. 941, 1135; *Brown v. Sartor*, 87 S. C. 120, 69 S. E. 88.

For other cases, see *Mortgages*, Cent. Dig. § 421; Dec. Dig. ⇨173.]

[3. *Appeal and Error* ⇨832.]

Counsel being absent at the call of a cause in its regular order in this court, the court declined to fix another time for counsel to argue the appeal orally, but granted them leave to submit an argument, which was done. *Held*, the refusal to fix a further time out of order furnished no ground for a rehearing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215–3228; Dec. Dig. ⇨832.]

[This case is also cited in *Armstrong v. Carwile*, 56 S. C. 474, 35 S. E. 196, without specific application.]

[This case is also cited in *Summers v. Brice*, 36 S. C. 210, 15 S. E. 374, as to facts.]

Before Hudson, J., Charleston, July, 1884.

A statement of the facts of this case will be found in the opinion of this court. Upon the status of the Doar mortgage, the master reported as follows:

But it becomes necessary, in the next place, to consider what effect the failure of the executors of Doar to record their mortgage within forty days from its execution as prescribed by law, and their recording it after that time, has upon the relative rights of parties as to the fund in court. The mortgage held by the executors of Doar was executed on February 1, 1877, and was recorded on January 7, 1879. Between those dates all the claims of the general creditors accrued.

It has been earnestly contended, with great force and ability in argument before me, that, inasmuch as these claims were not reduced to judgment prior to the recording of their mortgage by the executors of Doar, on January 7, 1879, they had no lien at that date; and that, under the act of 1876, the mortgage previously unrecorded, but recorded at that date, became from that time a lien prior to any lien that might be acquired by judgments obtained by these creditors after that date. Or to state the question in the language of the learned counsel, who so ably argued the point before me: "The precise question is, whether, under A. A. 1876 (Gen. Stat., § 1776), a deed in fee simple, or a mort-

gage recorded more than forty days after its execution, is valid against the claims of a creditor whose debt was contracted between the date of the execution and the date of the recording of such deed or mortgage, but who had no specific lien or right in rem, to be interfered with by the deed or mortgage at the

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date of its *record. In other words, who are meant by the words 'subsequent creditors and purchasers'? Do they include all creditors or purchasers subsequent to the execution or delivery of the deed or mortgage, or only those whose specific liens, or rights in rem, are interfered with by the recording of the deed or mortgage?"

It was urged that under the act of 1876, the recording of the deed or mortgage executed more than forty days previously, was equivalent to its re-execution at that date, and was a publication and notice of such re-execution, by and from the time of such recording. And that, therefore, as a new deed or mortgage executed on that day would certainly rank as a prior lien as against any "rights" of any creditor who was not a judgment creditor at that date, so an old deed or mortgage then for the first time recorded, would operate in the same way; and that the one would work no greater hardship to the general creditor than the other. It was contended that this was the policy and purpose of the act of 1876, in providing "that the above mentioned deeds or instruments in writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration, without notice, only from the date of such record."

I have been very much impressed by this argument. I am aware of the dangers and inconveniences that must be encountered in the examination of titles when a deed or mortgage which forms a part of the chain of title is recorded out of due time, and I understand the hardships which may be worked, if the words "subsequent creditors" shall be interpreted to mean "general creditors as well as judgment creditors." I am not opposed to some mild judicial legislation, to correct and harmonize the sometimes crude provisions of acts of assembly; but after the most careful consideration, I cannot hold this to be the true interpretation of the words, "rights of subsequent creditors," in the act of 1876. I can find no authority or precedent for so sharp and material a change in the language of the act as to make the word "creditors" read "judgment creditors." And I can find no warrant for such a change or for such an interpretation either in the context of the act, or in the history of the registration laws in this State.

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*The chief authority relied upon for this interpretation seems to be certain language

of that learned and distinguished jurist, Judge Wardlaw, in the celebrated case of *Steele v. Mansell*, 6 Rich., 452-453. But the only questions decided in *Steele v. Mansell* were: 1st. That a subsequent judgment, under the law as it then stood, was not preferred to an unrecorded absolute conveyance of land. 2d. That under the joint operation of the 45th section of the county court act of 1785 and the act of 1698, an absolute conveyance of land, not recorded for four years after its delivery, but recorded before any subsequent conveyance was made, had priority over a subsequent conveyance, which was recorded within six months from its date. All the rest of the opinion in that case is historical, discursive, critical and suggestive; but it makes no judicial decision of the questions suggested. It does suggest that under the 45th section of the act of 1785, "creditors" might have meant only judgment creditors. And it does suggest that under the joint operation of the act of 1698 and the 45th section of the act of 1785, recording after the prescribed time might have been considered to have had the same effect as if the deed had been executed on the day it was recorded. But neither question was even pretended to be decided, even as an historical question. It was a suggestion of possible views of the courts in the past, and nothing more.

I think everybody will agree with the learned judge who delivered the opinion in that case, when he says that "our registry law was, before the act of 1843 concerning mortgages, lamentably obscure and deficient." It is apparent, too, that the court, in *Steele v. Mansell*, regarded the act of 1843, as far as mortgages were concerned, as a new departure in our registry law, and that it must receive independent interpretation. They suggest, and only suggest, as a difficult question what would be the effect under that act, of recording after the prescribed time, but before opposing rights had accrued.

It would be difficult, too, not to concur with the chief justice, when, in *Williams v. Beard* (1 S. C., 321), he says: "It would be a matter more of interest and curiosity than of practical utility to consider here the numerous decisions under our registry laws." * * "The question, however, with which we have

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to *deal is, in our judgment, affected by neither of the said acts [the act of 1698 and the 45th section of the county court act of 1785], unless we can be persuaded by the argument to hold that the act of 1843 was intended by the Legislature to compel no change, and must be construed with reference to the former acts, only adding another to the structure, which was in no way to destroy the symmetry of the whole." And in *Youngblood v. Keadle* (1 Strob., 130), Wardlaw, J., says: "Our act of 1843, concerning the recording of mortgages, has so altered the law, that many cases are not likely to occur in

which the decision now made will be exactly applicable." It is thus apparent that the act of 1843 has been on all hands recognized as a new departure in our registry law, so far as mortgages are concerned.

Still more clearly, it seems to me, is the act of 1876 (Gen. Stat., § 1776) to be interpreted independently of the acts of 1698 and 1785. It is evidently a well considered effort to deal effectively and clearly with the whole subject of registration. It includes in its provisions absolute conveyances and other writings therein named, as well as mortgages. It changes the time allowed for recording. It enacts that "the deeds and instruments of writing therein named shall be valid, so as to affect, from the time of delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery and execution," &c.

But *McKnight v. Gordon* (13 Rich. Eq., 222 [94 Am. Dec. 164]), and *Williams v. Beard* (1 S. C., 309), had been decided. These in effect established that, under the act of 1843, the recording of a mortgage after the prescribed time did not operate as constructive notice from the date of record. And, therefore, in the act of 1876 the following proviso was added: "Provided, nevertheless, that the above mentioned deeds and instruments in writing, if recorded subsequent to said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record." It will be observed, however, that the words, "shall be valid to affect the rights of subsequent

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creditors and purchasers for valuable consideration, without notice," are an exact repetition of the language of the act of 1843.

Accepting, then, the acts of 1843 and 1876 as constituting a new departure in our registry law, it now becomes necessary to decide for the first time in the history of these acts what is meant by the words "subsequent creditors." Do they mean only creditors who have reduced their claims to judgment after the execution, but before the recording, of the deed or mortgage, or, in other words, only "judgment creditors;" or do they include all creditors whose debts have been contracted between those dates, or in other words, "general creditors" as well? The case of *McKnight v. Gordon* would seem to have come very near deciding it. But the question was not actually involved in that case. And the necessity, therefore, remains for an explicit decision.

It is a rule of interpretation so familiar and so long and well established that it is needless to cite authority for it, that, as a general rule, the words of statutes are to be taken and interpreted in their ordinary, popular, and customary sense, unless they are otherwise defined, either by express defini-

tion, or by the context of the same act, or the context of other acts dealing with the same subject, or, as it is said, in *pari materia*, or by judicial decision. Now, I find nothing, either in the context of the act of 1876 or that of 1843, or in any judicial interpretations of either, to warrant the giving of any other meaning to the word "creditors" than its well-established customary, commercial, and legal sense. The word "creditors" in all these senses means simply and plainly one who gives "credit" to another, by giving him money, or some other value, on the "credit" of, or the faith in, his honesty and his ostensible means of paying; or, in other words, it means those who popularly, commercially, and legally are known as "general creditors"—creditors who have given "credit," but have neither originally given, nor subsequently obtained, any lien or security for the payment of their debts.

The distinction between "judgment creditors" and "general creditors" was perfectly well known to the law and thoroughly established in its language. It is recognized in the very case of *Steele v. Mansell*, which is relied

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on for a different interpretation. It occurs *passim* in all the authorities. It is one of the phrases and features of the law, better known perhaps than any other among laymen, who thoroughly appreciate the difference between the creditor who can levy upon your property for payment and the creditor who can only dun you for his debt. The Legislature must be assumed not only to have well known the distinction between these two classes of creditors, but to have used the language of the acts with the purpose of providing for an existing evil or remedying some defect in the law.

What was the evil to be remedied? Ours is pre-eminently a commercial generation. The security of trade is one of the great objects of our governments. Trade is largely based upon the credit given to those who seem to have the means of paying, and who are believed to be fair and open in disclosing their property, and in declaring the incumbrances upon it. Registry laws are intended to furnish the citizens with the facilities of giving notice of their property and its incumbrances on the one hand, and of giving creditors the means of knowing what these are on the other. Such laws must necessarily be imperfect, but this is unquestionably their wise and useful purpose. The evil to be remedied was that some persons, by failing to record their deeds or mortgages, whether carelessly or purposely, induced others to give them "credit" for the means of paying their debts, when, by their own acts, they had conveyed away, or incumbered their property and concealed, or allowed others to conceal, the fact, or neglected to give notice of it. This was the evil to be remedied. But surely the creditor who gives credit, but does

not pursue his debtor to judgment, is as much deceived and wronged by the concealment as the creditor who sharply demands the rigor of the law. Did the legislature mean that creditors must make haste to pursue and cripple the debtor, or the registry law would give him no protection? We all know that such never was their temper. Yet such would be the result if the judgment creditor alone is protected against unrecorded deeds and mortgages, while the general creditor is left to suffer.

I have dwelt upon this question of the popular and customary commercial and legal meaning of the word "creditors," not only because it was the first which demanded at-

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tention, but because *it is the chief and the broadest ground on which I rest my decision.

Let us next consider what was the defect in the law as it stood in 1876 under the adjudicated cases which was to be remedied. It was found that many careless persons who had failed to record their deeds and mortgages had no means of repairing the neglect and giving notice of their existence, except by express notice to every possible creditor and every probable purchaser. Such express notice, from the very nature of the case, was almost impracticable. In *Williams v. Beard*, it had in effect been decided that recording after the prescribed time was not such notice as the law would recognize. The careless purchaser or mortgagee was left without a remedy. The act of 1876 came to his relief, and by the proviso we have quoted, declared that such recording, after due time, should operate as constructive notice from the date of the record.

And when we have thus described the evil to be remedied by both the act of 1843 and the act of 1876, and the defect in the act of 1843, which was supplied by the act of 1876, we have, in fact, given in brief the whole history and purpose of these acts, and by the very statement in effect decided the question before us. The great object of all registry laws is to give notice—notice to purchasers, notice to incumbrancers, notice to creditors who give credit on the faith of property. The preservation of the evidence of the deeds themselves has indeed, in these careless times of ours, been found to be an important function of registration, but it is secondary and incidental, and probably formed no part of the original purpose. That notice was the ruling idea is made unquestionable by the provision that express notice should be equivalent to careful recording. The object was thus to give notice of existing deeds, not to make, or aid in making, new securities, or giving them new dates. That was the right and function of the grantor or mortgagor alone.

And just here we have the essential difference between the recording of an existing deed and the making a new one at the date

of record. With the recording the grantor or mortgagor has nothing to do. He need not be consulted. He has no right, and has placed it beyond his power to prevent it. But a

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new *deed cannot be made without his express consent and concurring action. He might see proper, and think it right, not to make the new deed. He might sometimes justly say, "I supposed your deed was recorded; I have contracted debts, believing that my creditors knew from the records that my property was incumbered by your mortgages; I find that they have given credit on the faith of those records, which gave no notice of any incumbrance; they must not suffer by your laches; you must take the consequences of your own neglect; I decline to execute the new deed." Would the law, does the law, can the law compel him?

Again, both under the act of 1843 and the act of 1876, express notice, whether to purchasers or creditors, was to be a full equivalent for and have all the effect of recording. Could mere notice of an old deed, however clear, full, and express, have made that old deed a new deed, or have given it all the effect of a new deed? Can express notice be not only notice, but re-execution also? Can constructive notice be anything more? Could such notice of an unrecorded mortgage to creditors, after their debts were contracted, but before they had obtained judgments, have had the effect of defeating their rights as creditors under the act of 1843, which provided for the case of express notice, but not for the case of recording after due time? Can express notice have such an effect in a similar case under the act of 1876? What is there in the act of 1876 which gives express notice a greater effect under that act than express notice under the act of 1843? Can the constructive notice of recording under the act of 1876 have a greater effect than its equivalent express notice under that act? I think the whole theory, policy, and purpose of our registration law contradicts such an idea. Under the act of 1876, it seems to me, notice, whether express or constructive, remains notice, and nothing more.

In *McKnight v. Gordon* (13 Mich. Eq., 231 [94 Am. Dec. 164]), Chan. Inglis says: "Recording is not an element in the due execution of a mortgage." And again, after stating the mischief to be remedied, he says: "The remedy provided (by registration laws), therefore, consists in giving notice, so far as the law can effect this, to all persons, of every such mortgage sale, &c., by requiring of the first purchaser, &c., under pain of the

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defeat or post*ponement of his estate, that the deed or other instrument by which his purchase has been consummated, or an abstract of it, shall be recorded within a reasonable time in public books, kept in a public office provided for the purpose, to which

office or books all persons may have free access." And on same page: "The courts have uniformly in their construction of these laws come to hold that registration, being but a substitute for actual notice and intended to secure this, is not essential when the party intended to be protected has such notice." And in the same case the same distinguished chancellor says: "But the positive rule of law established by this statute precludes the mortgagee who has omitted to put his mortgage upon record within the time limited, from interposing the estate which he acquired by it in bar or derogation of the estate or claim for which one who is within the terms of its protection has paid."

Taking these extracts from the opinion of Justice Inglis together, they not only sustain the position that recording is notice, and only notice of a deed, and not a re-execution of that deed, but in the use of the word "claim," as among the rights to be protected, he came as near deciding the question as he well could in a case in which the question was not involved. This was, it is true, under the act of 1843, but as we have before said, the language of that act in regard to "subsequent creditors" is identical with the language of the act of 1876.

But in reply to all this it was earnestly urged in argument before me that the act of 1876 made a mortgage recorded after the prescribed time "valid to affect the rights of subsequent creditors and purchasers for valuable consideration, without notice, from the date of such record." And that if creditors had no judgments before such recording, they could have no "rights" in rem until after the recording, and the mortgage would be valid against these debts only contracted, but not reduced to judgment before such recording. And to illustrate the absence of such rights in rem, it is said that if either the recorded or the unrecorded mortgage was foreclosed, such creditors would not be necessary parties to the action as having no lien. But it must be remembered that the act does not say "rights in rem," but simply "rights." Have creditors no "rights" under

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the law, but "rights in rem in pre*sent"? May they not have rights which may become rights in rem in futuro by appropriate proceedings—rights in rem which, when acquired, will relate back to, and be protected by, their "rights" as creditors, existing before the mortgage was recorded, and which will rank and take priority as of that date? In other words, may they not have "rights" in the nature of equities which the law will respect and enforce as effectually as they would respect and enforce a "right in rem"?

Similar equities are well known to the law and thoroughly established. The equity or quasi lien of creditors of the estate of a decedent will furnish an example. See *Jones v. Wightman*, 2 Hill, 580; and *Adger & Co. v.*

Pringle, 11 S. C., 527. The equity of creditors (general creditors as well as judgment creditors) against a voluntary conveyance is an equity so well known as to be familiar law, and needs only to be referred to. In the case of these voluntary conveyances the voluntary grantor need not be shown to have had judgments against him unsatisfied at the date of the voluntary conveyance. (The lien of such judgments would protect themselves without the aid of the equity.) It is sufficient to show that those claiming the equity were bona fide creditors at the date of the voluntary conveyance. Could a substantial equity of "general creditors" be more clearly recognized? The claim of general creditors against an unrecorded marriage settlement will furnish another example.

And so in the case of general creditors subsequent to the execution of the mortgage, and before it was recorded. They may not be necessary parties to an action for foreclosure, but they are necessary parties to the title, so to speak. They cannot maintain a creditor's bill until they have obtained judgment. But when they have obtained judgment their equity will relate back to the time of contracting the debt, and the purchaser at the sale under the foreclosure will take subject to an equity of the possibility of which he was notified by the fact that the mortgage was recorded out of due time. In *McKnight v. Gordon*, already recited, Judge Inglis, at page 243, says: "Let it be borne in mind, then, that there are two classes of persons protected against the damage to be apprehended from these undisclosed mortgages: 1. Subsequent creditors of the mortgagor

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without notice of the mortgage. *2. Purchasers for valuable consideration without such notice. In order to make the rule effectual for the defense of the former class, it is necessary to insure a good title to purchasers at sales under their executions, whether such purchasers have or have not notice."

I understand very well that the exact question in this case was not involved in that case. I have only quoted the passage to show that the judge in that case had in his mind equities, which might only be equities when the "rights" accrued, but might become effective "rights in rem" against a mortgagee or a purchaser under the foreclosure of his mortgage. And it is noteworthy that neither in that case, nor in *Williams v. Beard*, already cited, is there any suggestion even that by "subsequent creditors" only judgment creditors might be intended.

One further consideration deserves brief notice. It would seem that if only creditors having judgments prior to the date of recording can claim under the act of 1876 against a mortgage recorded out of due time, because the recording was equivalent to the re-execution and delivery of the mortgage at

that date, then the provision of the act of 1876 for the protection of subsequent creditors was wholly superfluous. The lien of their judgments would have protected them, without the protection of the statute. *Ex proprio vigore* they would be liens prior to any deed or mortgage re-executed as of the date of record.

There may be inconvenience, hardships, and embarrassments growing out of what I hold to be the true construction of the act of 1876. But it must be remembered that one object of the act was to compel persons to record their conveyances and mortgages under pains and penalties. Frauds may be practised perhaps under that construction. But, as is well known, hardships and embarrassments and frauds may occur under the act of 1876 (and perhaps under any registration act) even as to those parts of it about which there never has been, nor ever can be, any dispute. And perhaps some of the questions of hardship and difficulty suggested in argument may receive solution, without so strong an act of judicial legislation as changing the well considered language of a statute.

After this anxious and careful considera-

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tion of the whole sub*ject, I hold that the words subsequent creditors in the act of 1876 include general creditors, and cannot be confined to judgment creditors.

And I hold, therefore, that the mortgage of "Jack's Bluff and Elmwood," proved in this case by the executors of S. D. Doar, is not a prior lien as against the claims of creditors for debts contracted by the defendant, S. S. Fraser, subsequently to the date of the execution of that mortgage, and prior to its being recorded, except in so far as that mortgage may be protected by the subsequent and duly recorded mortgage of the same tracts of land to the defendant, R. E. Fraser, who had express notice of this mortgage to the executors of Doar.

And this leads to one other question which remains to be considered. The mortgage of Jack's Bluff and Elmwood, proved in this case by the executors of Doar, was not recorded until all the debts of the claiming creditors had been contracted. The mortgage of the same tracts of land to the defendant, R. E. Fraser, was duly recorded within forty days from the date of its execution. But R. E. Fraser had express and admitted notice of the Doar mortgage at the time of the execution and record of his mortgage.

These conflicting claims present a curious puzzle, and the proceeds of sale of the land in dispute would at first sight seem to move in the endless circle of passing from the hand of one claimant to another claimant, and from the second claimant to a third claimant, and from the last to the first again, who must again pass it on through the same circle indefinitely. For example, the creditors of the mort-

gagee cannot claim against the mortgage of R. E. Fraser, because as to them it was duly recorded, and is a prior lien. But Fraser cannot hold so much of the proceeds of sale as is covered by the Doar mortgage, because he had express notice of it. And it is claimed that the executors of Doar cannot hold their portion of the proceeds against the creditors, because, as to them, their mortgage was not recorded, and they had no express notice of it.

But I think the circle can be broken and the problem equitably solved, by holding each party to his or their contract, and giving

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*the executors of Doar the benefit of their diligence in giving notice to Fraser.

1. It is evident that the creditors cannot equitably claim more than the balance of the proceeds of sale remaining after payment in full of Fraser's mortgage, because it is duly recorded, and they so had notice of it, and must be assumed to have given credit, subject to the right of the mortgagor to make it. This balance, then, is the only part of the proceeds of sale which can possibly come to the creditors.

2. R. E. Fraser can only claim, under his mortgage, the balance of the proceeds of sale remaining after deducting the amount due on the Doar mortgage, because he had notice of that mortgage, and this balance was the security for which he contracted. This balance, then, is the only part of the proceeds of sale which can come to R. E. Fraser.

3. But the executors of Doar did not give notice to Fraser for the benefit of the creditors of the mortgagor. They gave that notice for their own benefit. So much, then, as R. E. Fraser (and not the creditors), by reason of the notice of the executors of Doar to him, contributes to the payment of their mortgage they are entitled to retain; but so much as the creditors could claim after R. E. Fraser is paid in full (as before stated) the executors of Doar must pay over to them. Because, as to this last amount, the executors of Doar, by failing to record their mortgage in time, are held in law to have contracted that the creditors should have it. Or, in other words, what the executors of Doar can retain under their mortgage is the difference between the full amount Fraser could have claimed if they had not given him notice of their mortgage, and the reduced amount he is compelled to take by reason of that notice. Or, in other words again, just so far as, in the division of the proceeds, the Fraser mortgage laps over the Doar mortgage, just so far it protects that mortgage, and no farther.

I hold, then, that the proceeds of sale of the "Jack's Bluff and Elmwood tracts" are to be practically distributed as follows: 1. R. E. Fraser is to be paid out of the proceeds of sale the amount due on his mortgage, less the amount due on the Doar mort-

gage. 2. The creditors are to be paid the

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balance, if any, of the proceeds of sale which would remain if the Fraser mortgage were paid in full. 3. The executors of Doar are to be paid the difference between what the creditors receive, if any, and the whole amount due on their mortgage. This method of solving the problem stated and of adjusting the conflicting claims is, it seems to me, what is practically meant by the doctrine laid down in the cases of *Earl of Pomfret v. Lord Windsor*, 2 Vesey, 472, 486; and in *Wilcocks v. Wain*, 10 Serg. & R. [Pa.] 380; and in *Manufacturer's and Mechanic's Bank v. Bank of Pennsylvania*, 7 Watts & S. [Pa.] 335 [42 Am. Dec. 240], cited in 2 Lead. Cas. Eq., 185.

It has been contended before me that the meaning of the doctrine in these cases is, that the Doar mortgage is to be paid not out of the entire proceeds of sale, in such shares to Doar and the creditors, respectively, as I have above held they are to receive, but the entire amount due on the Doar mortgage is to be paid by Fraser out of that portion of the proceeds of sales which would have been his, if he had not had notice of that mortgage, and that the entire amount so paid is to be retained by the executors of Doar, while the creditors still receive the balance coming to them, after deducting the full amount due on the Fraser mortgage. Not only do I not believe this to be the true doctrine of those cases, but even if it was, I would regard such a ruling, which would thus punish Fraser for the failure of the executors of Doar to record their mortgage, as so repugnant to reason, justice, and equity that I would not feel bound by the authorities cited, but would still report as I have done and await the decision of our own courts.

In applying, however, the rule of apportionment I have adopted in the distribution of the proceeds of sale of Jack's Bluff and Elmwood, an equity arises which seriously affects the portion coming to the creditors. It is a familiar principle in marshalling assets, that where one of two creditors holds two securities for the payment of the same debt, and another creditor holds a subsequent lien or claim on the property included in only one of these securities, the creditor so holding the double security will be required to first exhaust the security in which the other creditor has no interest, before seeking payment out of the property on which alone that other creditor must rely

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for the payment of his claim. For the "advances" proved by the defendant, R. E. Fraser, in this case, he holds a double security, namely, the mortgage of Jack's Bluff and Elmwood, and the bill of sale of the turpentine, naval stores, and rice on those places at its date.

In ascertaining, therefore, the amount due on the claim of R. E. Fraser, which is to be paid out of the proceeds of sale of Jack's Bluff and Elmwood, he must be required to first exhaust the turpentine, naval stores, and rice for the payment of his "advances," and can only claim the balance of "advances" then left unpaid, and the amount due on the promissory note, under his mortgage of Jack's Bluff and Elmwood. And, therefore, the extent to which his recorded mortgage will protect the unrecorded mortgage of the executors of Doar is to be fixed, not by the whole amount due on his claim, but by the balance remaining due after this equity of the creditors has been enforced. In other words, Fraser's mortgage cannot protect the Doar mortgage beyond the amount Fraser can equitably, as well as apparently, claim under that mortgage as against the creditors. And, as we have seen, the only amount he can equitably claim under his mortgage, as against the creditors, is the balance left after exhausting the turpentine, naval stores, and rice in payment.

The decree of the Circuit Judge was a simple order confirming this report.

Mr. T. M. Mordecai, for plaintiff and the general creditors.

Messrs. J. P. Lesesne and Isaac Hayne, for the executors of Doar.

Messrs. Rutledge & Young and J. W. Perry, for respondents.

November 27, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The pleadings and earlier proceedings are not in the "Case," but from the very full report of master Hancel, it appears that prior to 1876 there had been a partnership between the plaintiff, S. B. King, and the defendant, S. S. Fraser, under the style of "S. B. King & Co.,"

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in carrying on the business of a turpentine farm and store called "Six Mile store," in Georgetown County; that this copartnership was not successful, and in 1876 was dissolved, its available assets realized, and all the debts paid, mostly by S. S. Fraser, to whom the other partner, S. B. King, was largely indebted.

Under these circumstances a new arrangement was made by the parties, which, as the master reports, was substantially as follows: "It was agreed that S. S. Fraser should purchase in his own name and with his own funds two tracts of land in the County of Charleston (now Berkeley), known as 'Jack's Bluff' and 'Elmwood,' for the purpose of carrying on the business of a turpentine farm, and that in some sort of connection therewith (not very clearly shown by the evidence) he should establish at South Santee Ferry a general store called 'Romney,' the entire business of both places to be carried on in the

name of S. S. Fraser, and one to be designated as 'Elmwood,' and the other as 'Romney.' * * * The plaintiff, King, was to have immediate charge of the active operations of the farm and store, while Fraser was to direct and control these operations and to have the entire management of the finances; and that, for his services, King was to receive as compensation one-half of the net profits after paying all expenses," &c.

In putting on foot this new arrangement, S. S. Fraser purchased "Jack's Bluff" and "Elmwood" from the executors of Doar, took titles in his own name, and had them regularly recorded February 1, 1877; and at the same time he executed a mortgage of the premises to secure the credit portion of the purchase money; but the executors of Doar neglected to record this mortgage until January 7, 1879. The business was not a success, and after the date of the aforesaid mortgage to the executors of Doar, other debts were contracted, which need not be specifically mentioned, except the following: First. To R. E. Fraser, part by promissory note for \$1,297.46, secured by mortgage of Jack's Bluff and Elmwood, and also by an account for advances, \$610.11, which was secured by a bill of sale of certain naval stores, and also covered by the aforesaid mortgage. The aggregate amount of this debt was about \$1,917.57, secured by the mortgage aforesaid

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December 17, 1878, which was regularly recorded within the time prescribed by law. Second. To Thomas R. Sessions, for \$761.22, secured by mortgage of "one still and fixtures, two mules, one horse, and two wagons," &c., on the place of S. S. Fraser, on Wambaw Creek, &c. This mortgage was executed December 10, 1878, and it seems was regularly recorded. Third. General unsecured creditors of S. S. Fraser. All these debts were contracted after the mortgage was executed to the executors of Doar, and without notice of it, except that of R. E. Fraser, which was contracted after the execution of said mortgage, but it was admitted that at the time he took his mortgage he had actual notice of the then unrecorded mortgage to the executors of Doar.

R. E. Fraser, by virtue of his bill of sale of naval stores, and T. R. Sessions, under his mortgage, commenced actions for the claim and delivery of the property covered by them respectively as the property of their debtor, S. S. Fraser. To this S. B. King, who was in possession, objected, and claiming that he was a copartner in the business, and entitled to an interest in the property, instituted these proceedings for an account, injunction, &c. The moving creditors were enjoined, and all being called in, the master made a full and exhaustive report, finding as follows: First. That the plaintiff, King, was not the partner of S. S. Fraser in the legal commercial sense of the word, either in the business of the turpentine farm at "Elmwood," or that of the

store at "Romney;" that all the real and personal property employed in the business belonged to S. S. Fraser, and he alone had the right to encumber it. Second. That the mortgage and bill of sale of R. E. Fraser, and the mortgage of Sessions, are all good securities for valuable consideration, and must rank as liens, except as they may be affected by the failure of the executors of Doar to record their mortgage within the time prescribed by law; and upon that subject he held that the Doar mortgage, which was not recorded within time, was not a valid lien as against creditors of the mortgagor, whose debts were contracted between the date and the registry thereof, except that of R. E. Fraser, who had actual notice of the execution and existence thereof; and, finally, that in this peculiar state of facts, the proceeds of the sale of the said premises should be distributed as follows:

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1. R. E. Fraser, *after exhausting the personal property covered by his bill of sale, to be paid the amount due on his mortgage, less the amount due on the Doar mortgage. 2. The general creditors to be paid the balance, if any, which would remain if the Fraser mortgage were paid in full; and, 3. The executors of Doar to be paid the difference between what the creditors receive, if any, and the whole amount of their mortgage, &c.

To this report exceptions were filed, and the cause coming on to be heard by Judge Hudson, he overruled the exceptions and confirmed the report. From this decree the plaintiff, King, appeals: I. Because the court should have decided that there was a partnership between S. B. King and S. S. Fraser subsequently to December 31, 1876. II. Because the court should have decided that the mortgages of S. S. Fraser to R. E. Fraser and to T. R. Sessions were respectively illegal and void so far as the creditors and the plaintiff are concerned. III. Because the court should have decided that the bill of sale from S. S. Fraser to R. E. Fraser, not having been recorded, and not being a mortgage, was invalid as against the creditors and the plaintiff. IV. Because the court should have decided that R. E. Fraser must first exhaust the proceeds of the personalty covered by the bill of sale, and that out of the proceeds of the sale of the lands he was only entitled to receive the balance so remaining unpaid, and that Fraser having admitted notice of the mortgage to the executors of Doar, such mortgage being void as against subsequent creditors to the extent of the amount due on such mortgage, the general subsequent creditors are entitled to the proceeds of the sale of the lands, and that the executors of Doar are simply general unsecured creditors.

The executors of Doar appeal: I. Because the presiding judge erred in holding that because the mortgage from S. S. Fraser to the executors of Doar was not recorded until aft-

er the expiration of forty days from the date of its execution, it is not a valid lien as against creditors of the mortgagor, whose debts were contracted between the date of its delivery and that of its record. II. Because his honor should have held that when the mortgage was recorded the mortgagees acquired a valid lien upon the mortgaged premises as of the date of its record; and in the

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distribu*tion of the sale of said premises, said mortgagees are entitled to rank as lien creditors, as of the date of the record of the mortgage, against all the creditors, alike those contracted prior to the execution of the mortgage, and those contracted between the date of the mortgage and that of its registry, and also those contracted subsequent to the record.

Whether there was such partnership between the plaintiff, King, and S. S. Fraser, as gave to King an interest in property purchased and paid for by Fraser and conveyed to him alone, was a question of fact as to which both the master and the Circuit Judge found that no such partnership existed. Under these circumstances this court will not disturb the finding, unless it is manifestly against the weight of the evidence. We have looked carefully through all the evidence in the case, which, it is admitted, is somewhat conflicting, but, taking it as a whole, we are unable to say that the finding is unsustained. The exceptions making this point are overruled.

This brings us to the most important question in the case, viz., whether the omission on the part of the executors of Doar to put their mortgage on record within forty days after its execution, although recorded afterwards and before the commencement of this suit, made it absolutely invalid as to all debts of the mortgagor contracted between its execution and registry; that is to say, whether a mortgage recorded after the time prescribed by law has a lien, as of that date, with the ordinary incidents of a lien as to all debts which at that time are unsecured or shorn of these incidents, as to that class of debts which were contracted between the execution and delivery thereof. This is a new question in this State, the precise point, so far as we know, never having arisen before; and it is certainly one not free from difficulty, arising principally from the terms of the general registration act of 1876, which it is now necessary to consider.

It has been truly said that there is no subject upon which our law has been more confused and obscure than that of registry, both as to the effect of omission to record, and of recording within as well as after the time prescribed by law. The act of 1843 (11 Stat., 256) embraced only mortgages, and as to them it made no provision for recording

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after the time prescribed, but *left unquali-

fied the general provision "that no mortgage of real estate shall be valid so as to affect the rights of subsequent creditors or purchasers, &c., unless the same shall be recorded in the office of the register of mesne conveyances," &c. As this act did not touch absolute conveyances, the confusion as to them still continued until 1847, when the old Court of Errors, after repeated argument in the case of *Steele v. Mansell* (6 Rich., 438), decided that an absolute conveyance of land never recorded was not thereby absolutely void, but as between the parties was still good; that if recorded within time the deed took effect from its date, and that if recorded after the time it did not have reference back to the date of the deed, but took effect and was notice to all the world from the date of its actual registry.

Thus the rule as to the effect of registry was not the same as to mortgages and absolute conveyances, and this discrepancy continued down to 1876, when the legislature (probably with the view of harmonizing this difference, and establishing one uniform system upon the subject) passed the general registration act (16 Stat., 92, re-enacted as section 1776 of the General Statutes), which repealed all former laws "inconsistent with it," and dealing with the registry of both mortgages and absolute conveyances, made as to both precisely the same regulations, which, as might have been expected, were the compound result of adding to the mortgage act (1843) the principles which had been declared in *Steele v. Mansell* as to the legality and effect of recording a deed after the time prescribed by law.

Possibly from this cause has arisen the obscurity of the act which, so far as relates to the point in question, is as follows: "And generally all instruments in writing now required by law to be recorded in the office of register of mesne conveyance, or in the office of the secretary of the State, delivered or executed after the first day of January, 1877, shall be valid so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded within forty days from the time of such delivery or execution in the office of the register of mesne conveyance of the county where the property affected thereby is situated, &c. Provided, nevertheless, that the above mentioned deeds or instruments in

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*writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice, only from the date of such record," &c.

If this section were to be considered without reference to the proviso, there would be little difficulty. Ignoring the proviso, it is clear that the body of the section declares

that, without recording, none of the instruments referred to would be valid as to any debts "without notice," whether contracted before or after the date of the instrument in question; but it goes on to provide that if recorded within the time prescribed, said instrument shall be valid even as to all "subsequent creditors without notice," reaching back to the time of the delivery of the instrument. Without the proviso the section would be substantially the same as the act of 1843 in reference to mortgages, which was several times before this court, notably in the case of *Williams v. Beard*, 1 S. C., 309, and *McKnight v. Gordon*, 13 Rich. Eq., 223 [94 Am. Dec. 164], which are not, however, applicable to the general act now under consideration; and see *Herring & Co. v. Cannon*, 21 S. C., 212 [53 Am. Rep. 661], as to an entire failure to record.

But the addition of the proviso in the act of 1876 makes a very material change in the law, applying to the registry of mortgages substantially the same rules which were declared as to the registry of absolute conveyances in the case of *Steele v. Mansell*, supra; and the question now presented is as to the effect of a mortgage recorded out of time upon the general unsecured debts contracted by the mortgagor between the time of the execution and registry of the mortgage. This makes it necessary to construe the proviso, the important words of which are: "shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice, only from the date of such record," &c. There cannot be the least doubt that this provision was intended to give to a mortgage, though recorded out of time, some "effect" upon the class of creditors indicated; not, however, to reach back to the date of the mortgage, as in the case of one recorded within time, but only from the time of recording.

It is obvious that this postponement of the

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lien must seriously *affect the rights of the mortgagee, especially in respect to liens, which, in the mean time, may have been acquired by others. While the lien of a mortgage not recorded in time is in abeyance for the lack of registry, other creditors of the mortgagor may come in and acquire liens upon his property, which will take precedence over the mortgage without regard to its date. This is not expressly declared, but results necessarily from the postponement of the lien of the mortgage and the general nature of liens as to which time is the essential thing. So far, therefore, as there may be conflict between liens, there is no obscurity, for as to them it is only necessary to inquire which is the first in the order of time. We may also say in passing that if the property is actually purchased before the mortgage is recorded, and without actual notice, the innocent purchaser will undoubtedly take

it unaffected by the dormant lien of the unrecorded mortgage.

So far, then, there is no difficulty, but the matter is not so plain as to what is the effect of a mortgage recorded after the time upon general debts contracted after its execution without notice, and which are found in the condition of unsecured debts at the time the mortgage is recorded and its lien attaches. It is certainly the general rule that a bona fide lien, no matter when entered, from that time forth has priority over all debts which are then unsecured, without the least regard to their date. This is involved in the very nature of a lien as against general unsecured debts. For example, we suppose that as soon as the Dear mortgage was recorded, the lien then taking effect, at once gave it priority even over debts (if any) contracted before the mortgage was executed.

It is, however, earnestly contended that the terms of the proviso make an exception in favor of such debts as were contracted between the execution and registry of the mortgage, for the reason that during that time the mortgage not being recorded, they were without notice; and, further, that this immunity, this shield from the lien of the mortgage, still remains over and protects this class of creditors from the mortgage, even after it is recorded and has become an effective lien as to all other persons, and for all other purposes. This view seems to pre-

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ceed upon the ground *that the exemption from the lien of the mortgage having existed during the time it was not recorded, may be said to have then attached as a charge, incumbrance, or a lien, which continues even after the mortgage is recorded, and acquires a lien, of which they have notice; in other words, that their exemption arising from want of notice continues even after they have notice.

For several reasons we hesitate to accept this view. In order to reach a satisfactory conclusion on the point, it is necessary first to settle clearly who are the persons meant by "subsequent creditors and purchasers without notice." The exact phrase occurs twice in the section, once in the body, and once in the proviso. Where it occurs in the first connection, it is plain that the creditors meant to be described are those whose debts were contracted between the execution and registry of the mortgage, "subsequent" having reference to the execution; and we see no reason to suppose that the very same phrase, when used in the proviso, has reference to a different class of creditors, and is limited to those whose debts were contracted "subsequent" to the recording instead of the execution of the mortgage. Besides those becoming creditors after the recording could not, with any propriety, be referred to as "without notice."

This being clearly settled, it would seem that the terms of the proviso itself negative the idea that a mortgage registered out of time is absolutely null and void as to all debts contracted between the execution and registry thereof, for it declares in express terms that such mortgage so registered "shall be valid to affect the rights of subsequent creditors," &c. It seems to us that there never could have been a doubt upon the subject, but for the last clause in the proviso, which makes the ambiguous declaration that such effect shall be "only from the date of such record," which, it is contended, limits the lien of the mortgage after registry to future debts, leaving the rights of the class of prior creditors before described entirely unaffected as they existed before registry.

There are insuperable difficulties in the way of this being taken to be the true construction. In the first place it would be inconsistent with the very sentence in which the phrase occurs, for that expressly declares that such mortgage so registered

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"shall be valid to affect the rights of subsequent creditors without notice," &c.; and, as we have seen, all these being prior to the recording, it is plain that the vitality given to the mortgage by registry was not intended to be limited to future debts counting forward "from the date of the record." Besides, it is not denied that the lien of the mortgage thus recorded is valid as to all debts contracted before the execution of the instrument, and therefore not falling within the category of those styled "subsequent."

It is not perfectly clear, but we suppose that upon this point some confusion may have arisen from interpreting the word "from" in a sense which was really not intended. Considering the subject matter and the context, we cannot doubt that the phrase "from the date of such record" was intended, not to fix that as the point from which the lien of the mortgage was to operate forwards, but simply to indicate the time at which it received vitality; or, in other words, that the registry fixed the time at which the mortgage becomes a lien, but not the date of the debts which, as such, it might affect, according to the condition, as to being secured or unsecured, in which they were found at that time. Unless some effect upon this class of creditors was intended, why was the phrase inserted at all? The sense would have been more clear by omitting it entirely, leaving the provision as if it read, "shall not be valid to affect subsequent creditors, whose debts were contracted without notice."

If, then, the registry from its date gave the mortgage vitality to affect, in some way, the class of creditors indicated, as well as others, what was intended by the words, "valid to affect their rights," &c.? To say that a mortgage shall be valid, means, of course, valid as a mortgage, that is to say,

a lien upon specific property, with the ordinary incidents of such lien, one of which is priority as to that particular property over all other debts of the mortgagor, which have not prior to that time ripened into a lien "To affect their rights." What rights and how? All creditors in common have certain rights, as the right to be paid, to sue to judgment, and to pursue the debtor in all the various modes allowed by law. But there are certain other rights which some possess and others do not; some have liens,

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and some have *none, and some may and some may not protect themselves by the equitable defence of being "subsequent creditors" without notice, &c. The whole tenor of the registry act shows that the "rights" therein spoken of, were those peculiar rights which appertained to the class indicated as subsequent creditors without notice of the mortgage; that is to say, the shield which protected them from the lien of the mortgage while it lay unrecorded and unknown. This was the only "right" in question or which could be "affected" by recording.

We can conceive of no effect of recording other than the putting an end to the exemption which arose from want of notice, and continued until notice was given by that recording, that the registry giving them notice at the same moment gives vitality to the mortgage as a lien with priority, as if the old mortgage had never existed and a new one had been executed and recorded on that day, the exemption arising from want of notice ceasing to exist as soon as notice is given. *Cessante ratione legis, cessat ipsa lex*. That this is what was meant by the phrase, "shall be valid to affect the rights of subsequent creditors," &c., conclusively appears by reference to the body of the section, where, in providing for the case of a mortgage recorded within time, the identical phrase is used to give priority to the mortgage over creditors whose debts were contracted subsequent to the execution of the instrument and without notice of it.

It seems clear to us that the principal object of the registry act was to require notice, and that it proceeds on the theory that recording is notice, whether made in or out of time. As foreshadowed by Judge Wardlaw in *Steele v. Mansell*: "Being without registration good as to the party who made it, the deed might, as to all other persons, be considered as if it had been executed on the day it was registered; in other words, as if it had been executed or acknowledged on that day. By delaying beyond a prescribed time, the grantee in a deed (or a mortgage) has lost the right to insist that the tardy registration shall have relation to the date of the deed so as to provide against intervening claims; but why should he lose the benefit of registration from the day it was made?"

It is, however, urged against this construction, that it must *operate as a hardship to the creditor who trusts the mortgagor without knowing that there was in existence a mortgage not recorded. We have considered and reconsidered this suggestion, and we confess we are unable to see the alleged hardship, beyond that which every creditor encounters when he trusts another upon faith in his ability to pay and his honesty and fair dealing. It is very true that our law properly denounces all manner of secret liens, that is, liens having an existence on property, without its being known; but this can hardly be said to extend to the case of a mere possibility of becoming a lien. Every debtor has the right to give a bona fide preference to one creditor over others, and this right is beyond the control of those others, who must be presumed to be aware of it and to extend credit subject to that risk. There is no obligation on the part of the creditor to whom a mortgage may be given, to record his debt, and as to the mortgage, he may omit to record or record it out of time, suffering therefor only the penalties imposed by the law. An unrecorded mortgage is in no sense a secret lien, nor, indeed, any lien at all until it is recorded. Up to that time it is precisely as if it had no existence, invalid and unknown to the creditor. It is difficult to understand how it could mislead or operate as a fraud upon him. It is true that as soon as the mortgage is recorded it becomes a lien, not, however, reaching back over the period in which the debts were contracted, but only from the date of record; the very act which makes it a lien also gives notice to the world. So far as other creditors are concerned, it would seem to be the same in effect as the giving a new mortgage or changing the date of the old one on that day.

Nor can we concur in the view suggested, that the object of registration is for the protection of the mortgagor, in order, as claimed, to secure him from the temptation of dealing with property as unencumbered which he has himself encumbered. The creditor may be ignorant of the existence of the unrecorded mortgage, and on that account he is protected until it is recorded, giving him notice; but the mortgagor certainly has knowledge of it in its inchoate state; and while the omission of the mortgagee to record may be his fault or misfortune, that surely can afford no excuse for the mortgagor to disregard what he knows to be the

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condition *of the property as to encumbrances. As we understand it, the object of the registration act was to give notice to the public, especially to creditors and purchasers, and not for the benefit of the mortgagor, who is bound by all the mortgages executed by him, whether they are recorded or not.

It must not be overlooked that the act of 1843 is no longer the law in relation to the recording of mortgages, but has been absorbed and superseded by that of 1876, which makes precisely the same provisions as to the registry of "all instruments in writing now required by law to be recorded," including mortgages and absolute conveyances; and, as to all, legalizes recording out of time, on the simple condition that the paper so recorded shall be valid only from the date of such record. This is a great advance as to systematizing our perplexed registry law, and in order to sustain and promote this effort at symmetry, it seems to us that it is incumbent on this court to make its decisions in regard to the registry of different kinds of instruments in the same spirit of consistency and uniformity.

The act of 1876 has not been before this court for construction, except in the single case of *McNamee & Co. v. Huckabee*, 20 S. C., 190. That case was in reference to the registry of absolute conveyances, and involved the question as to the effect of the registry of two deeds of the same land, each of which was recorded out of time, and it was held that deeds, under the registry act of 1876, not recorded within forty days, are valid as against subsequent creditors and purchasers without notice, only from the date of record; execution of the second deed before the registry of the first, and recording out of time, being equivalent to execution after the first and recording within time, as in *Steele v. Mansell*, *supra*.

In *Piester v. Piester* (22 S. C., 139 [53 Am. Rep. 711]), this court held that the mortgage in that case, recorded out of time, was void as to creditors whose debts were contracted after the execution and before its registry. But that case was not decided under the act of 1876. The question arose in the settlement of the estate of David B. Piester, who died in 1869, and, of course, both the mortgage and the debt of Wright, the "subsequent creditor," were executed before the passage of

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the act of 1876, and necessarily fell under the operation of the act of 1843. The case was decided right under the provisions of that act, which, as has been stated, did not recognize in any way the legality of registry out of time. It was, so far as the subsequent creditor, Wright, was concerned, precisely the same as if the mortgage to the probate judge had never been recorded at all. The court said: "It cannot be necessary to do more than to refer to the express terms of the act of 1843, which declares mortgages invalid as against subsequent creditors for valuable consideration, unless the same shall be recorded in the office of the register of mesne conveyance within sixty days from the execution thereof, which was not done," &c.

The case of *Cameron, Hull & Co. v. Marvin* (26 Kans., 622), cited at the bar, in-

volved, as we think, a point very analogous to that under consideration. The law of Kansas required that every conveyance intended to operate as a mortgage of personal property not actually delivered, "shall be absolutely void as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy shall be forthwith deposited in the office of the register of deeds, in the county where the property shall then be situated," &c. One Patterson executed mortgages of personal property, and among them one or more (March 2, 1880) to Cameron, Hull & Co., who failed to record them. Afterwards Patterson contracted a debt to Goodnow & Co. On June 3, 1880, Cameron, Hull & Co. took possession of the property under their mortgages which had not been recorded. On June 11, eight days after, the subsequent creditors commenced action by attachment, and under this process the sheriff seized the property. The holders of the unrecorded mortgages, Cameron, Hull & Co., brought an action of replevin against the sheriff, and the question was, whether they, as mortgagees, or "the subsequent creditors," Goodnow & Co., were entitled to the property; and it was held that the mortgages, from the time the mortgagees took possession, must be considered as valid, and the plaintiffs had a verdict.

In delivering the judgment of the court, Judge Valentine said: "We will assume that the mortgages were void as against Goodnow & Co. and all the subsequent creditors

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up to the time when *the plaintiffs took possession of the property, and will simply discuss the question whether they continued to be void after that time. Did the mortgages become valid when the plaintiffs took possession of the property under them? We think we must answer this question in the affirmative. [Citing many authorities.] Mr. Jones, in his work on chattel mortgages, says that if a mortgagee takes possession of the property before any other right or lien attaches, his title under the mortgage is good against everybody, although it be not acknowledged and recorded. Counsel for the defendant in error seem to contend that when a chattel mortgage is not recorded immediately after its execution, and the property is not immediately delivered, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage and prior to its being recorded. * * *

"Of course a chattel mortgage not recorded of personal property not delivered is void as to all creditors who have no notice of the mortgage; but they have no right to, nor interest in, any specific property until they have obtained this right or interest by some legal process. They have no more right to the property than the mortgagee has, whose mortgage is void. They all have an equal

right to the property—that is, they all have a right to procure a lien upon it, and the one who first acts will obtain the prior right. The mortgagor has a continuing right to mortgage his property. He has the right to prefer one creditor over another. And if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, &c., his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same thing as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both parties, and hence must be held to be valid from that time on as against all persons," &c. Our act recognizes registry, not only within the time, but afterwards. It is the right of the mortgagee to record, which he may or may not exercise in or out of time with or without the consent of the mortgagor.

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"If, as Mr. Dwaris states, considerations of inconvenience are allowable in construing a doubtful statute, it seems to us that the construction contended for, giving to a particular class of general creditors an anomalous character, yielding to some liens and overriding others—would in practice be fruitful of untold "complications, inconveniences, hardships, and embarrassments," creating indeed in this case what the learned master so aptly styled "a curious puzzle." Under what we conceive to be the proper construction of the act, no such complication can arise. The Doar mortgage, although recorded out of time, from that date became valid as a lien, and as such had priority over all the general debts of the mortgagor which had not then become liens, regardless of the time they were contracted as prior or subsequent; and as to the mortgage of Fraser, who had actual notice, it (the Doar mortgage) was, according to its date, the first lien, and from the proceeds of the mortgaged premises must be first paid, and the mortgage of Fraser second.

It is the judgment of this court that the judgment of the Circuit Court be modified so as to conform to the conclusions herein announced, and in all other respects be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER, dissenting. I am unable to concur in the construction given to the act of 1876, and, on the contrary, agree with the view taken by the master and adopted by the Circuit Judge. The question is so fully and satisfactorily discussed by master Hanckel in his able and elaborate report that it would be a work of supererogation to go at large into the argument. I propose simply to indicate some of the points which, to my mind, are conclusive.

The language of the statute to be construed, so far as it relates to the particular question with which we are concerned, is as follows: "All mortgages, or instruments in writing in the nature of a mortgage, of any property, real or personal, * * * should be valid so as to affect, from the time of such delivery or execution, the rights of subsequent creditors or purchasers for valuable consideration without notice, only when recorded with-

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in *forty days from the time of such delivery or execution. * * * Provided, nevertheless, that the above mentioned deeds, or instruments in writing, if recorded subsequent to the expiration of said period of forty days, shall be valid to affect the rights of subsequent creditors and purchasers for valuable consideration without notice only from the date of such record." The question to be determined is, whether the Doar mortgage, which was not recorded within forty days from its execution, takes precedence of the general creditors whose claims were incurred between the time of the execution of that mortgage and the time when it was recorded.

The turning point of the inquiry, as it seems to me, is whether the words "subsequent creditors and purchasers" in the proviso to the act mean persons whose claims arose subsequent to the date of the mortgage, whose validity is in question, or subsequent to the record of such mortgage. I think they refer to the latter, and not to the former period. There can be no doubt, and I understand it to be conceded, that if the body of the act stood alone, without the proviso, the result would be that a mortgage not recorded until after the time allowed for that purpose would have no validity as against the claims of creditors or purchasers subsequent to the date of such mortgage; for the language of the act of 1876, that a mortgage shall be valid so as to affect the rights of subsequent creditors and purchasers without notice, only when recorded within forty days, is in effect the same as that used in the act of 1843, which substantially declared that no mortgage should be valid so as to affect the rights of subsequent creditors and purchasers without notice, unless it shall be recorded within sixty days. To say that a mortgage shall be valid only when recorded, is tantamount to saying that no mortgage shall be valid unless it is recorded, &c.

The language of the act of 1843 has been construed by the courts of this State in several cases to mean that a mortgage not recorded within time has no validity as against subsequent creditors or purchasers without notice, and this, therefore, would be the proper construction of the act of 1876, without the proviso. *McKnight v. Gordon*, 13 Rich. Eq., 222 [94 Am. Dec. 164]; *Williams v. Beard*, 1 S. C., 309; and *Piester v. Piester*,

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22 S. C., 139 [53 Am. Rep. 711]. The *inquiry, then, is as to the effect of the proviso. Was its purpose anything more than to relieve a mortgagee who had neglected to record his mortgage within time from the extreme penalty, which under the body of the act he would incur, of having his mortgage declared of no validity as against the claims, not only of creditors or purchasers subsequent to the execution of the mortgage, but also of those subsequent to the recording of such mortgage, by declaring that as to this latter class his mortgage should have validity from the time it was actually recorded, inasmuch as from that time forward the public would have notice of his lien, and therefore any one who dealt with the mortgagor subsequent to that time must be affected by such lien?

The object of the proviso was simply to qualify the very general terms used in the body of the act and to confine the protection afforded by them to the class of creditors and purchasers who needed and deserved protection, viz., those who had dealt with the mortgagor without knowing, or having the means of knowing, of the mortgage, and to deprive another class of creditors and purchasers of that protection to which they would not be entitled, though under the general terms of the act, unqualified by the proviso, they could claim it, viz., those who dealt with the mortgagor after they had the means of knowing of the existence of the lien by the recording of the mortgage, and who chose subsequently to that time to deal with the mortgagor.

This, it seems to me, is the proper construction of the act. The other view would lead to the very singular result of giving superior efficacy to constructive over actual notice, and this certainly was not the intention of the act. For if the Doar mortgage had never been recorded, and the simple contract creditors had received actual notice of it after their claims were contracted, this would not give the mortgage any validity as against such claims, and yet it is contended that mere constructive notice, arising from the record of the mortgage after the claims of the simple contract creditors were contracted, and after the time allowed by law for recording the mortgage, will give the mortgage a validity against these claims, which actual notice would not do.

Again, the construction contended for in-

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volves the necessity *of interpolating words into the statute, for which I find no warrant; for, practically, by that construction the word "creditors" must be read "judgment or other lien creditors." The act, in express terms, declares that creditors, not judgment or lien creditors, subsequent to the execution of a mortgage, shall not be affected by it, unless it is recorded within forty days; and

yet it is contended, practically, that a creditor who has acquired no lien prior to the recording of a mortgage, will be affected by such a mortgage, even though it be not recorded until after the lapse of forty days. This, it seems to me, is extending protection to that class of creditors who do not need it—lien creditors—and withholding it from that class—unsecured creditors—who do need it, and defeats the main object of the registry law, which is notice—not notice to the creditor after, but before, his debt is contracted.

Again, it will be observed that the word "subsequent" qualifies the word "purchasers" as well as the word "creditors," and therefore we may legitimately test the construction by reading the act as if purchasers were the only class intended to be protected. So reading the act it seems clear that the words "subsequent creditors and purchasers" in the proviso mean persons whose claims arose subsequent to the recording, and not the date, of the mortgage. For it must be, and is, conceded that a mortgage recorded out of time cannot affect the rights of a purchaser who has bought the property subsequent to the date, but prior to the recording, of such mortgage, and as the same protection is extended in the same language to a creditor, it is difficult to understand why a creditor, whose debt was contracted subsequent to the date, but prior to the recording, of the mortgage, should not receive the same protection against the mortgage, as it is admitted a purchaser could claim.

It is a mistake to suppose that if the word "subsequent" in the proviso has relation to the time of recording of the mortgage, and not to its date, that then there would have been no necessity for the provision contained in the proviso. Such a view proceeds upon the erroneous assumption that the recording of a mortgage after the time limited for that purpose, would operate as constructive notice, and therefore that all persons who be-

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came creditors or purchasers after that time, having constructive notice of the mortgage, would be bound by it. But prior to the act of 1876 the recording of a mortgage out of time did not operate even as constructive notice, and hence, according to my view, the principal object of the proviso was to enable it so to operate: and therefore the legislature very properly declared that such a mortgage should be valid as against subsequent creditors and purchasers without notice "only from the date of such record," meaning that from that time it should operate as notice to all who might subsequently thereto become creditors of, or purchasers from, the mortgagor. Otherwise the anomaly would be presented of having a creditor or purchaser affected by notice after the debt was contracted or the purchase made, when

it would be difficult to understand what good the notice would do.

It seems to me, therefore, that the judgment of the Circuit Court should be affirmed.

Judgment modified.

In this case a petition for rehearing was filed by the unsecured creditors upon the ground that their counsel were absent at the hearing, because they had not expected the case to be reached as soon as it was; that they then applied for the appointment of a time when they might be heard orally, which the court declined, but gave them leave to file printed arguments.

December 2, 1885. The following order was passed—

PER CURIAM. It is not claimed that any material fact or principle was overlooked by this court in rendering its recent judgment in this case, the only ground stated in the petition for rehearing being that the petitioners had no opportunity for oral argument when the appeal was heard. It will be observed from the correspondence submitted with the petition that the court did not decline to hear oral argument in the case, but declined to fix a time for such hearing out of order, of which the petitioner had notice. The failure to hear oral argument, therefore, was not the fault of the court. Hence there is no ground for a rehearing. The petition is dismissed.

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*WALTERS v. KRAFT.

(April Term, 1885.)

[Reported and annotated in 55 Am. Rep. 44.]

[1. *Limitation of Actions* ¶155.]

Where a principal and sureties gave their joint and several promissory note, upon which, after maturity, the principal debtor, from time to time, made several payments, the legal liability of all the parties to the note was discharged at the expiration of six years from its maturity, and thereafter action could be maintained only on the new promise implied from the partial payments credited on the note.

[Ed. Note.—Cited in *Colvin v. Phillips*, 25 S. C. 234; *Fleming v. Fleming*, 33 S. C. 508, 509, 12 S. E. 257, 26 Am. St. Rep. 694; *Jacobs v. Gilreath*, 41 S. C. 148, 19 S. E. 308, 310; *Milwee v. Jay*, 47 S. C. 439, 440, 25 S. E. 298; *Ewbank v. Ewbank*, 64 S. C. 437, 42 S. E. 194.

For other cases, see *Limitation of Actions*, Cent. Dig. § 625; Dec. Dig. ¶155.]

[2. *Limitation of Actions* ¶155.]

But as such subsequent promise constituted a new contract and a new cause of action, no one is liable except him who made it; the liability of the sureties was not continued by the payments and promises of the principal debtor.

[Ed. Note.—Cited in *Dickson v. Gourdin*, 26 S. C. 392, 396, 400, 401, 2 S. E. 303; *Id.*, 29 S. C. 344, 349, 351-354, 7 S. E. 510, 1 L. R. A. 628; *Park v. Brooks*, 38 S. C. 306, 17 S. E.

22; *Hunter v. Hunter*, 63 S. C. 91, 41 S. E. 33, 90 Am. St. Rep. 663.

For other cases, see *Limitation of Actions*, Cent. Dig. §§ 623-630; Dec. Dig. ☞155.]

[3. *Limitation of Actions* ☞155.]

The relation of agency does not exist between joint-debtors arising from community of interest; their community of interest is confined to the payment of the debt. Payment by a principal debtor cannot continue the obligation of a surety, beyond his consent, beyond the period fixed by the original contract.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 623-630; Dec. Dig. ☞155.]

4. *Silman v. Silman* (2 Hill, 416) is inconsistent with *Smith v. Caldwell* (15 Rich. 378), and was practically overruled by this later case. Mr. Justice McGowan, dissenting.

Before Witherspoon, J., Richland, April, 1885.

This was an action by Caroline Walters against P. W. Kraft and others, the makers of a joint and several promissory note. The judge refused several requests to charge made by the sureties, and did charge as follows:

1. That if P. W. Kraft had made a payment on the note within six years from its maturity, and this action was commenced within six years from that payment, the defense of the statute of limitations cannot avail the other defendants.

2. That the note carried with it a liability on all the makers for six years from the date of any payment made on it by any of the joint makers within six years from its maturity.

The jury found a verdict for the plaintiff against all of the defendants for \$499.17.

From the judgment entered upon this verdict the defendants, Anna C. Kraft and the executors of Hei, duly appealed on exceptions, alleging error in the refusals to charge and the charge as made.

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*Mr. LeRoy F. Youmans, for appellants. Messrs. Clark & Muller, contra.

November 27, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On May 29, 1872, P. W. Kraft, Anna C. Kraft, and E. F. Hei, executed their joint and several promissory note, whereby they promised to pay to the plaintiff or bearer thirty days after the date thereof five hundred dollars, with interest at two per cent. per month if not paid at maturity. The interest was regularly paid each year by P. W. Kraft, the principal debtor, the other two parties being his sureties, the last two payments of interest being dated, one on June 1, 1877, and the other on June 1, 1878, the latter being acknowledged to be for interest to January 1, 1879, on which day there was another payment by P. W. Kraft on account of the principal. The action was commenced on the note on February 21, 1880,

and in the complaint the several payments endorsed on the note were set out, and judgment was demanded for the balance after deducting said payments, together with the interest on such balance. Pending the action the said E. F. Hei died testate, and the same has been regularly continued against his executors.

The defense relied upon by the sureties was the statute of limitations, and the only question raised by the appeal is whether the payments made by the principal debtor, before the statutory period as to the note had expired, would take the case out of the statute as to the sureties. There is no doubt that at one time the courts of this State held that a payment made by one of several joint makers of a note, whether before or after the statutory period had expired, would take the case out of the statute as to the others. *Beitz v. Fuller*, 1 McCord, 541 [10 Am. Dec. 693], following the famous case of *Whitcomb v. Whiting*, Doug., *629; 1 Sm. Lead. Cas., 318. Subsequently, however, this doctrine was modified, so that while payment made by one of several joint contractors before the statutory period had run out, might have the effect of taking the case out of the statute as to the others, yet that a payment made after the expiration of the statutory period would

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*have no such effect. *Steele v. Jennings*, 1 McMull., 297; *Goudy v. Gillam*, 6 Rich., 29; *Smith v. Caldwell*, 15 Rich., 365.

Again, it is manifest that in the earlier decisions the statute of limitations was, in disregard of the terms of the statute, regarded as raising a presumption of payment, and therefore anything that went to rebut such a presumption was regarded as sufficient to take a case out of the statute. *Aiken v. Benton*, 2 Brev., 330; *Pearce v. Zimmerman*, Harp., 305; *Beitz v. Fuller*, supra, and other cases of that class. But the later decisions, giving effect to the express language of the statute, which declared that the action shall be commenced within the time limited, "and not after," treat the statute as an absolute bar to the recovery of the debt, unaffected by any presumption that the debt was actually paid. *Reigne v. Desportes*, Dudley, 118; *Smith v. Caldwell*, supra. From this it logically followed that when the statutory period from the maturity of a note has run out before any action is commenced upon it, and reliance is placed upon a subsequent promise, whether express or implied, the action must be upon such promise, whether it is made before or after the expiration of the statutory period, and not upon the note.

As is said by O'Neill, J., in *Reigne v. Desportes*, at page 124: "The statute directs that the action of debt on simple contract and assumpsit shall be brought within four years next after the cause of said action or suit, and not after: the words of the statute

are of plain and obvious meaning, and to give it effect only two questions need be asked: When did the cause of action accrue? Is the suit brought within four years from the accrual of the cause of action? * * * If more than four years intervenes between the time at which the party by his contract had the right to demand the payment and the institution of the suit, the bar of the statute is complete and effectual, and the cause of action is gone. But the old debt, as a past consideration, will support a new promise, for notwithstanding it cannot be legally enforced as a cause of action, yet if it has not been paid, the party who contracted it is in honesty * * * bound to pay it. This obligation of honesty and morality is a good consideration, and the new promise founded upon it will be enforced; but it is a new cause of action, not as the revival of the old

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one. For if *not regarded as a new cause of action, the words of the statute would prevent it from enabling the party to recover. Regard it as a new contract, a new cause of action, and the case is not affected by either the intent or the words of the statute." He then goes on to show that a contrary impression had grown up, from the fact that under the old form of pleading in assumpsit, a new promise could be treated as the real cause of action under the general counts in the declaration, and from "many loose expressions * * * to be found in the opinions of some of the most learned judges."

So in *Smith v. Caldwell*, supra, Wardlaw, J., in laying down certain propositions which are held to be settled, uses this language: "1. That the statute of limitations does not operate by raising a presumption of payment, but by creating a legal bar to the action. * * * 2. That where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute, is itself the true cause of action; and this, whether such promise was made before or after the expiration of the period just mentioned. If before, the legal liability was its consideration: if after, the moral obligation. This proposition, under the general form of pleading which is allowed, is, in practice, unimportant, where the declaration is in assumpsit upon an executed consideration; but it is material in the declaration of the rights of parties wherever the new promise, and that alone, stands unaffected by the statute; and from this proposition it follows that payment, admission, and the like are but evidence of a promise to pay, and that whatever is said to revive a debt must operate through a promise expressed or implied."

It will be observed that these principles, announced by these two distinguished judges in the cases last cited, are deduced from the terms of the former statute of limitations,

which required actions to be commenced within the time limited, and not after; but we think that the language of the present statute—"civil actions can only be commenced within the periods prescribed in this title"—is equally imperative, and requires the same construction. It follows, therefore,

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that this action, not having *been commenced within six years from the maturity of the note, cannot be maintained on the note, and the only question, assuming the action to be upon the subsequent promise implied by the payments, about which no question seems to have been raised, is as to whether the appellants are bound by such promise.

If this question be considered apart from authority, we do not see how there could be a doubt about it. If it be true, as we have shown it to be, that the legal liability of all the parties on the note is forever discharged by reason of the failure of the plaintiff to bring her action within six years from the maturity of the note, and that the plaintiff's only cause of action is the subsequent promise implied by the partial payments made by the principal debtor, P. W. Kraft, and credited on the note, then nothing would seem to be clearer than that no one is bound by such promise except the person who made it. If the subsequent promise, as we have seen, constitutes a new contract and a new cause of action, then certainly no one can be held liable to the performance of such new contract, except him who made it.

This is, and must necessarily be, conceded, but it is said that the act of one of several joint debtors, especially the act of making a payment on the note upon which they are all liable, is the act of all, as it enures to the benefit of all, and that the relation of agency exists between them, arising from community of interest. We are, however, unable to discover any just foundation in the nature of things for such an idea. Their community of interest is confined to the payment of the debt, and cannot be extended beyond that. There is certainly no reason why a payment by one of several joint contractors, which enures to the benefit of all, should carry with it the idea that the one who makes the payment has the authority to make a new contract for all. An agency to pay, implied from the common obligation, does not necessarily, or even naturally, involve the idea of an agency to make a new promise whereby the common obligation is continued for a longer period than that fixed by the original contract, in which all the parties joined. For that would practically amount to an alteration of the original contract by extending its legal effect beyond the time when its legal obligation would cease. And when we remember the well settled rule that any al-

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teration *of the original contract by the creditor and principal debtor, without the

assent of the surety, will discharge the surety, it would seem to follow necessarily that a payment made by the principal debtor, even before the statutory period has expired, cannot have the effect of continuing the legal obligation of the original contract beyond the period originally fixed for its duration, because that would be an alteration of one of the terms of the original contract.

A surety, when he signs a joint and several note with his principal, knows that unless the creditor brings his action on the note within six years from its maturity, his legal liability is discharged by the operation of the statute of limitations, and we are unable to see by what authority his liability can be extended beyond that period without his assent. One may be willing to assume a legal liability for another for a definite period, but it does not by any means follow that he would be willing to assume such liability for an indefinite period, dependent wholly upon the act of the other, to which he has not assented, and of which oftentimes he has no knowledge. So that it seems to us that it would be in violation of well settled principles to hold that a principal debtor can, by any promise of his own, either express or implied, without the assent of his surety, extend the legal obligation of such surety beyond the period originally fixed for its duration.

This notion that one of several joint debtors may, by his own act, without the consent of the others, defeat the operation of the statute of limitations upon the original contract, manifestly rests upon what is now conceded, and we believe universally conceded, to be an erroneous view of the statute, and is wholly inconsistent with the later and more correct view of the statute. As long as it was held that the statute operated "by raising a presumption of payment," and not "by creating a legal bar to the action," it was very natural that anything which went to rebut that presumption should affect all the parties to the contract alike, and hence any act of any one of those parties tending to show that the debt was not in fact paid, was held sufficient to defeat the plea of the statute, which was then, in effect, a plea of payment, inasmuch as it was assumed

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that motives of self-interest would deter every one of the parties to the contract from any act or omission which would show that the debt was not paid, if in fact it was paid.

Accordingly we find that originally no distinction was drawn between mere admissions or positive promises, and no distinction was drawn between promises, either express or implied, made before or after the expiration of the statutory period on the original contract. In fact, the whole question was regarded as one of payment, and therefore anything which went to defeat the presumption of payment arising from the lapse of

the time fixed by the statute, was considered sufficient to defeat the plea of the statute. But when the later and more correct view of the statute became well settled—when it was definitely determined that the statute did not operate "by raising a presumption of payment," but "by creating a legal bar to the action;" and when it was distinctly decided "that where the statutory period, counting from the original accrual of the cause of action, expired before commencement of the suit, a promise shown for the purpose of opposing the plea of the statute, is itself the true cause of action; and this, whether such promise was made before or after the expiration of the period just mentioned," a different rule must necessarily be adopted; otherwise the anomalous result would follow that a man might be made liable upon a contract which he never made or authorized, and which in many, if not most, cases he knew nothing of. If, after the expiration of the statutory period, from the maturity of the note the statute is a legal bar to an action on the note, and resort must be had to a subsequent promise, either express or implied, as a new cause of action, it follows necessarily that no recovery can be had on such new cause of action against those who did not join in the subsequent promise which gave rise to such cause of action.

It is true that the conclusion at which we have arrived is in conflict with the decision in the case of *Silman v. Silman*, 2 Hill, 416; but it will be observed that in that case Judge O'Neill says that "the decisions that the promise of one joint contractor would take out of the statute a debt which would be otherwise barred, have been altogether founded in mistake," and in deciding otherwise only yields to what he calls "the un-

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broken *current of authorities," and yet he modifies those former decisions by drawing a distinction, which had first been clearly pointed out in *Young v. Monpoe* (2 Bail., 278), between a promise made before and one made after the expiration of the statutory period on the original contract, and confines the decision to cases in which the new promise was made before the expiration of the statutory period, for the reason that in such a case the new promise operates as a continuance of the original liability for four years from the date of such promise; but that where the new promise is made after the expiration of the statutory period, "the debt is gone, and the new promise or acknowledgment must show a sufficient cause of action to entitle the plaintiff to recover," meaning, doubtless, that the legal remedy for the collection of the debt is gone, and the action can only be maintained on the subsequent promise as a new cause of action.

Thus stood the law when the case of *Smith v. Caldwell*, supra, came before the late

Court of Appeals for decision, when we think the foundation upon which *Silman v. Silman* rested was swept away, and the case was practically overruled. This was the manifest view of the Circuit Judge, and at least one of the judges of the Court of Appeals, and what was the opinion of the other two does not very clearly appear: for according to the view which they took it was not necessary either to affirm or disaffirm the case of *Silman v. Silman*, but the principles or propositions which they declared settled are clearly inconsistent with the ground upon which Judge O'Neill placed the case of *Silman v. Silman*. For, as we have seen, judge O'Neill, drawing a distinction between a promise made before and one made after the expiration of the statutory period on the original contract, based his decision upon the idea that where the promise was made before the expiration of the original statutory period, it operated as a continuance of the then existing liability for another period of four years from the date of such promise; but this idea is clearly repudiated in the case of *Smith v. Caldwell*, and is entirely inconsistent with the conclusion there reached.

In that case, before the statutory period on the note had expired, Neuffer, the principal debtor, made one payment, and within four years after such payment he made another

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payment, *but the first was more than four years before the commencement of the action, and the second more than four years from the maturity of the note, but, deducting the time during which the statute of limitations was suspended by one of the sections of the stay law, within four years from the commencement of the action; and yet the court held that the action against Caldwell, the surety, was barred. Now, it is manifest that if the court had recognized the doctrine upon which *Silman v. Silman* was based, to wit, that the first payment operated as a continuance of the then existing liability of both parties for another period of four years from the date of such payment, the statute could not have been successfully pleaded, for during the second period of four years, over which, according to *Silman v. Silman*, the defendant's original liability had been extended, another payment was made, which, upon the same principle, ought to have extended his liability for another period of four years, within which the action was commenced. It is clear, therefore, that the decision in *Smith v. Caldwell* is entirely inconsistent with the principle upon which the case of *Silman v. Silman* was decided, and that it was practically overruled by that case, though the majority of the court did not deem it necessary so to declare in express terms, and we are not aware of any case in which it has been subsequently recognized.

Under this view the other question as to the effect of the provisions of the code of

procedure cannot arise, and need not be considered.

The judgment of this court is, that the judgment of the Circuit Court against Anna C. Kraft and the executors of E. F. Hei be reversed, and that the case, as to them, be remanded to that court for a new trial.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McGOWAN, dissenting. I cannot concur in this judgment. It was held in the case of *Silman v. Silman* (2 Hill, 416) that "where the statute of limitations has not run out, the promise or acknowledgment of one of two joint makers of a note will prevent its operation against both; but where

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the bar of the *statute was complete, a promise or acknowledgment by one will only be obligatory on himself, and will not revive the demand against the other." &c. This decision was rendered in 1834, and has since been regarded as the settled law in South Carolina. In delivering the judgment of the court, Judge O'Neill said that he felt "constrained to yield to the unbroken current of authorities." The case has frequently been recognized and followed. *Goudy v. Gillam*, 6 Rich., 30; *Bowdre v. Hampton*, *Ibid.*, 218; *Smith v. Townsend*, 9 Rich., 44. It does not seem to me that the case of *Silman v. Silman* was overruled by that of *Smith v. Caldwell* (15 Rich., 378), either directly or indirectly. It is certainly not claimed in the case itself, and Judge Inglis did not concur in the judgment, for the reason that he could not make the decision consist "with the yet acknowledged law, as authoritatively ascertained and announced in *Silman v. Silman*, 2 Hill, 416."

But if anything held in *Smith v. Caldwell*, supra, was inconsistent with the well-established doctrine of *Silman v. Silman*, this court, as late as 1883, in the cases of *Shubrick v. Adams* (20 S. C., 56) and *Pyles v. Bell* (*Ibid.*, 369), reaffirmed the doctrine of *Silman v. Silman*, and held as follows: "In regard to the statute of limitations, the rule is well settled that after the debt is barred, nothing short of an express promise, or what is equivalent to such promise, will suffice to take a case out of the statute; but before the bar of the statute is complete, mere acknowledgments, as shown by part payment or otherwise, are sufficient to keep the original debt alive, by giving at each acknowledgment a new starting point for the running of the statute. *Rucker v. Frazier*, 4 Strob., 94; *Lomax v. Spierin Dudley*, 367; *Bowdre v. Hampton*, 6 Rich., 212." The case of *Lomax v. Spierin* was an acknowledgment by one of two executors, and it was announced that the principle drawn from all the cases was "that the debt is not barred if there has been a sufficient promise to pay at any time within four years from the commencement of the action."

This has certainly been considered the settled law, and, it seems to me, is correct in principle. A simple acknowledgment before the action is barred is sufficient to keep

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alive the original *obligation with all its incidents, and there is not in this any violation of the contract of the surety, for it was the law when he became surety, and he must be taken to have contracted with reference to the law as it existed. I greatly fear that the new rule now established will operate as a surprise upon parties and affect retroactively and disastrously the rights of creditors who have relied upon the rule as heretofore established.

New trial granted.

23 S. C. 588

GARDNER v. GARDNER.

(April Term, 1885.)

[1. *Principal and Surety* ¶105.]

A surety has the right to stand upon the contract as he made it, and if altered in any respect, it is no longer the contract that he made, and he cannot be bound by it. A valid agreement between the creditor and principal debtor, extending the time of payment, is such an alteration, and will discharge the surety even though not prejudicial to him.

[Ed. Note.—Cited in *Sanders v. Bagwell*, 32 S. C. 242, 10 S. E. 946, 7 L. R. A. 743; *Kennedy v. Adickes*, 37 S. C. 181, 15 S. E. 922; *Sloan v. Latimer*, 41 S. C. 219, 220, 19 S. E. 491, 691; *Greenville v. Ormand*, 51 S. C. 124, 28 S. E. 147; *Griffith v. Newell*, 69 S. C. 304, 48 S. E. 259; *Providence Machine Co. v. Browning*, 70 S. C. 155, 49 S. E. 325; *Exchange Bank v. McMillan*, 76 S. C. 567, 57 S. E. 630.

For other cases, see *Principal and Surety* Cent. Dig. §§ 191, 192, 196, 201-210; Dec. Dig. ¶105.]

[2. *Principal and Surety* ¶104.]

Where a creditor receives from the principal debtor payment of interest in advance on a past due note, an agreement to give time is necessarily implied, and the creditor thereby debars himself of suing meantime on the note, and the surety is therefore discharged—unless the creditor can show mistake, or, possibly, an agreement that the right of suit should not be suspended.

[Ed. Note.—Cited in *Sloan v. Latimer*, 41 S. C. 219, 19 S. E. 491, 691.

For other cases, see *Principal and Surety*, Cent. Dig. § 190; Dec. Dig. ¶104.]

3. The question whether a sealed note which matured in 1860, and was credited with payments by the principal debtor down to 1865, should be presumed paid as to the sureties in 1884, raised but not considered. Mr. Justice McGowan dissenting.

[This case is also cited in *Gardner v. Gardner*, 49 S. C. 69, 26 S. E. 1001; *Providence Machine Co. v. Browning*, 70 S. C. 155, 49 S. E. 325, without specific application.]

Before Wallace, J., Richland, November, 1884.

The opinion fully states the case.

Messrs. Andrew Crawford and R. W. Shand, upon the point decided by the court, cited *Brandt Sur. & Guar.*, ch. XIV.; *Ibid.*, §§ 312, 305; 2 *Lead. Cas. Eq.* (last edit.), 1912; *Pitman Pr. & Sur.*, 174; *DeColl Sur. & Guar.*, 407; 1 *Younge & C. Ch.*, 420; 43 *Ind.*, 396; 50 *Id.*, 377; 37 *Ga.*, 385; 26 *Ill.*, 286; 30 *Vt.*, 712; 6 *Whart.*, 440; 5 *Rich.*, 51.

Messrs. Allen J. Green and Abney & Abney, contra.

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*November 27, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The questions raised by this appeal grow out of the following state of facts: On February 3, 1859, one E. W. Geiger executed his note under seal, with Samuel Gardner and J. H. Threewits as sureties, whereby he promised to pay Jacob Geiger, and A. W. Geiger, administrators of Godfrey H. Geiger, deceased, or bearer, the sum of \$1,583.53, on February 3, 1860, with interest from date, payable annually. On this note sundry payments are endorsed as follows: February 3, 1860, interest to date; February 3, 1861, interest to date; February 3, 1862, interest to date; June 29, 1863, interest to date and \$583.53 on the principal; March 3, 1865, interest to June 29, 1865. It is conceded, however, that the date of this last payment is erroneous, and that the true date is April 27, 1865. All of these payments were made by E. W. Geiger, the principal debtor, to Jacob Geiger, who seems to have had entire charge of the money matters of the estate of his intestate, and the credits endorsed are all signed by him. These payments were all made during the life-time of Samuel Gardner, who died in 1883. Jacob Geiger and Threewits, the other surety, are also dead.

This action was commenced on January 29, 1884, by the plaintiff, who had become the lawful owner and holder of the note above mentioned some time in 1870, against the administrators and heirs at law of Samuel Gardner, deceased, in the nature of a creditor's bill, and the fundamental inquiry is whether the estate of Samuel Gardner is still liable on said note. The defendants rely upon two defenses. First, the presumption of payment arising from lapse of time. Second, the discharge of the surety by reason of a change in the original contract, arising from the receipt by the creditor from the principal debtor of interest in advance, after the maturity of the note, which, it is contended, necessarily extended the time of payment to the day to which the interest was paid in advance. The Circuit Judge held that the presumption of payment could not arise, because twenty years had not elapsed from the date of the last payment to the time when the ac-

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tion was commenced; *and that while the receipt of interest in advance was prima facie

evidence of a contract to give further time to the principal debtor, which would discharge the surety, and in the absence of other evidence would be conclusive; yet if there be other evidence, then it is a question of fact, upon all the evidence, whether there was such a contract. He then says: "There is other evidence in this case, and the facts and circumstances of this case rebut the idea that there was any contract to give further time," and accordingly found, as matter of fact, that there was no such contract. He therefore rendered judgment that the estate of Samuel Gardner was still liable on the note. From this judgment the defendants appeal, alleging error in each of the findings of the Circuit Judge.

We propose to consider, first, the question of the discharge of the surety. There can be no doubt that any alteration of the contract, without the assent of the surety, will discharge him from liability. It is equally certain that any valid agreement between the creditor and the principal debtor, whereby the former legally binds himself to extend the time of payment for any length of time, is such an alteration of the contract as will discharge the surety. It is a mistake to suppose, as has been argued, that the alteration, to be effectual as a discharge to the surety, must be to the prejudice of the surety. The surety has a right to stand upon the contract as he made it; and if it is altered in any respect, it is no longer the contract which he made, and he cannot be held bound by it. As is said by Mr. Justice Story in *Miller v. Stewart*, 9 Wheat., 703 [6 L. Ed. 189]: "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal." These views are referred to with approval in *Martin v. Thomas*, 24 How., 317

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[16 L. Ed. 689], and in *Smith v. United States*, 2 Wall., 234 [17 L. Ed. 788]. See, also, the notes to the case of *Rees v. Berrington*, 2 Lead. Cas. Eq. (W. & T.), 974.

The cases cited by counsel for respondents to sustain the position that the alteration of the contract must be such as would be injurious in order to operate a discharge, do not establish any such doctrine. The case of *McLemore v. Powell* (12 Wheat., 554 [6 L. Ed. 726]) merely decides that an agreement to extend the time of payment, without consideration, will not discharge the endorser, for the simple reason that in such a case there is no valid agreement. The case of the *United States v. Hodge* (6 How., 279 [12 L.

Ed. 437]) simply decides that the taking of a mortgage as collateral security, in which time is given for the enforcement of such collateral security, where there is no valid agreement to give time to the principal debtor personally, does not discharge the sureties on the original debt.

In that case the action was on a postmaster's bond for twenty-five thousand dollars, given in 1836, and the defence was that the principal in the bond had, on August 15, 1837, given a mortgage to secure to the post-office department payment of a sum not exceeding sixty-five thousand dollars, or such sum as might be found due on a settlement, from and after six months from the date of the mortgage, and it was claimed that time having thus been given to the principal the sureties were discharged. But the court said, "Giving time for payment, to discharge the endorser, must operate upon the instrument endorsed by him. Now, if the post-office department had, by the mortgage, suspended the right of action on the bond for the time limited in the mortgage, it might have released the sureties. But no such condition is expressed, and none such can be implied." Here the principal entered into two obligations, and as the latter in no way affected the former, it could not, of course, have the effect of altering the contract evidenced by the bond upon which the sureties were sued, and their contract not having been changed, they could not claim to be discharged. As the court said: "The remedy on the collateral instrument is wholly immaterial, unless it discharges or postpones that on the original obligation. There is no such condition in the mortgage under consid-

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eration, and consequently it can in no respect affect or suspend the remedy of the post-office department on the bond."

The cases of *Jackson v. Patrick*, 10 S. C. 197, and *Rosborough v. McAlley*, 10 S. C. 235, have also been cited to sustain respondents' position, but an examination of those cases will show that they afford no support to the idea that the alteration of the contract, which will discharge a surety, must be such an alteration as will be injurious to the surety. In making the quotation from the former case to sustain the position contended for, the significance of the words "either" and "or" seems to have been overlooked. The language quoted is as follows: "That in order to discharge the surety, the creditor must do some act of positive character, either by entering into a valid contract with the principal debtor, varying the terms of the obligation by extending the time for its performance, or otherwise, or by doing some other act prejudicial to the interests of the surety, or he must omit, after demand from the surety, some duty imposed upon him whereby loss results to the surety, is a proposition too well settled to admit of dispute."

Now, the obvious meaning of this language is, that there are three things which will dis-

charge a surety: First, a valid contract between the creditor and principal debtor, "varying the terms of the obligation by extending the time for its performance, or otherwise." Second, "doing some other act prejudicial to the interests of the surety." Third, omitting, "after demand from the surety, some duty imposed upon him (the creditor), whereby loss results to the surety." So that when a surety claims his discharge upon the first ground, it is only necessary for him to show that the contract into which he entered has been changed, either by extending the time for its performance, altering the rate of interest, or in any other way, and it is wholly immaterial to inquire whether such alteration is prejudicial to him, for the simple reason that a man cannot be made liable upon a contract different from that which he entered into. In the language of Judge Story: "He has a right to stand upon the very terms of his contract." But if he claims a discharge upon either of the other two grounds, then

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he must show that the *creditor has done or omitted, after demand, some act which has resulted injuriously to him.

In the case of *Rosborough v. McAliley*, nothing was said as to the discharge of a surety by an alteration of the contract, the question there being whether the creditor had done a positive act to the prejudice of the interests of the surety. Nor do the cases of *Hampton v. Levy*, 1 McCord Eq., 107, and *Lang v. Brevard*, 3 Strob. Eq., 64, likewise relied upon, touch the point here under consideration, for in those cases the discharge of the surety was not claimed upon the ground of the alteration of the original contract, but upon the ground that the creditor had omitted to record the mortgages given to secure the debt.

Our next inquiry is as to the effect of the act of the creditor in receiving payment in advance of the interest after the maturity of the debt. Does this necessarily imply an agreement on the part of the creditor to extend the time for payment to the day up to which he has received the interest, or is it, as the Circuit Judge held, merely *prima facie* evidence of such agreement, which may be rebutted by other evidence? This is a new question in this State and the decisions elsewhere are conflicting. It seems to us that where a creditor receives from the principal debtor after the maturity of the note or other obligation, payment of interest in advance, this necessarily implies an agreement on the part of the creditor to give time to the principal debtor, and that he thereby debars himself of the right to sue upon the original contract until the time arrives, up to which he has received interest in advance.

Interest for money is defined to be "the compensation which is paid by the borrower to the lender, or by the debtor to the creditor, for its use." 1 Bouv. Law Dict., 652.

Hence when a creditor receives interest on his debt up to a certain period, he receives from his debtor compensation for the use of the money by the debtor up to that period, and until that period arrives he cannot demand payment of the money, for by receiving compensation for its use by the debtor for a specified time, he has, by necessary implication, agreed that the debtor shall have the use of the money for which he has paid for the time specified; for the payment of the money certainly constitutes such a con-

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sidera*tion as will make the agreement valid and legally binding. There can be no question of intention, for parties are presumed to intend the necessary legal effect of their acts.

If, therefore, a creditor knowingly receives from his debtor interest in advance on a note, after maturity, he is necessarily presumed to have extended credit to his debtor during the period for which he has voluntarily received compensation for the use of the money then due. Otherwise a creditor who should, after the maturity of his note, receive the interest on it for twelve months in advance, might, the very next day, bring suit against his debtor, and in due course of law recover judgment and enforce the payment of the very money the use of which for twelve months the debtor had already bought and paid for before the period had elapsed during which the debtor had by purchase acquired the legal right to its use. Surely, no court of equity would allow this; and hence we think that by such a transaction the creditor necessarily ties his own hands and debars himself, by a valid agreement, from the right of action for a specified time, which it is conceded would discharge the surety.

These views are well supported by the authorities cited in the argument for appellants, especially in the case of *Blake v. White*, 1 Younge & C. Ch., 420. In that case the bond became due in 1818, and in October of that year the creditor received the interest up to January 1, 1819. Lord Abinger said: "Could he then in the interim have been allowed by a court of equity to bring his action on the bond? I think not. It is admitted that in the case of a principal only, without a surety, if the debtor had given six months' interest in advance, a court of equity would interfere to stop the action. If in such a case the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but if it appeared simply that the six months' interest had been given, what could the imagination suggest but a contract *ip-sissimis verbis* that the creditor should not sue for that time? Besides, the interest being paid, would a court of equity endure that the creditor should put the interest into his pocket and next day sue for the principal? If that be so as between the princi-

pal debtor and the obligee, the same principles will apply to the surety. The question

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here is *whether the party did not preclude himself from suing on the bond by receiving by anticipation the interest due between October and January. The shortness of that period cannot affect the question." And it was in effect held that the surety was discharged by such extension of time to the principal.

It may well be that if, through mistake, the creditor should receive more interest than was then due, or if, possibly, at the time the interest was paid in advance, it should be made to appear that it was agreed between the debtor and creditor that this should not have the effect of suspending the creditor's immediate right of action, the necessary implication resulting from the payment of interest in advance would not arise, but this it is incumbent upon the creditor to show. What facts and circumstances the Circuit Judge relied upon as rebutting the idea that there was a contract to give further time do not appear from his decree. We think his error was one of law in not holding that the receipt of interest in advance was conclusive evidence of such contract, unless the creditor showed that it was a mistake, or that there was a special agreement at the time that his immediate right of action on the note should not be suspended. There certainly was no evidence of any such special agreement, and we do not think there was any evidence of a mistake.

The credit endorsed on the note shows unmistakably that the creditor knew that he was receiving interest in advance, and all the circumstances point to the same conclusion. The money was undoubtedly received on April 27, 1865, as shown by the date of his letter to E. W. Geiger, but at what particular time the last credit was endorsed upon the note does not appear. This endorsement was proved to be in the handwriting of Jacob Geiger, the creditor, and the terms in which it is expressed leave no doubt of the fact that he intended to receive that money as interest up to a future period. He no doubt knew that the preceding payment, which bears date June 29, 1863, had reduced the balance due on the note to one thousand dollars, and we cannot doubt that, when the money was offered to him in April, 1865, his intention was to receive the simple interest on that sum for two years, one hundred and forty dollars, the amount acknowledged in his letter written the day the money was paid.

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*We think, therefore, that the surety was discharged, and the plaintiff not being a creditor of the estate of Samuel Gardner, cannot maintain this action against his representatives.

Having reached the conclusion that the

surety was discharged in 1865 by the act of the creditor in giving time to the principal debtor, the other question as to whether the note should be presumed paid from lapse of time cannot arise, and need not, therefore, be considered.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice MCGOWAN, dissenting. E. W. Geiger, together with his sureties, Samuel Gardner and J. M. Threewits, executed a sealed note to Jacob Geiger and A. W. Geiger, as administrators, for \$1,583.53, which was due February 3, 1860, with interest from date, and payable annually. On this note there were endorsed receipts of payments as follows: February 3, 1861, interest to date; February 3, 1862, interest to date; June 29, 1863, interest to date, and \$583.53 on the principal; March 3 (really April 27), 1865, interest to June 29, 1865. It seems, therefore, that on April 27, 1865, the "annual" interest for two years—from June 29, 1863, to June 29, 1865, was received. At the time the money was received the two years had not actually expired by two months, as to which two months, May and June of 1865, the interest was received in advance; and it is now contended that such receipt of the interest alone must be construed into a contract on the part of the creditor not to sue during those two months, which, although in no way injurious to the sureties, discharged them and absolutely absolved them from all obligation to pay the note. In this I cannot concur for several reasons.

First. It is well settled that mere indulgence will not release the surety. In order to have that effect there must be a valid agreement for indulgence between the creditor and the principal debtor, obligatory on the creditor. Witte v. Wolfe, 16 S. C., 274, citing Parnell v. Price, 3 Rich., 121, and

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other cases. I *think no such contract was shown in this case, either expressly or by proper implication. The mere receipt of the interest in advance was surely not a contract to forbear suing, even for the two months covered by the interest received. To constitute a contract intention is necessary, and it is not claimed that there was any such express contract; but it is said that there was such implied contract—that the receipt of the interest necessarily showed that there was such a contract. It seems to me that in no sense could that be more than evidence tending to prove such a contract, and evidence only through a process of reasoning which probably was not in the minds of the parties, viz., that as the receipt of interest in advance prevents suit for the period covered by it, therefore he who takes it pre-

sumably intended to make such a contract.

It strikes me, when we consider the very serious consequences of absolving sureties from their solemn contract, that this whole view is strained; manufacturing a contract, which is matter of intention, by a process of logic that most probably never entered the heads of the parties assumed to have made it. But assuming that it was evidence bearing upon the question of contract, it certainly could not be more than *prima facie* evidence and rebuttable by other evidence. The parties might assuredly, by express declaration, negative the inference of such a contract, and why may it not be negated by other proof as strong as an express declaration? The rule, in reason, cannot be stronger than as stated by Mr. Brandt: "The general rule is that the reception of interest on a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which interest has been paid, unless the right to sue has been reserved by the agreement of the parties. The payment of the interest in advance is not of itself a contract to delay, but is evidence of such a contract; and while this evidence may be rebutted, yet, in the absence of any rebutting evidence, it becomes conclusive." Brandt Sur., § 305, and authorities.

Second. The Circuit Judge held that "there is other evidence in this case, and the facts and circumstances of the case rebut the idea that there was any contract to give

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further time. I therefore, upon full consideration of all the evidence in this case, am clearly of opinion, and conclude as matter of fact, that there was no such contract. It follows as a conclusion of law that Samuel Gardner, the surety, has not been discharged, and is still bound." In this finding I entirely concur. In brief, the facts were as follows: In April, 1865, the war was in its last agonies. Everything was in utter confusion. The courts were disorganized, and there was actually on the statute book a stay law, forbidding the service of any process for the collection of debts. This very note, along with other papers, was lying buried in order to escape robbery, and was therefore not in the possession of the creditor. But the debtor, E. W. Geiger, like most debtors at that time, was anxious to pay his debt in worthless Confederate currency. He did not go himself to see his creditor, Jacob Geiger, but he sent by one "Donald a roll of Confederate money to pay the debt." Jacob Geiger said that "he would take the interest, but he had no use for the balance, and to carry it back to Edward" (E. W. Geiger).

The note was not before them to ascertain precisely what interest was due, but knowing that it was payable "annually," he consented to take \$140, and at the same time he wrote

to his cousin as follows: "Before the Yankees came here, I sent the notes and bonds off that was in my possession, including your note, and as soon as I receive the notes again I will give you credit on your note for the amount which I received to-day from Mr. David Donald, which was one hundred and forty dollars. If you stand in need of this money which you sent to-day, send back for it, as I could do without it," &c. It does not appear when the note was brought back from its place of hiding, or the exact time of entering the last receipt on it, but it was probably some time afterwards (possibly after June 29), as it was made by mistake as being received on March 3, instead of April 27, 1865.

These were the circumstances under which the worthless Confederate money was shoved upon the creditor in payment of the interest, and it seems to me that the imagination can hardly conceive of any stronger to negative the idea of a contract not to sue until after June 29, 1865. How can we presume that the creditor by receiving the interest prom-

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ised not to do what was *already forbidden by the law as it stood upon the statute book, and which from the absence of courts was simply impossible? Even if such contract necessarily arose by implication, it is at least doubtful whether the worthless article received as money could constitute a good and sufficient consideration to make it obligatory. See *Cornwell v. Holly*, 5 Rich., 47, as to usury.

Third. But has this court the right to review and reverse the finding of the Circuit Judge upon a question of fact? We certainly would not have any such right if the case were a simple action at law to recover the note, which it really was in substance. It is true that the surety, Gardner, being dead, the proceeding was thrown into the form of an action to marshal the assets of his estate, which is equitable in its nature. I cannot, however, see clearly how this accidental circumstance should change the nature of every issue that may arise in the case, such as the alleged payment or discharge of a note presented. I am inclined to think that when such issue arose, the parties, notwithstanding the form of the proceeding, had a right to the finding of a jury. "When the trial is before a jury, this court in no case has the authority to review questions of fact." Wait Anno. Code, 662; *Parker v. Jervis*, 3 Keyes [*42 N. Y.] 271. Where such a question, by the consent of parties, is decided by a judge, his decision should stand as a special verdict. The nature of the issues are not always determined by the form of the proceeding. See *Johnson v. Clarke*, 15 S. C., 80.

But passing this, and assuming that the issue was one really "in chancery," I am not able to see that instead of an issue of fact it was one of law. Whether the other proof

and circumstances are sufficient to overthrow a prima facie case, is surely a question of fact. Judge Wallace so considered and decided in this case, and it seems to me that his decision should stand. "Where the testimony is conflicting, and the Circuit Judge has, upon weighing it, reached a conclusion which can be supported by the testimony, we will not interfere, although there may be other testimony in the case pointing to a different conclusion. We are not to substitute our judgment for that of the Circuit Judge as to

the comparative weight of the testimony. It is only where there is no testimony to sup-

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port his conclusion, or where *manifest error is proven, that this court will undertake to overrule a finding of fact by a Circuit Judge." Gary v. Burnett, 16 S. C., 633.

In the view that the Circuit Judge was right both as to the law and the facts, his judgment should be affirmed.

Judgment reversed.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full

23 S. C. *601

*No. 1709. *STATE v. AULTMAN*. April Term, 1885. The defendant was convicted of manslaughter in 1878, and sentenced to be confined in the State penitentiary at hard labor for life. Between October, 1884, and April, 1885, defendant (who had been in the penitentiary since his sentence) appealed. *Held*—

[1. *Homicide* ⇨354.]

That the defendant could not be sentenced for a longer term than thirty years, and the sentence was therefore erroneous.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 731; Dec. Dig. ⇨354.]

[2. *Criminal Law* ⇨1069.]

That at the time of the conviction there was no law of force in this State limiting the time within which a party might appeal from a sentence in the Court of General Sessions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2691-2699; Dec. Dig. ⇨1069.]

[3. *Criminal Law* ⇨913.]

The error being in the sentence only, defendant is not entitled to a new trial, but only to a resentence. *State v. Trezevant*, 20 S. C., 364 [47 Am. Rep. 840].

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 686; Dec. Dig. ⇨913.]

[This case is also cited in *State v. Knotts*, 70 S. C. 402, 50 S. E. 9, without specific application.]

Opinion by Mr. Justice MCGOWAN, May 25, 1885. W. S. Monteith, for appellant. Bonham, solicitor, contra.

No. 1713. *SHEPPERD v. TRADERS' NATIONAL BANK OF BOSTON*. April Term, 1885. Plaintiff made a contract with Shepperd & Co., to obtain for them orders for cotton-ties, at an agreed commission. One Nichols, acting in concert with Shepperd & Co., purchased the ties in England with funds obtained on a letter of credit furnished him by defendant, and they were consigned to defendant with bills of lading drawn to defendant's order. Defendant reshipped to Charleston to its own order, with an understanding with Nichols that the ties were to remain the property of defendant until paid for. To the bills of lading on this second shipment were attached drafts of Shepperd & Co. on the parties in Charleston who had ordered them. These parties refused to pay, upon the ground that the ties were in bad order. Correspond-

ence ensued between the defendant and its Charleston correspondent, which ended with storing the ties in a warehouse. The Circuit Judge (Hudson) granted a non-suit. On appeal, *held*—

[1. *Trial* ⇨139.]

That the judge erred in granting a non-
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suit; for while *there may have been no testimony to show that Shepperd & Co. were in the outset agents of the defendant, there was some testimony tending to show an appropriation of the purchases procured by plaintiff and a recognition of plaintiff's agency.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

[2. *Pleading* ⇨343.]

That judgment for plaintiff on the pleadings could not be directed, as his case rested on allegations of agency which were denied in the answer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1048-1051; Dec. Dig. ⇨343.]

[3. *Trial* ⇨59.]

It is well settled in this State that the time when testimony may be introduced must be left to the discretion of the Circuit Judge, to be governed by the particular circumstances of each case, and that in some instances the courts have permitted a plaintiff to introduce other evidence even after a motion for a non-suit has been made and argued.

[Ed. Note.—Cited in *Hornsby v. South Carolina Ry. Co.*, 26 S. C. 190, 1 S. E. 594; *Petrie v. Columbia & Greenville R. R. Co.*, 27 S. C. 70, 2 S. E. 837.

For other cases, see *Trial*, Cent. Dig. §§ 138-140, 142, 143, 145; Dec. Dig. ⇨59.]

Judgment reversed. Opinion by Mr. Justice McIVER, June 27, 1885. Simonton & Barker, for appellant. Buist & Buist, contra.

No. 1731. *SMALLS v. BENEVOLENT SOCIETY OF THE TABERNACLE CHURCH OF BEAUFORT*. April Term, 1885.

[*Appeal and Error* ⇨854; *Judgment* ⇨139, 143, 148.]

This was a motion by certain members of the defendant corporation to be relieved from judgments obtained by default against the defendant, the motion being based upon the ground of excusable negligence in failing to put in an answer. The Circuit Judge (Aldrich) held that there was no excusable negligence, and refused the motion. On appeal,

held, that the motion was addressed to the discretion of the Circuit Court, and that there was no abuse of discretion in this case, as the summons and complaint were served upon the president of the defendant corporation, its duly accredited officer, and there was no evidence of any collusion between such officer and the plaintiff; and if such officer was guilty of negligence in not making and prosecuting a defence, the plaintiff is not responsible; and, further, as the motion was not made by the defendant corporation, but by individual members thereof, without authority from the defendant as a corporation. If the judge erred in expressing his opinion as to the merits of the defence, that would not avail appellants, for it is the duty of this court "simply to inquire whether there is any error in the judgment rendered, and not whether the reasons given to support it are sound."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⚡854; Judgment, Cent. Dig. §§ 259, 265–270, 272–291; Dec. Dig. ⚡139, 143, 148.]

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*Judgment affirmed. Opinion by Mr. Justice McIVER, July 20, 1885. Verdier & Talbird, for appellants. Elliott & Howe, contra.

No. 1732. STATE v. TERRY. April Term, 1885.

[Homicide ⚡224.]

The defendant being on trial under an indictment for murder, his counsel proved by the magistrate who held the inquest that a paper produced was the testimony taken at the inquest and was correct, and that Bond (a witness who had been just examined in behalf of the State) was present at the examination. The judge ruled that as this paper had been introduced without objection, both sides could use it, and that it could not be limited by the defence to so much only as contained the testimony of Bond. On appeal, this ruling was held not to be erroneous. State v. Campbell, 1 Rich., 124.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 467; Dec. Dig. ⚡224.]

Judgment affirmed. Opinion by Mr. Chief Justice SIMPSON, July 20, 1885. Perry, Perry & Heyward, for appellant. Orr, solicitor, contra.

No. 1738. FITZSIMONS v. THE GUANAHANI COMPANY. April Term, 1885.

[Courts ⚡8.]

This case was tried upon the same pleadings and evidence as at the first trial of the case, reported 16 S. C., 192. The Circuit Judge (Hudson), feeling bound by the statement of this court on that appeal, that "plaintiff had based his right to sue on the ground

that he was an inspector under the statute of Georgia, and that the action could not be sustained under said statute," charged the jury that if they found that the services had been rendered outside of that State, the plaintiff could not recover. On appeal the court say that the Circuit Judge overlooked the fact that while this expression was found in that opinion, yet that this was not the question raised in the appeal, nor was it the point upon which the judgment was there reversed; nor was the second opinion of this court in this case (21 S. C., 599) brought to the judge's attention, in which this court attempted to correct the misapprehension as to the point decided in the first, and which gave rise to the demurrer at the second trial.

While the plaintiff cannot recover for services in this State under any contract raised by

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a Georgia statute, he could for services rendered at a stipulated price agreed upon between the parties, independent of such statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 18, 19; Dec. Dig. ⚡8.]

Judgment reversed. Opinion by Mr. Chief Justice SIMPSON, July 30, 1885. W. J. Verdier, for appellant. William Elliott, contra.

No. 1739. NICHOLS v. RAILROAD COMPANY. April Term, 1885.

Plaintiff sued defendant, the Wilmington, Columbia & Augusta Railroad Company, in a trial justice's court, for damages in killing a cow. The trial justice gave judgment, upon the verdict of a jury, for \$40. Defendant appealed, and the Circuit Judge (Cothran) dismissed the appeal. Defendant then appealed to this court on the following exceptions:

1. Because his honor erred in failing to sustain the appeal from the trial justice's court upon the grounds stated in said appeal.

2. Because his honor erred in failing to reverse the finding in the court below on the testimony in the case.

3. Because his honor erred in holding as matter of fact that it was such negligence in the appellants to run their train around the curve at the rate of speed shown by the testimony as to make said company liable for damages for killing the cow in question.

1. The first ground cannot be considered, especially so, as the respondent invokes the protection of the rule of court.

[2. Appeal and Error ⚡1094.]

The second ground points out no specific error, and besides raises only a question of fact, of which this court has no jurisdiction in a case like this.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4322–4352; Dec. Dig. ⚡1094.]

[3. *Appeal and Error* ⇨1008.]

The third exception points out no error of law, but only one of fact upon which the judge, acting as a jury, has passed, and this court cannot review it.

[Ed. Note.—Cited in *Thomson v. Dillinger*, 35 S. C. 609, 14 S. E. 776; *Greene v. Tally*, 39 S. C. 343, 17 S. E. 779; *Henderson v. Wendler*, 39 S. C. 555, 17 S. E. 851.

For other cases, see *Appeal and Error*, Cent. Dig. § 3956; Dec. Dig. ⇨1008.]

Judgment affirmed. Opinion by Mr. Justice McIVER, July 30, 1885. J. H. Rion, for appellant. C. A. Woods, contra.

No. 1741. *GRAY & CO. v. HILL*. April Term, 1885.

[*Execution* ⇨351, 353.]

This was an action on four notes, and the defence was payment. Verdict for defendant. Plaintiffs appealed upon three grounds, two of which raised only questions of fact. The third imputed error to the Circuit Judge (Cothran), in charging the jury that defend-

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*ant was entitled to credit for certain cotton of defendant, seized by the sheriff under plaintiffs' lien, and at their instance, and sold, and the proceeds, upon claim of a third party, paid over to the clerk of court, and by him to such third party, if the jury thought that such cotton really belonged to the defendant. This court saw no error in this charge. "It is well settled that a levy under an execution or other process is prima facie satisfaction pro tanto, and until the plaintiffs showed, as they failed to do, that this cotton was not applicable to their claim, they were bound to account for its value."

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1075; Dec. Dig. ⇨351, 353.]

Judgment affirmed. Opinion by Mr. Justice McIVER, August 1, 1885. J. C. Haskell, for appellant. Holmes & Simpson, contra.

In this case there was a petition for a rehearing, which was refused.

No. 1748. *MOWRY v. MOWRY*. April Term, 1885.

[*Partition* ⇨48.]

Plaintiff, claiming to be the only living issue of an intestate, brought this action against the widow for partition. The defendant denied the legitimacy of the plaintiff's father, who was the intestate's son, and alleged that the paternal grandmother of plaintiff had never been the wife of intestate, but that she, defendant, was his only wife. Plaintiff, while willing to let the defendant have one-third of the land involved, denied that she was the lawful wife of intestate, and insisted that his grandmother was lawfully married. The Circuit Judge (Witherspoon) decreed in favor of plaintiff, giving to him one-third of the land, and defendant appealed. But as it appeared from the evidence that defendant had three children by intestate, one at least of whom was living, this court declined to pass upon the merits of the case until these children were made parties, as they were necessary parties, and had a right to be heard upon the issue involved. And to this end the judgment below was reversed without prejudice, and the cause remanded for a new trial, with leave to plaintiff to amend by making such additional parties.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 118-129; Dec. Dig. ⇨48.]

Opinion by Mr. Justice McIVER, September 14, 1885. G. W. Brown, for appellant. Ward & Nettles, contra.

AMENDMENTS OF THE RULES OF COURT

23 S. C. *606

*Rule XX. of the Supreme Court. On January 26, 1886, the Chief Justice read the following order of the court:

It is ordered that the second paragraph of Rule XX. be altered and amended so as to read as follows:

"On application to either of the justices at chambers, an order may be granted for a further stay of the remittitur for such time as he may deem proper, not beyond the third day of the ensuing term, subject to the order

of the court; provided a petition for that purpose be presented, stating specifically the grounds of such application with a certificate from some counsel not concerned in the cause, that there is merit in such grounds, accompanied with a consent in writing signed by the parties and not by their counsel that the stay of the remittitur shall be granted upon condition that the status of the property involved in the case shall not be disturbed until after the final determination of the case."

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT
OF
SOUTH CAROLINA

VOLUME XXIV

CONTAINING CASES OF APRIL AND NOVEMBER TERMS, 1885

BY ROBERT W. SHAND

STATE REPORTER

COLUMBIA, S. C.
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(24 S.C.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST CIRCUIT,	HON. BENJAMIN C. PRESSLEY.
SECOND	“ “ ALFRED P. ALDRICH.
THIRD	“ “ THOMAS B. FRASER.
FOURTH	“ “ JOSHUA H. HUDSON.
FIFTH	“ “ JOSEPH B. KERSHAW.
SIXTH	“ “ ISAAC D. WITHERSPOON.
SEVENTH	“ “ WILLIAM H. WALLACE.
EIGHTH	“ “ JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CHAS. RICHARDSON MILES.

SOLICITORS.

1st Circuit—W. ST. J. JERVEY.	5th Circuit—R. G. BONHAM.
2d Circuit—F. H. GANTT. ¹	6th Circuit—J. E. McDONALD.
3d Circuit—T. M. GILLAND.	7th Circuit—D. R. DUNCAN.
4th Circuit—H. H. NEWTON.	8th Circuit—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

¹ Died November 10, 1885, and succeeded by W. Perry Murphy, Esq.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED
IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.

HON. HENRY McIVER, ASSOCIATE JUSTICE.

HON. SAMUEL MCGOWAN, " "

24 S. C. *1

*BANKER v. HENDRICKS.

(April Term, 1885.)

[1. *Deeds* ⇨ 68.]

A woman, 82 years of age, and very ill, not expected to survive a day, executed to a stranger a deed of conveyance of her entire real estate, worth \$2,500, for the alleged consideration of \$2,000, but no money was paid or agreed to be paid, the grantee averring that the real consideration was that he should support the grantor and her husband (who was then over 70 years of age) for the remainder of their lives. Two weeks afterwards, upon the expressed consideration of such support, this old woman and her husband executed a bill of sale of all their personal property to this same grantee, who then executed a bond for \$2,000, and a mortgage of the lands conveyed to him, to secure such support, and handed the mortgage to his attorney to be recorded, which was not done. In action by this old woman to set aside and cancel this deed and bill of sale, *held*, that the plaintiff was imposed upon by defendant, while she was in an

*2

extremely feeble condition, mentally and physically; that the consideration was, under the circumstances, grossly inadequate; and that both instruments must be canceled. Mr. Chief Justice Simpson, dissenting.

[Ed. Note.—Cited in *Gaston v. Bennett*, 30 S. C. 473, 9 S. E. 515; *Hall v. Hall*, 41 S. C. 167, 19 S. E. 305, 44 Am. St. Rep. 696; *Wille v. Wille*, 57 S. C. 427, 35 S. E. 504; *Zeigler v. Shuler*, 87 S. C. 6, 68 S. E. 817; *Du Bose v. Kell*, 90 S. C. 215, 71 S. E. 371; *Lawton v. Charleston & W. C. R. Co.*, 91 S. C. 335, 74 S. E. 750.

For other cases, see *Deeds*, Cent. Dig. § 153; Dec. Dig. ⇨ 68.]

[2. *Appeal and Error* ⇨ 1017.]

All the issues of law and fact having been referred to a referee, and no testimony introduced to sustain the allegation in the complaint of damages done to the property by defendant while

in his possession, that question cannot be again raised in the cause.

[Ed. Note.—Cited in *Steen v. Mark*, 32 S. C. 291, 11 S. E. 93.

For other cases, see *Appeal and Error*, Cent. Dig. §§ 3911, 3961, 3996-4005; Dec. Dig. ⇨ 1017.]

[This case is also cited in *Price v. Richmond & D. R. Co.*, 38 S. C. 215, 17 S. E. 732, without specific application.]

[This case is also cited in *Gaston v. Bennett*, 30 S. C. 479, 9 S. E. 515, as to facts.]

Before Aldrich, J., Pickens, September, 1884.

Action by Charlotte S. Banker against William A. Hendricks, commenced March 5, 1884. The opinion fully states the case.

Messrs. Child & Boggs, for appellant.

Messrs. M. F. Ansel and J. H. Newton, contra.

November 2, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. The object of this action is to set aside a deed and bill of sale, whereby the plaintiff conveyed and transferred to the defendant every vestige of her property, both real and personal, even including all her household furniture, beds and bedding, upon the ground of fraud and imposition practiced upon her at a time when she was so enfeebled by age and disease as to be incapable of transacting such business.

It seems that the plaintiff is a very old lady, in the eighty-third year of her age, living with her husband, a feeble old man, who has passed the age of three score and ten, with no children, and no relatives, ex-

cept a brother and some nieces. The defendant was her tenant, in no way related to or connected with her, represented to be a young man of some thirty-five or forty years of age. On November 21, 1883, the deed for the real estate was executed while the plaintiff was very low indeed, so much so as to create the belief in the minds of her neighbors and herself that she could not live more than twenty-four hours, and her husband was also sick at the same time. The consideration mentioned in the deed is two thousand dollars, though it is not pretended that any money was paid, or intended to be paid; the claim on the part of the defendant being that the real consideration was that he was to support these old people during their *lives, though it does not appear that anything was said about it at the time the deed was executed. The person who drew the deed, and who was present when it was executed, though not a subscribing witness, testified that he told the parties that "there had to be a money consideration mentioned in the deed," but he also said: "Nothing was mentioned about the consideration of the deed but the two thousand dollars on the day the deed was executed."

*3

The old lady was so very feeble on the day when the deed was executed that she had to be assisted from her bed to the chair in which she sat when she signed the deed, and had to be assisted in signing her name by the witness, Richey, who was carried to the plaintiff's house by the defendant for the purpose of drawing the deed. The two subscribing witnesses to the deed both testify that the deed was not read to the plaintiff in their hearing, though Richey, who drew the deed, said he read it over to her "two or three times and took particular pains," and added: "Deed was read in presence of witnesses. Called one of them in the room, I don't know whether Frank Smith (one of the subscribing witnesses) was there all the time the deed was being read; but I rather think both of them were there." The old lady did little or no talking the day the deed was signed, and was moaning or groaning most of the time as if in great distress. Richey, however, testified that "Mrs. Banker was sitting up in a chair when I went in.

* * * I told her I had come to fix up the papers; she told Mr. Banker to get the papers; she told him where the papers were." Again he says: "Old man did a good deal of the talking, seemed to be active in the matter; he or she one said the other writing they would fix themselves, in answer to my question if there were any other paper to fix up."

Mrs. Mary Oats testified that Richey told her he had been down drawing up the papers between Mrs. Banker and Mr. Hendricks: "I told him she was not fit to make papers; I told him she was not the evening before. He said he reckoned she was, but that she

was very low and the least thing would take her out; it would not do to excite her." Richey does not deny this positively. He says: "Had conversation with Mrs. Oats; don't remember whether she said Mrs. Bank-

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er was not fit to fix papers; *don't think I had the conversation mentioned by Mrs. Oats. Don't think I told her a little excitement would take her out." Folger, another witness for the plaintiff, testified to a conversation with Richey at Easley as follows: "Mr. Richey said he had his doubts as to the propriety or legality of the deed, from the fact that he had to hold the old lady's hand." This likewise Richey does not deny positively. His language is: "Don't think I said anything to Newton Folger about the legality of the deed or holding her hand, at Easley; don't remember if I did."

Mrs. Mary Smith testified that "I heard a conversation between plaintiff and defendant about three weeks before deed was made. He offered to buy four acres of land. She told him she would not sell it at any price. He offered to give her fifty dollars an acre; he told her he would take care of her for her property. She told him, No; as long as she kept her right senses he should not have anything she had. Mr. Hendricks called at my house and said for us to be good to the old people and he would pay for it. He said he did not have time to stay over there, as he would have to gather up her corn and things; said if he did not do it before she came to her right mind, he would not get it, for he had tried it enough to know." This witness on her cross-examination stated that her husband was not upon good terms with Hendricks, and that about a month after the deed was made she told Mrs. Oats that she knew something in favor of Hendricks, but would not tell it, but Mrs. Oats testified that this was said by Mrs. Smith in a joke when they were "rummaging on in fun about the trial," though a witness for defendant said he was present when this remark was made by Mrs. Mary Smith, and "he did not consider that she was talking in a joke; they were laughing and talking, but I meant what I was saying."

Mrs. Mollie Hinton, a cousin of the defendant, and living with him, testifies to a good deal that Mrs. Banker said on the day the deed was executed, which none of the other witnesses present at the time seem to have remembered. She says: "Mr. and Mrs. Banker sent Mauldin Smith after Mr. Hendricks. The morning before Mr. Hendricks got there, and before the deed was made, Mrs. Banker told me she was going to make

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her property *over to Wm. Hendricks to take care of her. She told Mr. Richey this too, and said she did not intend the Claytons nor her brother to have it, for her brother had gone through her mother's property and had no home, and she did not intend for him

to have hers. Some of the Claytons were her nieces: she said they had mistreated one of her sons. This occurred the morning before the deed was made. She told me after the deed was made that she had heard that Mr. Banker owed money in Wallhalla, and they were coming on her property after she died to pay it, and she did not intend it. This was about a week after the deed was made. She said the Claytons and Mr. Atkinson, her brother, would be mad, but it was her property and she would do as she pleased with it. She said she would not give her property to any one who asked her for it, and Mr. Hendricks never had, and he was the only one could get it." Another witness for the defendant, Mrs. Nancy Gunter, who had been hired by Hendricks to wash for the plaintiff, testified that she had a conversation with the old lady a few days after the deed was made in which "she said she had made her property over to Mr. Hendricks: that she wanted Mr. Hendricks to have it, as he had been a playmate of her son Cicero, and he would take good care of her: said she had been intending to do it some time, but had let it go on; that she thought it best to do so while she was in her right mind."

The plaintiff and the defendant were both examined, and, as was to be expected, their testimony is very conflicting. If the plaintiff's testimony is to be believed, then it is very manifest that this old lady was grossly imposed upon: but, on the other hand, if the testimony of the defendant is to be given full credence, then though the transaction would still appear to be a very singular and unusual one, yet there would be no ground to impute fraud or imposition to him. The old lady denies in toto the conversation detailed by Mrs. Mollie Hinton, and the defendant in like manner denies the conversation detailed by Mrs. Mary Smith. There is, however, one point of concurrence between them, and that is, that but a short time before the deed was made Hendricks offered to buy four acres of the same land conveyed by the deed at a very

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high price, and that the plaintiff *refused his offer. It seems, too, that very soon after the deed was made the defendant carried off all of the old lady's personal property except her household furniture, and, so far as the testimony discloses, contributed nothing towards her support except one hog and part of another, and employed a woman to do her washing.

The deed for the real estate was promptly put upon record the day after it was executed, and about two weeks afterwards, to wit, on December 7, 1883, Mr. and Mrs. Banker executed a bill of sale to the defendant of all their personal property, of every kind and description whatsoever, in consideration of the comfortable support and maintenance of these two old people, but what was the value of the personal property thus trans-

ferred does not appear. On the same day the defendant executed to Mr. and Mrs. Banker a combined bond and mortgage of the real estate conveyed to him by the above mentioned deed, conditioned for the comfortable support of the said Bankers, but this paper was never put into the possession of either Mr. or Mrs. Banker, and was never recorded.

What occurred on the day these last mentioned papers were signed will best be learned from the testimony of Mr. Child, the attorney for the defendant in this case. He says: "I went to Mr. Banker's on the 7th of December last. Mr. and Mrs. Banker had been sued by Mauldin Smith; I was employed to defend them. I went in and they were sitting in the house. They told me about the deed she had made to Mr. Hendricks, and that he was to take care of them. They asked me how to fix the papers so that if Mr. Hendricks should die, they would be taken care of. I told them to take a bond and mortgage from him to secure their support. I prepared the papers; Mr. Hendricks signed, and I brought them and turned them over to Mr. Lewis to be recorded. I suggested that they both sign the deed to the personal property, which they did. From what I heard and saw there I am satisfied she was as competent then to transact her own business as she is now. Mr. Banker did most of the talking. Now, I don't pretend to distinguish what Mrs. Banker said in particular during the conversation. I don't know whether the note was given to me at

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the house or at Easley. The mortgage *was not recorded; I took it and the bill of sale out of the clerk's office, after there was a talk of this suit." According to the testimony of the plaintiff, she remembers nothing of what occurred when Mr. Child was at her house, and the probability is that she had very little to say in the matter as it appears from Mr. Child's testimony that "Mr. Banker did most of the talking."

Soon after the old lady recovered from the attack of sickness under which she was laboring at the time the deed was executed, she says that she applied to the defendant to restore to her her property, saying that she was ruined and would be turned out of doors. Upon his refusal so to do, this action was commenced, and the case was referred to a referee "to hear and determine the issues of fact and law involved in said case." The referee found as matter of fact that the real value of the land was twenty dollars per acre: that the plaintiff, at the time of the execution of the deed, "was extremely ill and physically weak, but not so weak in mind as to render her non compos or disqualified to transact business;" that she was about 83 years of age, and the relation of landlord and tenant existed between the grantor and grantee, "but the testimony fails to satisfy the referee that circumvention, fraud, or undue

influence was practised upon the plaintiff by the defendant;" that she was "not laboring under mental disqualification at the time" the bill of sale was executed; that on the 7th day of December, 1883, the defendant executed a bond and mortgage to the plaintiff conditioned for the support of herself and husband, and the payment of two thousand dollars, but the same has not been recorded and turned over to the plaintiff; that said deed was read over to plaintiff before she signed it, and that the plaintiff offered no testimony as to damages." And as matter of law, he found that the deed and the bill of sale were valid; and "that the defendant should be required to execute notes and mortgages to the plaintiff for the value of the land and personal property, or at least a sufficient amount, not less than two thousand dollars, the consideration expressed in the deed, for the comfortable and easy support of the plaintiff and her husband during their natural lives. The old lady should be protected by a

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court of equity, and it is *against good conscience that her property should pass out of her hands and this court not render the proper relief."

To this report both parties excepted, and the case went before the Circuit Judge to be heard on the report and exceptions, together with the testimony, which is fully set out in the "Case." While he concurred with the referee "that the plaintiff was not non compos mentis," which he explains as meaning "bereft of all sense," at the time of the transaction in question, yet he says: "I am perfectly satisfied that she was in such a condition of physical and mental weakness as to be entirely unfit for the transaction of business of any kind, especially of so serious a nature as the transfer of her whole estate;" and the concluding language of the referee's last finding of law would seem to indicate that he too was impressed with some such notion. The Circuit Judge also found that the plaintiff was imposed upon while in this extremely weak and feeble condition, and improperly induced to transfer her whole property to a stranger in blood, not allied to her by any ties of affection, while she had relatives living, some of whom at least would most naturally be the objects of her bounty. He therefore rendered judgment that the deed and bill of sale be cancelled, and that the referee "inquire and report what damage the plaintiff has sustained by the felling of her timber, the removal of her personal effects, and the killing of her stock."

It is impossible to read the testimony in this case without concurring with the Circuit Judge in view which he has taken of this case. The testimony is too long to be incorporated in this opinion, and therefore only extracts have been given. There was no little conflict amongst the witnesses as to the old lady's mental condition at the time the

deed was executed, and there certainly was amply sufficient testimony to support the conclusion reached by the Circuit Judge as to that matter. It is true that the referee seemed to have been of different opinion, but, as we have said, he evidently was of the opinion that the plaintiff had not been dealt with fairly, and that there was something in the case which, in equity and good conscience, called for the interposition of a court of equity. He doubtless assumed, what we shall presently see is a mistake, that it was

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necessary to show *that the plaintiff was non compos mentis, absolutely "bereft of all sense," in order to warrant the court in setting aside the deed. Hence his conclusion that the plaintiff was not in such a mental condition as would disqualify her from transacting business does not carry with it the weight which it might otherwise carry.

But be that as it may, we think the weight of the testimony is in favor of the conclusion reached by the Circuit Judge. The idea that this old lady should, of her own free will and accord, strip herself of every vestige of property, even down to the bed upon which she rested her aged and feeble body, in favor of a mere stranger, who, so far as we can see from the testimony, had no claim upon her whatever, is so utterly inconsistent with the motives which ordinarily prompt human actions as to be utterly incredible, and could only be sustained by the clearest and most satisfactory evidence of the good faith of the transaction. This old couple had the most abundant means to insure their comfortable support during the very short period which they could, under the most favorable circumstances, expect to live. The plaintiff could not have been in any immediate need of ready money, for, a very short time before the deed in question was signed, she had an offer from the defendant to buy only a very small portion of her land, at a very high price, which she peremptorily refused, although the amount would probably have been sufficient to have provided for her wants during the brief remainder of her life; and the idea that she should, within a few days afterwards, have been willing to convey her entire property, which, according to the testimony, was worth something over twenty-five hundred dollars, to an entire stranger, solely for the consideration that he would provide for the support of herself and husband during their lives, then drawing so rapidly to a close, is utterly incredible.

When to this is added that at the time when the pretended deed was signed the old lady was apparently in extremis, not expected to live longer than twenty-four hours; that she was at the time so extremely weak and enfeebled by old age and disease as to be incapable of doing anything, even signing her name, without assistance, and suffering so

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much as to be unable *to express herself except by groans—as one of the subscribing witnesses said, “she seemed to be very bad off from the way she was groaning; she did not talk any;” or, to use the language of the other subscribing witness, “was groaning, but did not say a word”—and when, in addition to this, we find from the testimony of another witness that she heard a conversation between the plaintiff and defendant, but a very short time before she became so ill, in which the old lady not only refused the defendant’s offer of a very high price for a small part of land, but also refused his offer to take care of her for her property, it is impossible to resist the conclusion that the transaction in question cannot receive the sanction of a court of equity.

Then, too, the conduct of the defendant does not present itself in a very favorable light. In his answer, he says that the plaintiff “earnestly and persistently besought the defendant to allow her (plaintiff) to execute to him a deed of conveyance of all her property in consideration of her support and the support of her husband (Girard Banker) during their natural lives;” but when examined as a witness, subject of course to the ordeal of a cross-examination, he does not venture to put it so strong. He simply says that on the day before the day the deed was signed he got a message from these old people to go and see them, and they told him to go after Mr. Folger, or any other suitable person, to fix up the papers; that he did get Mr. Richey, who was told by them what they wanted done. “He done up the deed as they told him to. I was to support them. This was the consideration of the deed.” But Richey, when examined, does not say anything of his being told that the consideration of the deed was that Hendricks was to support these people. On the contrary, he says: “Nothing was mentioned about the consideration of the deed, but the two thousand dollars.”

Again, if this was an honest, straightforward transaction, why was it that some security or obligation was not given to the plaintiff by the defendant to secure the performance of his part of the contract? Not a word seems to have been said about that; but Hendricks is very careful and prompt to have the deed recorded the very next day, and it is not until more than two weeks afterwards that we hear of any talk about the defendant

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*entering into any obligation for the support of these people. What occurred in the meantime to prompt the conscience, or perhaps the fears, of Hendricks, we are not informed. All that we know is that sixteen days afterwards, when Mr. Child is at the house of the plaintiff on other business, he is called upon to draw, and does draw, the combination bond and mortgage set out in the “Case,”

whereby Hendricks binds himself, under a penalty of two thousand dollars, to provide for the support and maintenance of Mr. and Mrs. Banker, which, however, was never turned over to them, but was carried off by Mr. Child and deposited in the clerk’s office to be recorded; but which was never recorded, and was taken out of the office as soon as there was talk about bringing this suit.

On the same day a bill of sale was executed transferring every vestige of the plaintiff’s personal property to the defendant, the consideration expressed therein being the support and maintenance of Mr. and Mrs. Banker. Why the old lady should have been required to transfer her personal property to the defendant, when, according to his own testimony, he already held her deed, duly recorded, for all her real estate, proved to be worth upwards of twenty-five hundred dollars, which he himself said was executed in consideration of his supporting this aged couple, the testimony does not inform us. Surely, the value of the land was amply sufficient to compensate the defendant for any probable, or we might say, any possible, outlay which he would be called upon to make for the support of these two old people just tottering on the brink of the grave. No witness, not even the defendant himself, has testified that it was any part of the original arrangement on the day the deed for the land was signed that the personal property should also be transferred to the defendant as a part of the price paid for the support of the plaintiff and her husband. On the contrary, as we have said, the defendant distinctly testified that in consideration of the deed for the land he was to support them. Now, if that was a valid transaction, the plaintiff had already, by the execution of the deed for the land, secured a support for herself and husband, and there remained no reason why she should, to secure the same end, transfer all of her personal property.

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The natural inference is *that the plaintiff was so much under the control and influence of the defendant that she was ready to sign, and did sign, any paper that he might place before her. She certainly could not have been prompted to do so by a desire to secure a support for herself and husband, for, according to the claim of the defendant, that had already been secured by the deed.

But without going any further in the discussion of the testimony, we think that there is quite sufficient to support the conclusion reached by the Circuit Judge, that the plaintiff, while not absolutely non compos mentis, was in such an extremely weak and feeble condition, both physically and mentally, as to render her an easy subject to be imposed upon, and that while in this condition she was imposed upon by the defendant.

This being our conclusion as to the facts, the law is clear that she is entitled to the re-

relief asked for. In 1 Story Eq. Jur., § 221, passing from a general notice of cases of fraud, arising from a misrepresentation or concealment of material facts, it is said: "We may now pass to the consideration of some others, which, in a moral as well as in a legal view, seem to fall under the same predicament, that of being deemed cases of actual, intentional fraud, as contradistinguished from constructive or legal fraud, * * * and in special manner, all unconscientious advantages or bargains obtained over persons disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of or protecting their own rights or interests." Again, in section 235, after referring to the remark of a learned judge, that if a weak man give a bond, and there be no fraud or breach of trust in obtaining it, equity will not set aside the bond only for the weakness of the obligor, if he be compos mentis, the learned author proceeds to say: "But whatever weight there may be in this remark, in a general sense, it is obvious that weakness of understanding must constitute a most material ingredient in examining whether a bond or other contract has been obtained by fraud, or imposition, or undue influence; for although a contract, made by a man of sound mind and fair understanding, may not be set aside, merely from its being a rash, improvident, or hard bargain; yet if the same contract be made with a person of weak understanding, there does arise

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a *natural inference that it was obtained by fraud, or circumvention, or undue influence." In section 238, it is said: "The doctrine, therefore, may be laid down as generally true that the acts and contracts of persons who are of weak understandings, and who are thereby liable to imposition, will be held void in courts of equity if the nature of the act or contract justify the conclusion that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome by cunning, artifice, or undue influence."

In *Butler v. Haskell*, 4 Desaus., at page 637, Chancellor Desaussure, in delivering the opinion of the court, after an elaborate review of the authorities, says: "I consider the result of the great body of the cases to be, that wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and in general a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, the weakness, or the distress and necessity of the vendor." See, also, the case of *Bunch v. Hurst*, 3 Desaus., 273 [5 Am. Dec. 551], where a deed made by a very weak man, though capable of understanding the ordinary transactions of life, and though there

was no direct evidence of fraud, was set aside.

The fact, therefore, that the plaintiff in this case has not been found to be absolutely non compos mentis, is not sufficient to deprive her of the relief which she demands. There can be no doubt but that, from her advanced age and from disease, she was extremely weak, both mentally and physically, and not in a condition to look after her own interests properly, and that the consideration for which she conveyed away her entire property to a mere stranger, not allied to her by any ties, either of blood or affection, was grossly inadequate, considering her extreme old age and infirmity, and that, under all the circumstances, the transaction was not such an one as can receive the sanction of a court of equity.

We think, however, that the Circuit Judge erred in directing the referee to inquire and report what damages the plaintiff had sustained, for the question of damages was one

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of the issues *raised by the pleadings, and when, by the original order of reference, the referee was required to hear and determine all the issues of law and fact, and the plaintiff failed to offer any testimony as to damages, it is too late now to reopen that question. The judgment below must therefore be modified in so far as it requires the referee to inquire and report as to the damages sustained by the plaintiff.

The judgment of this court is that the judgment of the Circuit Court, except as modified herein, be affirmed.

Mr. Justice McGOWAN concurred.

Mr. Chief Justice SIMPSON, dissenting. It is admitted that the property embraced in the papers which the plaintiff seeks to annul by the action below belonged to the plaintiff. Nor is it denied that she had the legal right to execute said papers and thereby to convey said property to the defendant, if such was her will and desire. Nor is it denied or doubted that said papers were executed by her, and with all the formality necessary to make them valid, as to their mere execution. Such being the fact, all the presumptions are in their favor; and being thus prima facie valid, they must stand until it is shown by satisfactory testimony either that the plaintiff was incompetent at the time of their execution, or that she was induced thereto by the fraud, artifice, or undue influence of the defendant. Has such a showing, one or both, been made, is the question in the case.

I have thoroughly and closely examined the testimony as reported, biased somewhat, it may be, in favor of the plaintiff, and yet I must say that, after analyzing and sifting said testimony fully, and excluding therefrom all hearsay and gossip, in which it

abounds, it seems to me to be utterly destitute of the necessary facts to impeach the instruments in question upon either of the grounds mentioned. There is certainly no direct or positive evidence reported on the question of the plaintiff's competency. No expert was examined, nor were there any facts testified to by other witnesses showing either general incapacity in the plaintiff or that she did not understand this particular transaction or the nature and character of the instruments which she executed. It is true she was quite old and feeble, and was not

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expected to live *more than twenty-four hours when the deed was executed. It is also true that she had to be lifted from bed and her hand had to be held and guided in affixing her signature thereto, but the evidence is silent as to the extent to which her mind and understanding had been impaired by her physical weakness and disease, and it will not do to say that old age and physical weakness merely are sufficient to disqualify one from disposing of his property.

Besides this, it is in evidence that, some two weeks after the execution of the deed, she recognized its existence and made a second paper, the bill of sale of her personal property, in harmony with and in furtherance of the scheme upon which the deed had been previously executed, to wit, the comfortable support and maintenance of herself and husband during their lives, to secure which she took a bond and mortgage from the defendant covering the property conveyed to him. The papers were drawn by Mr. Child, an attorney of standing, by the direction of the plaintiff; Mr. Child testifying to these facts, and saying "that from what he heard and saw, the plaintiff was as competent to transact her own business then as she is now." In the face of this testimony, I cannot see how it can be claimed that the plaintiff did not understand what she was doing.

It appears to me, too, that the testimony is destitute of facts impeaching the conduct of the defendant as to any improper agency in procuring these papers. He had no special control of the plaintiff. Nor does it appear that he exercised, or attempted to exert, any influence over her, either by threats, importunity, fraud, or imposition of any kind. It is true that Mr. Richey, who drew the deed, was carried to the house of plaintiff by the defendant. Why should he not have done so? If the plaintiff had made up her mind to execute the deed in favor of defendant, and he was informed of that fact, it was more in accordance with the idea of fair dealing that he should have a suitable person to prepare the papers, openly and personally, than to stand in the background, working entirely through others. True, too, that he had the deed properly recorded. What is there in this to excite suspicion? The paper was of a

character which in law should have been recorded. Such being the fact, its record was

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*in accordance with law, and just what most business men would have had done. The law requiring this deed to be recorded, if the defendant had withheld its record, that fact would have needed explanation, rather more than the fact of recording, and would have been much more damaging to the conduct and character of the defendant.

It is said that the bond and mortgage was not recorded. This, however, was explained by Mr. Child, and the defendant was in no way responsible for the non-record of these papers. Nor did this occur from any want of understanding in the plaintiff as to her rights thereunder. If any one is to blame for this, it was Mr. Child himself; certainly not the defendant. Upon the whole, I have not been able to find any direct testimony in the case either impeaching plaintiff's mental capacity or showing that she was overreached by the circumvention, artifice, or undue influence of the defendant, or of any one in his behalf.

It is said, however, that while there is no direct evidence showing absolute incapacity in the plaintiff, nor imposition, perhaps, on the part of the defendant, yet when the age of the plaintiff is considered, and also her extreme feebleness, in connection with the remarkable character of the papers, transferring, as they did, her entire estate, real and personal, to the defendant, the inference, both of incapacity and imposition, is irresistible, and it is upon that ground that the papers should be declared void. The legal principle under which this is claimed is no doubt correct, and it is true that great mental weakness, yet short of absolute incapacity, may sometimes be a sufficient ground to invalidate instruments in which unconscientious bargains have been obtained, or where the inadequacy of consideration is so gross as to be explained in no other way, except from the imbecility of the grantor or the imposition of the grantee. But such cases are rare, and before this principle can be applied, the facts should be undoubted and overwhelming.

Now, can such an inference be drawn fairly from the facts of this case? What are those facts? The plaintiff at the date of the deed was an aged lady—nearly 83. She was sick, and thought to be near her end. Her husband was perhaps older than herself; he was

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certainly beyond "three score and ten." *They had no children. The plaintiff owned a small tract of land, I suppose about 125 acres, worth, it is said, upon valuation \$20 per acre, or in the whole, \$2,500, and some personalty, value not mentioned. These two aged people were living to themselves, the plaintiff's only relations being a brother and perhaps some nieces, with whom it seems she had no association. They were alone in the world, in possession of the property mentioned and

with no other means of support, so far as it appears. Now, it is manifest that this aged couple, sick and feeble as they were, could not have been able to make even a scanty support by their own labor on the land which the plaintiff owned. Nor could they have done so by hired labor under their supervision and direction. An attempt to do so, in either of these ways, would no doubt have soon resulted in crushing debt, and finally in starvation or the poor house. The relations of the plaintiff were not present, giving aid and comfort. They themselves were absolutely powerless to provide for their necessities in their declining years. What need had they for this little tract of land and their household personalty, but through it to obtain an easy and comfortable living during the years before them? They could not take it with them beyond the grave. They could only use it while they lived, and the relations of the plaintiff had no claim upon them, or at least no such claim as demanded that they should not make all necessary use of it while they were alive for their comfort and support, even if this use required its entire destruction, leaving nothing to go to said relations.

Under these circumstances, the arrangement which the old lady made with the defendant, if fairly carried out by him, does not strike me as so remarkable and strange—certainly not so strange as to indicate irresistibly incapacity on her part, or imposition on the part of the defendant. She bargained for a comfortable and easy support both for herself and her husband during their respective lives, and she secured the enforcement of this obligation on the defendant by a mortgage of the land. True, she had refused to sell to the defendant a short time before this a small portion of this land at \$50 per acre. In this she acted wisely, as she no doubt knew that the money received would soon go, while the land was permanent. The arrange-

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ment which this old lady made, when all the circumstances are duly considered, though somewhat unusual, certainly cannot be said to be devoid of sense or reason, and if it was faithfully carried out by the defendant, fully and honestly, in all probability would be the best for the plaintiff and her husband. The bond and mortgage afford the means to her of having such faithful enforcement to the full extent of the property.

That it should have been made with a stranger is not of itself sufficient to avoid it. In this country the owners of property have the right to make their own disposition thereof, and while it is more in accordance with nature that relations should be preferred to strangers, yet the courts have no right to control parties in this respect. There are often reasons, facts, and motives beyond the reach of the court, sufficient to influence the party,

or if even within its reach, yet beyond its legal power to set aside or suspend. If the arrangement which the plaintiff made had been made with her brother, under all the circumstances surrounding her, could its wisdom be fairly impeached? Does the fact that it was made with a stranger to her in blood make it less wise—especially when she secured its enforcement so completely?

For the reasons given above I am unable to concur in the opinion of the majority.

Judgment modified.

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AGNEW v. CHARLOTTE, COLUMBIA & AUGUSTA R. R. CO.

(April Term, 1885.)

[Mortgages *↔* 295.]

A debtor gave to his surety a mortgage of land to secure the debt and to indemnify the surety; afterwards another creditor obtained judgment against this debtor; and after that, such surety being required to pay the debt, the debtor conveyed some of this land to such surety, the conveyance stipulating that it was made subject to said mortgage, which was to remain open to protect the surety against dower, liens, and encumbrances. The judgment creditor then levied, sold, and purchased a portion of the land so conveyed, and brought action for its recovery. *Held*, that the express agreement of the parties prevented a merger, that the mortgage remained open, and that the plaintiff was not entitled to recover the land. Mr. Justice McIVER, dissenting.

[Ed. Note.—Cited in *Navassa Guano Co. v. Richardson*, 26 S. C. 402, 411, 414, 2 S. E. 307; *Bleeckey v. Branyan*, 26 S. C. 424, 427, 429, 431, 2 S. E. 319; *Agnew v. Renwick*, 27 S. C. 562, 572, 4 S. E. 223; *Bleeckey, Brown & Fretwell v. Branyan*, 28 S. C. 453, 6 S. E. 291; *Fowler v. Wood*, 31 S. C. 405, 10 S. E. 93, 5 L. R. A. 721; *Craig v. Miller*, 41 S. C. 45, 46, 19 S. E. 192; *Jefferies v. Fort*, 43 S. C. 50, 20 S. E. 755; *Parker v. Parker*, 52 S. C. 386, 29 S. E. 805; *Brown v. Bank of Sumter*, 55 S. C. 74, 32 S. E. 816; *Singleton v. Singleton*, 60 S. C. 233, 38 S. E. 462; *Glenn v. Rudd*, 68 S. C. 103, 104, 46 S. E. 555, 102 Am. St. Rep. 659; *McCreary v. Coggeshall*, 74 S. C. 51, 52, 53, 54, 53 S. E. 978, 7 L. R. A. (N. S.) 433.

For other cases, see *Mortgages*, Cent. Dig. § 825; Dec. Dig. *↔* 295.]

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*Before Wallace, J., Richland, December, 1884.

This was an action by John Agnew against the Charlotte, Columbia & Augusta Railroad Company, commenced May 30, 1884. The opinion states the case. The Circuit Judge rendered the following judgment:

The issue presented for me to decide is as follows: The plaintiff claims that the tract of land, having been conveyed by the mortgagor to the mortgagee, the equity of redemption and the legal estate became merged; and the mortgage, upon the bond being paid, became extinguished. The defendant claims that the intention expressed in the

conveyance from Hoffman to defendant kept the mortgage open and prevented its extinguishment.

The general rule of law is, that where the mortgagee purchases the land mortgaged to him, the equitable and legal estates, becoming thus united in him, are merged and the mortgage thereby extinguished. The courts of most of the States and of England and the United States Supreme Court hold that where it can be shown that it was the intention of the parties, or where this intention can be inferred from it being the interest of the grantee, to keep the mortgage open, then the mortgage will not be extinguished. *Insurance Company v. Murphy*, 111 U. S., 744 [4 Sup. Ct. 679, 28 L. Ed. 582]. This, however, seems not to be the law in South Carolina, as I interpret *Devereux v. Taft*, 20 S. C., 555.

But no case has been cited from the decisions of this or any other State, where a court has held that when the intention to keep the mortgage alive is written in the deed of conveyance of the land and duly recorded, in such case the mortgage is extinguished. Dr. Pomeroy, in his admirable work on *Equity Jurisprudence*, vol. 2, pp. 248—9—50—1, tells us that the rule is universal, that where the intention is expressed in the conveyance, the mortgage remains open, and is not extinguished. The cases cited by the Supreme Court in the case of *Devereux v. Taft* (nor any cited by counsel here) do not involve or consider the question when there is an express stipulation that the mortgage shall be kept open to protect against liens and encumbrances. The case now under consideration by me illustrates how great injustice would result from a departure from the rule last stated by me.

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*This case is of novel impression in South Carolina, yet I have no hesitation in making my decision. I find the issues presented before me in favor of the defendant; and it is therefore adjudged and decreed that the complaint be dismissed with costs for the defendant.

Mr. E. C. Haynsworth, for appellant.

Mr. J. H. Rion, contra.

November 27, 1885. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action to recover 210 acres of land under the following circumstances: On September 9, 1872, James M. Rutland and James H. Rion, as executors, conveyed to one G. P. Hoffman a tract of land containing 1,159 acres, which included the small tract in dispute. Hoffman gave his bond for the purchase money, with the defendant corporation as surety, and on the same day executed to the said railroad company a mortgage of the premises, to indemnify them against loss as such surety. On May 11, 1882, the plaintiff, Ag-

new, recovered a judgment against the said Hoffman and issued execution thereon. On October 27, 1882, the railroad company, as surety, having been required to make payments on the purchase money, settled with Hoffman, who assigned certain choses in action, paid a sum in lumber, and conveyed 560 acres of the land mortgaged to them, including the 210 acres now in dispute, towards payment of the mortgage debt.

This conveyance contained the following clause: "All of said tracts being portions of a tract of 1,159 acres purchased by me of James M. Rutland and James H. Rion, as executors, &c., on September 9, 1872, payment secured by my bond with the aforesaid company as surety, and a contemporaneous mortgage of the premises for joint security of grantors and surety; this grant, bargain, sale, and release being made with the consent of James H. Rion as a conveyance of the said three tracts of land, the same having been paid for by said railroad company; and hence I do hereby grant, bargain, sell,

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and release the said land subject to a *mortgage to said company, which is to remain open to protect against claim of dower, liens, and encumbrances, together," &c.

On March 3, 1884, the sheriff, under plaintiff's execution, sold the tract of 210 acres, and the plaintiff, becoming the purchaser, brought this action for the land. Trial by jury was waived, and Judge Wallace dismissed the complaint. The plaintiff appeals to this court upon the following grounds: "1. Because his honor did not find, in his fifth finding of fact, that on October 27, 1882, the said G. P. Hoffman and the defendant herein came to a settlement, in which said G. P. Hoffman assigned some choses in action and paid the defendant \$205 in lumber, and conveyed to the defendant, in settlement of the balance due by him, 568 9-10 acres, it being a part of the original tract, and consisting of three tracts, of which the tract of 210 acres mentioned in the complaint is one. 2. Because his honor held that there being an express stipulation in the deed of conveyance that said mortgage should remain open, the conveyance from Hoffman to the defendant did not operate to merge or satisfy said mortgage as to the land conveyed to the defendant. 3. Because his honor did not hold that said mortgage was merged or satisfied by such conveyance, and that the plaintiff is entitled to the possession of said tract of land. 4. Because his honor did not hold that even if said mortgage was not merged or satisfied, the plaintiff is entitled to recover the possession thereof, subject to the lien of said mortgage," &c.

It is true that under our law a mortgage of real estate is merely a security for the debt, the legal title remaining in the mortgagor. The conveyance of the land by Hoffman to the railroad company was subse-

to the recovery of Agnew's judgment against Hoffman, and, therefore, that conveyance alone could not stand in the way of title acquired under Agnew's judgment. The answer to this, however, is, that there was a lien upon the land when Agnew's judgment was recovered, viz., the mortgage of the railroad company, and that the land was conveyed to the company in payment of the debt secured by that senior lien. But to this it is replied that the conveyance of Hoffman, the mortgagor, to the company, the mortgagee, operated, by way of merger, to extinguish not only the whole mortgage debt, but the mortgage itself, leaving the land subject to

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the next lien, precisely as if the *mortgage had never existed; so that the question is whether the court must apply the technical legal doctrine of merger, and thereby declare the mortgage extinguished, notwithstanding the stipulation of the parties, expressed in the conveyance itself, that the mortgage should "remain open" to protect the purchaser, who had paid the debt, against liens subsequent to the mortgage, but prior to the conveyance of Hoffman to the railroad company.

In this State the legal doctrine of merger has been applied to the case of a mortgagee purchasing from the mortgagor, or under legal process against him, the interest known as the equity of redemption. See *Devereux v. Taft*, 20 S. C., 558. The general doctrine as stated by Chancellor Wardlaw in the case of *Allen v. Richardson* (9 Rich. Eq., 53), is, "that a mortgagee, who buys the estate under mortgage, not under process of foreclosure of his lien, extinguishes the debt or claim with lien on the land," &c. It will be observed that the rule as here announced excludes from its operation a case, where the mortgage premises are sold to pay the mortgage debt, under process of foreclosure. In such case the mortgagee may purchase and take good title. So far as title to the premises is concerned, it is somewhat difficult to draw a distinction in principle between a sale for the purpose of paying the mortgage debt under proceedings of foreclosure and one for the same purpose by the mortgagor himself. It is at least intelligible how such a purchase might be held as an extinguishment of any portion of the mortgage debt which the conveyance of the land failed to pay. But it is not equally clear why a private sale for the same purpose should be considered as placing the matter in the same condition as if neither the mortgage debt nor the mortgage had ever existed. It would seem that a conveyance in part payment of the debt secured should at least carry good title to the extent of the payment made upon the debt. Such is undoubtedly the result when the sale is made under proceedings to foreclose the lien.

But, assuming the rule to be as stated,

none of the cases in our books deal with any of the exceptions and qualifications of the general rule; as, for instance, the case of an express written agreement by the parties that there should be no merger, but that the mortgage shall remain open for the protec-

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tion of the *purchaser. Although this precise point has never before arisen in this State, it seems that the general law upon the subject is well settled. Mr. Pomeroy states the doctrine as follows: "When the owner of the fee becomes absolutely entitled in his own right to a charge or encumbrance upon the same land, with no intervening interest or lien, the charge will at law merge in the ownership and cease to exist. Under like circumstances a merger will take place in equity, where no intention to prevent it has been expressed, and none is implied from the circumstances and interests of the party. Generally the same results follow, whether a mortgagee assigns a mortgage to the mortgagor or the mortgagor conveys the land to the mortgagee." 2 Pom. Eq. Jur., § 790. And in the sections following he further says: "If there is no reason for keeping it (the mortgage) alive, then equity will, in the absence of any declaration of his intention, destroy it; but if there is any reason for keeping it alive, such as the existence of another encumbrance, equity will not destroy it. In short, where the legal ownership of the land and the absolute ownership of the encumbrance become vested in the same person, the intention governs the merger in equity. If the intention has been expressed, it controls," &c. 2 Pom. Eq. Jur., § 791, and authorities in note; *Jones Mort.*, § 848; *Insurance Company v. Murphy*, 111 U. S., 744 [4 Sup. Ct. 679, 28 L. Ed. 582].

We agree with the Circuit Judge, that in this case the express agreement of the parties prevented a technical merger, and the senior mortgage of the company is still open. The plaintiff, Agnew, only purchased the equity of redemption, and he is not entitled to recover possession of the land in this action. Possibly he may, upon tender of the mortgage debt, have his action to redeem, but upon that subject we rule nothing in advance.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER. I cannot concur in the conclusion reached by the majority of the court in this case. The general rule, as established in this State, undoubtedly is, that

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where *the mortgagee buys the mortgaged premises, except under a sale for a foreclosure of the mortgage, the mortgage debt is extinguished. *Snell v. Schroder*, Bail. Eq., 334; *McLure v. Wheeler*, 6 Rich. Eq., 343; *Allen v. Richardson*, 9 Rich. Eq., 53;

Deveraux v. Taft, 20 S. C. 555, recognized, also, in Trimmer v. Vise, 17 S. C., 499 [43 Am. Rep. 624].

It is claimed, however, that to this admitted general rule there is at least one exception, viz., that where there is an express stipulation to the contrary, at the time the mortgagee acquires the title to the mortgaged premises, no extinguishment will take place. There is no doubt that there are strong authorities elsewhere, some of which are cited in the opinion of the majority of the court, which not only fully sustain the view there taken, but go much further, and establish the doctrine that in equity it is always a question of intention, and that even where such intention is not expressed, it may be inferred from the fact that it is to the interest of the mortgagee to keep the mortgage alive, as, for example, where there is an intervening encumbrance. But these authorities, while entitled to the highest respect, are not, like the decisions in this State, binding upon this court, whose duty it is to determine what is the law of this State. Now, it is not pretended that there is any case in this State which establishes or even recognizes any such exception as that contended for, to the well settled general rule. On the contrary, in all of the cases above cited, there were intervening encumbrances, which made it to the interest of the mortgagee that the mortgage debt should not be extinguished, and yet there is not the slightest intimation in any one of them that that circumstance could affect the result.

Indeed, it may be doubted whether the doctrine of merger, upon which the rule, with its exceptions, is rested by the authorities elsewhere, is applicable to a mortgage in this State. Merger applies to an estate, and as, since the act of 1791, a mortgage here is not the conveyance of an estate, but is simply a security for a debt, it may lead to confusion if such a doctrine be applied to a mortgage. The principle upon which the rule here is based is well stated by Mr. Chief Justice Simpson in Trimmer v. Vise, 17 S. C., at page 501 [43 Am. Rep. 624], as fol-

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lows: "The right of the mortgagor *to redeem being the only interest that can be sold by a judgment junior to the mortgage, the purchaser at such sale, whether he be the mortgagee or a stranger, is supposed to give the amount of his bid for that interest, over and above the mortgage debt, leaving the land, when purchased by a stranger, still subject to be sold for the mortgage debt, and when purchased by the mortgagee to be applied in satisfaction of his debt, which by operation of law is thereby extinguished." Or, as is said by Mr. Chief Justice Moses, in Edwards v. Sanders, 6 S. C., at page 334: "All the right reserved by the mortgagor is transferred to the mortgagee, who then holds in the premises the interest both of the cred-

itor and debtor, and there is nothing left on which the lien of the mortgage can operate. Where the sale is under a junior judgment, a third party purchasing must not only pay the bid which he has made for the only interest which the sheriff can sell, but, to enjoy an unencumbered estate in the land, he must satisfy the mortgage which still retains its lien. If the mortgagee purchases, to whom is such payment to be made? Not only is the lien destroyed but the debt also."

I am, therefore, unable to find any warrant for saying that there is any such exception as that contended for to, what I understand to be, the well settled rule in this State: nor do I see any reason why such an exception should be engrafted on the rule, inasmuch as a mortgagee always has it in his power to protect himself by the ordinary proceeding for the foreclosure of his mortgage.

It is said, however, that in this case there was an express agreement, entered into in writing, between the mortgagor and mortgagee, at the time of the purchase, that the mortgage was "to remain open to protect against claim of dower, liens, and encumbrances," and that, as there is no case in this State where the general rule has been applied, in which there was any such agreement, the question is now an open one, and we are at liberty to follow the authorities elsewhere. This is all true, but how such an agreement can affect the rights of third persons not parties to it, is difficult to understand. But in addition to this, the fact that the intention which, according to the authorities relied on, determines the question of merger, is expressed in writing, can-

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not be *decisive. It may facilitate proof of its existence, but it cannot give it an effect which it would not otherwise have. According to those authorities, if the intention that there shall be no merger is ascertained, whether by express proof or implied from the circumstances, it controls. I do not see how it is possible that the mode in which it is ascertained can affect its nature or effects. It is true that there are some things which are required to be in writing, as, for example, a contract for the sale of land, which have no efficacy unless so expressed; but this is not of that class. It does not seem to me, therefore, that the fact that the intention that the mortgage should not be extinguished, was expressed in writing, takes this case out of the operation of the rule as settled in this State.

There is no doubt that at the time the defendant bought the land from Hoffman now in controversy it was covered by two liens—the mortgage to the railroad company and the judgment in favor of the plaintiff—and there is as little doubt that if any one else had been the purchaser, he could not have acquired an unencumbered title without satisfying both of those liens, as against

those who held those liens he could not retain the land unless he paid the debts secured by such liens. How does the fact that the mortgagee was the purchaser alter the case? To hold the land, it must pay or satisfy both of the liens; and being thus liable to pay the mortgage debt due to itself, the company united in itself the character of both debtor and creditor, and, according to a well settled rule, when this is the case, the debt was paid by operation of law, and the only remaining lien on the land was the judgment in favor of the plaintiff. This lien being senior to the title which the defendant acquired by purchase from Hoffman, any sale under it must give the purchaser at such sale the better title, and hence it seems to me that the plaintiff in this case is entitled to recover the land. Of course, I do not mean to say that the mere fact that the purchaser has bought the mortgaged premises makes him absolutely liable, in all events, to pay the mortgage debt, but I do mean to say that before he can retain the land he must pay, or in some other way satisfy, the mortgage debt; and hence, if he insists upon retaining the land, he thereby becomes liable for the mortgage debt.

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*It may be a hard case that the company should lose its debt as well as the land which it received in payment of such debt, but it only adds another to the numerous cases in which parties have incautiously bought and paid for property covered by liens, the enforcement of which subsequently has deprived them of the property. In this case, however, it appears that the parcel of land here in controversy does not constitute the whole of the land covered by the mortgage, and it may be, under the case of *Trimmer v. Vise*, supra, that the defendant may yet enforce its mortgage upon the balance of the land. Be that as it may, however, it does seem to me altogether anomalous that the defendant, after acquiring the fee simple title to the land in controversy, should still hold a mortgage upon it—a lien upon its own land.

But if I am wrong in these views, and the defendant still retains its mortgage lien on the premises, still I do not see why the plaintiff cannot recover the land and hold possession of it until it is sold under proper proceedings to foreclose the mortgage. If a person other than the mortgagee had bought the land at private sale from the mortgagor, he could only have bought the mortgagor's interest therein, called the equity of redemption, and such interest would still be liable, in the hands of such purchaser, to levy and sale under the plaintiff's judgment; and if sold under that judgment and bought by the plaintiff, he, certainly, could recover from such purchaser the possession of the land and hold it until it was sold under a proceeding to foreclose the mortgage. How does the fact, that the purchaser at private sale was

the mortgagee, alter the case? The mortgagee by such purchase acquired, and could only acquire, the equity of redemption, which, in its hands as well as in the hands of any other purchaser, would be liable to levy and sale under the plaintiff's judgment; and when so sold and bought by the plaintiff, it seems to me that he is entitled to recover the possession and hold it until the defendant sees fit to have it sold under its mortgage.

It may be said that this would lead to circuity of action, and involve the necessity of instituting another action, when the whole matter could be determined in the present proceeding, or rather in the action which the plaintiff ought to have brought, viz., an action to redeem, which it was argued was the

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plaintiff's only *remedy. This course would be open to two objections: first, it would force a plaintiff to advance from his own pocket the whole amount of the mortgage debt, which might in many cases prove to be very inconvenient, if not impracticable, whereas if the land is sold at public outcry, and it is really worth more than the mortgage debt, the plaintiff's interests would be very much better protected. Indeed, to allow the mortgaged premises, subject also to a junior lien, to be transferred to the mortgagee by a private arrangement between the mortgagee and mortgagor, would open the door to collusion between these parties, which might work serious detriment to the holder of the junior lien, but where the premises are sold at public sale under the mortgage, the supposition is that they will bring their full value and the interests of all parties are protected. Of course, I am not to be understood as intimating that there was any collusion in the present case, as there is no ground for such an intimation; but I am only looking to the general principle.

The second objection to the remedy by action to redeem, suggested as the plaintiff's only remedy, is that it would deprive the plaintiff of the right to throw the mortgagee upon the balance of the mortgaged premises, upon the principle that where there are two creditors of a common debtor, one of whom has a claim or lien upon two funds, and the other upon only one of these funds, the latter has an equity to require the former first to exhaust the fund upon which he has no claim or lien. It appears that the mortgage covered 1,159 acres, and the portion here in dispute is only 210 acres. What has become of the balance of the land does not appear. All that we know is that 568 9-10 acres, embracing the tract in dispute, has been conveyed to the defendant. If the remainder of the 1,159 acres is still in the hands of the mortgagor, then clearly the defendant ought to be required to go upon that for the mortgage debt, to the relief of the 210 acres claimed by the plaintiff. This, however, could not be required if the plaintiff's only remedy is

an action to redeem. But even if this objection should not prove to be practically applicable to this particular case, yet it is sufficient to illustrate my objections to the conclusion reached by the majority of the court.

It seems to me, therefore, that in any view

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of the case the *plaintiff is entitled to recover possession of the land in controversy.

Judgment affirmed.

24 S. C. 29

MUNRO v. JETER.

(April Term, 1885.)

[1. *Adverse Possession* ⇨63.]

Neither a party in possession of land under an agreement to purchase, nor his heirs, can claim title by adverse possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 343; Dec. Dig. ⇨63.]

[2. *Homestead* ⇨182.]

Has a Circuit Judge jurisdiction to adjudge the right to homestead when asserted before him by the widow in an action to marshal the assets of her deceased husband?

[Ed. Note.—Cited in *Swandale v. Swandale*, 25 S. C. 394; *Bridgers v. Howell*, 27 S. C. 431, 3 S. E. 790; *National Bank of Newberry v. Kinard*, 28 S. C. 115, 5 S. E. 464; *McMaster v. Arthur*, 33 S. C. 516, 12 S. E. 398; *People's Bank v. Brice*, 47 S. C. 137, 24 S. E. 1038; *Ex parte Worley*, 49 S. C. 57, 26 S. E. 949; *Gray, Sullivan & Gray v. Putnam*, 51 S. C. 100, 28 S. E. 149.

For other cases, see *Homestead*, Cent. Dig. § 359; Dec. Dig. ⇨182.]

[3. *Homestead* ⇨150.]

A decree by a Circuit Judge denying to the widow and children of one deceased a right of homestead in land which was held by the deceased under a contract to purchase, is not res judicata preventing the determination of a subsequent application for homestead—the purchase money being unpaid at the date of the decree, but fully paid at the time of the subsequent application.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 302; Dec. Dig. ⇨150.]

[4. *Homestead* ⇨151.]

Homestead may be demanded in land held by an equitable title only. Where a party held land under an agreement to purchase, and after his death the purchase money was paid in full by the sale of a portion of the land, but no title deed was ever executed, the widow and children are entitled to their homestead out of the unsold remainder.

[Ed. Note.—Cited in *Ex parte Kurz*, 24 S. C. 471; *Bridgers v. Howell*, 27 S. C. 433, 3 S. E. 790; *Ex parte Allison*, 45 S. C. 343, 23 S. E. 62; *McNair v. Moore*, 64 S. C. 90, 41 S. E. 829.

For other cases, see *Homestead*, Cent. Dig. § 290; Dec. Dig. ⇨151.]

5. *Garaty & Armstrong v. Du Bose* (5 S. C., 493,) explained and limited.

[6. *Homestead* ⇨1.]

[Cited in *Bank of Columbia v. Gibbes*, 54 S. C. 582, 32 S. E. 690, to the point that a right of homestead is a right of exemption and not an estate.]

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

Before Aldrich, J., Union, June, 1884.

This was an appeal from the following decree:

"The petitioner, as widow of John Broxie Jeter, in behalf of herself and their two minor children, has asked this court for a writ of mandamus to require the master of this court to appoint commissioners to assign and set apart a homestead to the petitioner and her children.

"It seems that a case has been and still is pending in this court involving, in part, the settlement of the estate of J. Broxie Jeter, deceased, a marshalling of his assets, &c. J. Broxie Jeter held his lands under a bond for titles, and one of the claims presented against his estate was a balance on the note given for the purchase money. The cause came on

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for a hearing before Judge *Wallace, who considered the question of the right of the widow and children to a homestead in the lands in question, and held that she was not entitled to a homestead. From this decree no appeal has been taken. Under this decree a part of the lands were sold. Afterwards Judge Kershaw, by consent of all the parties of record, ordered a sale of the remaining tract of land, which is the tract now claimed as homestead. Before the sale Augusta A. Jeter, in behalf of herself and children, filed her petition with the master of this county to have a homestead assigned and set apart to herself and children. The sale was had and petitioner became the purchaser thereof at the price of \$800, but she has never complied. Since said sale the master has heard the petition for homestead and declined to appoint commissioners to assign it. From this decision the petitioner has appealed to this court, and in the same paper asks for the writ of mandamus above stated.

"It appears to the court that the question of Mrs. Jeter's and her children's right to a homestead in these lands of her deceased husband, was presented to Judge Wallace and passed upon by him in his decree, and I will not interfere with his decision. I regard his decree as conclusive upon this point. The appeal from this decision of the master is dismissed, and the application for a writ of mandamus refused."

Messrs. Rion & McKissick, for appellants.
Messrs. Shand & Culp, contra.

November 30, 1885. The opinion of the court was delivered by

Mr. Justice MCGOWAN. John Broxie Jeter died intestate in 1880, leaving a widow, Augusta A. Jeter, and two infant children, Grace and Mabel. James Munro, Esq., as clerk of the court, administered upon his estate, and instituted these proceedings for several purposes, not necessary to be mentioned now, and among them, to marshal the

assets of the estate. It appeared that the estate was insolvent; that the intestate at the time of his death left his widow and chil-

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dren aforesaid living on *a tract of land (272 acres) for which he never had legal title, but had gone into possession under the following circumstances: the said tract of land was a part of 752 acres which William Munro, Esq., had several years before purchased for one B. A. Jeter, who had agreed to sell the same to the intestate, giving him bond for titles upon the payment of the purchase money. The intestate was let into the possession. He sold 248 acres of the land to Kate Busby Jeter for \$500, and also 232 acres to his mother for \$500, leaving the remainder, 272 acres, in his possession, upon which he with his family lived until his death, at which time there was still due a portion of the purchase money, \$511.63.

The cause was heard by Judge Wallace, who, on October 9, 1882, rendered a decree, in which, among other things, he said: "The only point at all contested before me was the right of Mrs. Augusta A. Jeter and her children to a homestead in the land upon which they are now living; but the case of *Garaty & Armstrong v. DuBose* (5 S. C. 493), is direct authority against this claim and binding upon me." And accordingly he ordered so much of the land sold as it was supposed would be sufficient to pay the aforesaid balance of the purchase money, and also the other debts of the intestate; but leaving out that part of the land on which stood the residence of the family.¹ There was no

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appeal from this *decree, and the portion of the land included in the order was sold and the proceeds applied in the payment of the debts. The aforesaid balance of the purchase money for the land was paid in full, but it turned out that the proceeds of this

¹The order of sale was as follows:

It is therefore ordered and decreed, that the land heretofore described as having been purchased by Kate Busby Jeter be vested in her and her heirs for ever, and that the Beaver tract be vested in the infant children of James J. Jeter, deceased, to wit, Maud, Eula, Eugene, Ernest, and Virgie, and their heirs for ever; that the J. Broxie Jeter tract of 272 acres be subdivided into two tracts, as nearly equal in size as is practicable, without prejudice to the value of each subdivision as a separate tract; that the Sarah C. Jeter tract (exclusive of the Beaver tract) and that subdivision of the J. Broxie Jeter tract which does not contain the dwelling house and outbuildings, be separately sold by James Munro, Esq., as clerk of this court, or as master, as the case may be, on salesday in November next, or on some convenient salesday thereafter, upon the following terms, to wit, one-third cash, balance in equal instalments in one and two years, with interest from day of sale, to be secured by bond of the purchaser with one or more sureties and a mortgage of the property; that the costs of these proceedings be charged one-half against the proceeds of the sale of the Sarah C. Jeter place and one-half against the proceeds of the sale of the J. Broxie Jeter place. That if the amount

sale were not sufficient to pay the other debts of the estate, all of which were contracted since the adoption of the constitution allowing homestead.

Afterwards, as it would seem, with the consent of all the parties of record, Judge Kershaw ordered a sale of the remaining portion of the land, upon which stands the residence, in which the intestate had lived and his wife and children still live. But before the sale of this second parcel was actually made, the widow, Augusta A. Jeter, filed a petition before the master, James Munro, to have homestead in her deceased husband's estate set off to her and her children. The land, however, was offered for sale as ordered, and bid off by the widow for \$800, but she declined to comply with the terms of sale. After this sale, the master formally dismissed the petition for homestead. From this refusal of the master to have homestead set off, the petitioner appealed to the Circuit

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Court, praying also for a writ *of mandamus requiring the master to appoint commissioners to lay off the homestead. Judge Aldrich refused the application and dismissed the appeal, holding that the matter was res adjudicata by the decree of Judge Wallace, in the proceedings in the Common Pleas.

From this order the widow and children appeal to this court upon the following grounds: "I. For that his honor held that the question of the right of homestead of Augusta A. Jeter and her children was concluded by the decision of Judge Wallace, denying the right of homestead; whereas he should have held that Judge Wallace had no jurisdiction to determine the question in the proceedings before him. II. For that his honor held that the question of the right of homestead was concluded by the decision of Judge Wallace; although since the said decision the purchase money of the land, out

realized to the estate of J. Broxie Jeter from the sales above ordered be sufficient to pay its proportion of the costs and also debts due by the said estate, together with the expenses of administration, that then the remaining subdivision of the J. Broxie Jeter place, with the dwelling house and other improvements thereon, be vested in Augusta A. Jeter, Grace Jeter, and Mabel Jeter, their heirs and assigns for ever, share and share alike; but if such amount so realized be insufficient to pay such claims and demands, that the said dwelling house subdivision be then sold on salesday in November next, or on some subsequent salesday, by the same officer and upon the same terms as is above directed as to the other two tracts. * * *

That the proceeds of the sale of the J. Broxie Jeter lands, after payment of its proportion of costs, together with the interest of said Broxie in his mother's lands, be applied first to the payment of five hundred and eleven and 63-100 dollars, with interest from this date, balance due to Thomas B. Jeter, administrator of B. A. Jeter, or other party entitled to the same, and the remainder of the proceeds to the expenses of administration and the debts ascertained and adjudged against the estate of J. Broxie Jeter; the remainder, if any, to be paid to his widow and children, to each one-third.—REPORTER.

of which homestead is claimed, has been paid off and the decedent's estate has become entitled to receive a legal title. III. Because his honor held that a widow and minor children were not entitled to homestead in a tract of land held by the deceased husband and father under a bond for titles; although the purchase money thereof has been fully paid, and the said land been in possession of such husband and father and of his widow and children for more than ten years."

Notwithstanding the numerous decisions upon the subject, it seems that new questions are constantly arising under the provisions of the constitution and laws respecting homestead.

There can be nothing in the fact that the land had been in the possession of the intestate and his family for more than ten years. The possession of the widow and children come through the intestate, who entered under an agreement to purchase, and consequently his possession was not adverse.

We do not see that the question of the right to homestead on the part of the widow and children was conclusively adjudged against them by the decree of Judge Wallace, which was rendered in an equity proceeding originally filed in the Court of Common Pleas, without any special reference to the question of homestead. That question, however, seems to have been made before the judge, who held, upon the authority of *Garaty & Armstrong v. DuBose*, supra, that

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the widow and children were *not entitled to homestead, for the reason that the land was held by the intestate under a contract to purchase, which gave only an equitable title, not the subject of levy and sale. It is true the question of the right of the widow to homestead did not arise before Judge Wallace upon a regular application to have homestead laid off, in the manner prescribed by law, but in an action to marshal the assets of the estate, and for that purpose to sell land, in aid of the personal property. He had no jurisdiction as an original question made in that case to have homestead laid off; for that purpose, the law did not give him the proper machinery. But it is not necessary in this case, and we would not be willing to hold that the Court of Common Pleas, in a proceeding to marshal the assets of an insolvent estate, has not jurisdiction to decide the question simply of the right to homestead. In marshalling assets it may become necessary to decide that question.

But assuming this to be so, Judge Wallace only adjudged and could only adjudge that question, according to the facts as they then existed. At that time, the whole of the purchase money had not been paid, but afterwards it was paid; and when this proceeding was instituted on November 19, 1883, to have the homestead laid off, the question

was presented under a different state of facts, and should have been determined according to the state of facts as they then existed. As was said in *Chafee & Co. v. Rainey* (21 S. C., 11): "The real question is, does the condition of things exist under which the constitution forbids the use of the process of the courts in enforcing the collection of debts?"

It is obvious that the condition of things now is different from what it was when Judge Wallace rendered his judgment. Then the land, as to which the exemption was claimed, was held only under a contract to purchase, where a part of the purchase money was still due; now the purchase money has been fully paid. There the legal title was in the vendor under a trust first to secure the payment of the remainder of the purchase money, and then to convey to the vendee; now the only trust is to convey to the vendee or his heirs. Until the whole purchase money was paid, it could not be known with certainty whether the trust to convey would ever become operative, or

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whether it might not be *necessary to sell the whole of the land to satisfy the primary trust; but now that uncertainty no longer exists, and the vendee has an absolute right to a conveyance. It is not unlike the case of one who sets up a claim of homestead which is adjudged against him, upon the ground that he is not the head of a family, and afterwards and before a sale of the land is made, he does become the head of a family and again makes application to have homestead set off to him under this new state of facts. We suppose there can be no doubt that the first judgment would not be held as adjudging conclusively, as a bar to his claim, based upon a wholly different condition of things. We do not think that the right to homestead was *res adjudicata*.

The question, then, being *res integra*, were the widow and children of John Broxie Jeter entitled to homestead in the remaining tract, upon which he was living at his death, and they still live? When the petition for homestead was filed (November 19, 1883) no part of the purchase money remained unpaid, and they could have demanded the legal title. All the debts then existing were contracted after the constitution, and if the legal title had been executed, there can be no doubt that they would have been entitled to homestead; and the question now is, whether the fact that such title was not executed should deprive them of homestead, upon the ground that there cannot be homestead in land held only by an equitable title. Is this the law? Going back to the fountain-head, we do not see anything in the constitution, or in the amendment of 1880, or in any of the acts of the legislature in pursuance thereof, which necessarily restricts the right of homestead to land in which there is legal title, or which requires, as in respect

to dower, that there should be legal seizin. The constitution makes no reference whatever to the character of the title to land in which homestead is given. Section 20 of article I. simply declares that "a reasonable amount of property as a homestead shall be exempt from seizure and sale," &c. Section 32 of article II. declares that "the family homestead of the head of each family residing in the State, such homestead, consisting of dwelling house, * * * shall be exempt from attachment, levy, or sale on any mesne or final process, issued from any court," &c.;

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and the phraseology of the amendment of 1880 is that "the general assembly shall make such laws as will exempt from attachment and sale under any mesne or final process issued from any court to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate," &c. We fail to see in any of these provisions anything which excludes homestead in land held by an equitable title; but, on the contrary, they all seem to contemplate the exemption without regard to the title.

This court has held that the homestead provision does not undertake to deal with the estate of the debtor; that the right is neither a lien nor new estate, but a mere negation of the ordinary remedies of the creditor as to certain property for certain purposes, an "exemption," dealing merely with the means of enforcing the contract and leaving the title of the property untouched. Being a mere "exemption" from judicial process, what difference can it make whether the title to the property be legal or equitable? From the very nature of the right, the object being to secure a shelter, a home, it would seem to have reference rather to the physical state of the property itself than to the nature and quality of the title. The right, of course, must always be subject to the payment of the purchase money; but, as we understand it, that is entirely independent of the nature of the title, and is equally necessary whether the estate be legal or equitable. We do not see why there may not be homestead in lands held only by an equitable title.

This view is certainly sustained by a great preponderance of authority. Most of the States of the Union have homestead laws, which, while differing from each other in various particulars, are very much the same in their general scope. Nearly all of these States hold the doctrine that homestead is allowable in lands held only by equitable title. Mr. Thompson lays it down as follows: "Will an equitable estate support a homestead right? This question must be answered in the affirmative. Thus an equity of redemption will support a homestead right. In such case the mortgagor, though he holds subject to the mortgage debt, holds his homestead paramount to his other credi-

tors. * * * And so will possession under a verbal contract of purchase support the homestead right. And so will possession un-

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der an unexecuted written contract of purchase," &c. *Thomp Homest.*, § 170, and notes, citing authorities from at least ten States, viz., Vermont, Minnesota, Iowa, Michigan, Kansas, Illinois, Wisconsin, Texas, Mississippi, and North Carolina. In *MacManus v. Campbell* (37 Tex., 267), the doctrine is stated as follows: "The homestead rights attach whenever the property is dedicated to that purpose. This dedication may be made even before the fee passes, or the whole of the purchase money is paid, subject only to the vendor's lien"—that is, the payment of the purchase money where the vendor's lien is not allowed. In *Allen v. Hawley* (66 Ill., 173), it is stated thus: "The residence was on the west half, and it is insisted that because Hardy only had an equitable title to that part of the quarter section, the right of homestead did not attach. I do not see how the proposition assumed can be maintained. * * * Mrs. Hardy was entitled to a homestead in the premises as against all the indebtedness of her husband, except for the purchase money or improvements."

But it is urged that the question has been settled in this State in the case of *Garaty & Armstrong v. DuBose*, 5 S. C., 493. It is true that the syllabus of that case does indicate that the question was there made and decided. We think, however, that a careful examination of the case as reported will disclose the fact that it is at least doubtful whether the exact point in question was there made at all. R. M. DuBose was a bachelor, who kept an establishment with furniture, employees, and hired servants on a tract of land which he held under an unexecuted written contract to purchase, with one-third of the purchase money still unpaid. The sheriff, under executions against him, levied this land and his personal property, and being ruled for not selling, he made return "that DuBose, the defendant in execution, claimed homestead and exemption of the articles of personal property, and that the defendant had no such interest in the land as that it could be levied and sold. The plaintiffs insisted that the defendant was not 'the head of a family,' and therefore not entitled to homestead or exemption." Really, the only two questions in the case were, first, whether DuBose was the head of a family. If so, he was entitled to homestead in the personalty; but if not, then, second, whether he had a leviable in-

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terest in the land, and if not, the levy was void. These were certainly the only questions argued. The court held that DuBose was not the head of a family in the sense of the constitution and laws, and therefore not entitled to homestead at all.

That was necessarily the end of the whole matter, except as to the ulterior question, whether the defendant in execution had a leviable interest in the land. Upon that question the court held that a mere equity was not leviable under execution, which was the point made; but the court went further and held the unnecessary point, which had not been argued, that because DuBose had no leviable interest in the land, therefore he would not have been entitled to homestead in it, even if he were (which he was not) the head of a family. The chief justice said: "If the claim to a homestead by the respondent, DuBose, was founded only on his interest in the land of which he is the occupant, it would be enough to say that he does not hold it by any legal title, and only to such does the homestead provision apply. The constitution (art. II., sec. 32) expressly refers to the real estate of the head of a family, subject to sale "under mesne or final process issued from any court. It presupposes a title capable of transfer by such a sale. The respondent here has no legal title to the real estate. He has but an equitable interest. It can never ripen into a legal title until the full consideration agreed to be paid has been satisfied. The constitution and the several acts of the legislature in their various provisions in regard to the homestead exemption, all look to an interest in the land, which can be transferred by a judicial sale. The mere equitable interest which the claimant holds in the real estate does not entitle him to its benefit," &c.

But if we must assume that the question was fairly before the court and decided in the case of DuBose, it does not follow that it should necessarily be conclusive of this. In this case the equitable interest has substantially "ripened into the legal title." Besides, the case of DuBose arose in connection with the enforcement of an execution, and, as appears from the judgment itself, was decided under the law as it stood before 1873. Up to that time certainly it seemed to be considered that process was an indispensable prerequisite to the assertion of the

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claim of home*stead. In that view, it was easy to conclude that the questions of homestead and of having an estate leviable under execution were identical, and that there could be no homestead where there was no legal estate capable of being levied and sold under execution. But in 1873 the legislature passed an act (15 Stat., 372) which gives the right to the widow and children of a deceased debtor to petition the probate judge (now master or clerk) to have homestead set off to them, "although no process has been lodged with any officer against the homestead," thus in such case disconnecting the question of the right to homestead from the enforcement of process or any inquiry as to

the character of the estate. It seems to us that it is enough to entitle the parties to the exemption if a homestead has been established upon the land, and it may be attached, levied, or sold under proceedings or "process of any court" either in law or equity; always, of course, subject to the payment of the purchase money.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the cause remanded to the Circuit Court for such further proceedings as may be necessary to carry out the conclusions herein announced.

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HELLAMS v. SWITZER.

(April Term, 1885.)

[1. Action \hookrightarrow 40.]

In what cases several causes of action may be united in one complaint, and the remedy for failing to state them separately, considered.

[Ed. Note.—Cited in *Cartin v. South Bound R. Co.*, 43 S. C. 224, 20 S. E. 979, 49 Am. St. Rep. 829; *Buist v. Melchers*, 44 S. C. 64, 21 S. E. 449; *Saunders v. Phelps Co.*, 53 S. C. 176, 31 S. E. 54; *Lewis v. Hinson*, 64 S. C. 577, 578, 43 S. E. 15; *Welborn v. Dixon*, 70 S. C. 113, 49 S. E. 232.

For other cases, see Action, Cent. Dig. §§ 320-327; Dec. Dig. \hookrightarrow 40.]

[2 Action \hookrightarrow 38.]

Where several plaintiffs, severally owning adjacent tracts of land, join in one action for injuries to their land caused by a dam of the defendant, and claiming damages in solido, the cause of action is single, and a demurrer upon the ground of misjoinder of causes of action will not lie.

[Ed. Note.—Cited in *Postick v. Barnes*, 59 S. C. 26, 37 S. E. 24; *Black v. Simpson*, 94 S. C. 316, 77 S. E. 1023, 46 L. R. A. (N. S.) 137.

For other cases, see Action, Cent. Dig. §§ 549, 565; Dec. Dig. \hookrightarrow 38.]

[3. Action \hookrightarrow 50.]

But the injuries being separate and distinct, the plaintiffs could not jointly sue to recover damages therefor; and a demurrer, interposed orally at the hearing, that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained.

[Ed. Note.—Cited in *Griffin v. Southern Ry.*, 65 S. C. 127, 43 S. E. 445.

For other cases, see Action, Cent. Dig. § 515; Dec. Dig. \hookrightarrow 50.]

[4. Nuisance \hookrightarrow 77.]

A civil action will not lie to recover damages for injuries caused by a dam, unless special damage to plaintiff be alleged in the complaint; for a public nuisance the only remedy is by indictment.

[Ed. Note.—Cited in *McMeekin v. Central Carolina Power Co.*, 80 S. C. 516, 61 S. E. 1020, 128 Am. St. Rep. 855; *Barksdale v. Charleston & W. C. Ry. Co.*, 83 S. C. 292, 64 S. E. 1013.

For other cases, see Nuisance, Cent. Dig. § 189; Dec. Dig. \hookrightarrow 77.]

[5. Action \hookrightarrow 22.]

An action for damages on account of a private nuisance and to abate *the same is a legal,

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not an equitable, action. A prayer for equitable relief does not change the nature of the action.

[Ed. Note.—Cited in *Westlake v. Farrow*, 34 S. C. 273, 13 S. E. 469; *Coleman v. Curtis*, 41 S. C. 290, 19 S. E. 499; *Threatt v. Brewer Mining Co.*, 42 S. C. 96, 19 S. E. 1009; *Lipscomb v. Littlejohn*, 63 S. C. 45, 40 S. E. 1023.

For other cases, see *Action*, Cent. Dig. §§ 124-139, 143, 145; *Dec. Dig.* § 22.]

[6. *Parties* § 14.]

The joinder of parties under sections 138 and 140 of the code of procedure considered.

[Ed. Note.—Cited in *Park v. Southern Ry.*, 78 S. C. 308, 58 S. E. 931.

For other cases, see *Parties*, Cent. Dig. §§ 13, 16, 17; *Dec. Dig.* § 14.]

[This case is also cited in *Threatt v. Brewer Mining Co.*, 42 S. C. 95, 19 S. E. 1009, as to facts.]

Before Pressley, J., Laurens, December, 1884.

This action was commenced August 11, 1884. The opinion fully states the case.

Messrs. Holmes & Simpson, for plaintiffs.
Messrs. Ferguson & Young, contra.

November 30, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to abate an alleged nuisance and for damages against the defendant Switzer for erecting on his land immediately below and adjoining the lands of the first named plaintiff a dam across a stream known as North Raburn Creek, in Laurens County. The plaintiffs, R. Y. and P. M. Hellams, as tenants in common, owned one tract of land immediately above the land of the defendant, and each of the other nine plaintiffs, viz., W. L. Hopkins, J. R. Brownlee, G. W. Anderson, J. R. Childress, D. D. Harris, Hannah Babb, William Hellams, L. R. Babb, and Gideon Yeargin, owns a separate and distinct parcel of land on the creek above the aforesaid dam, and none of them has any interest in the lands of either of the others named.

The plaintiffs all unite in one complaint and in stating one cause of action as follows: "III. That the defendant, John R. Switzer, has recently, against the wishes and the solemn protest of these plaintiffs and manifold other citizens of the community surrounding these farms, erected upon his lands immediately below and joining the lands of the first plaintiffs, R. Y. and P. M. Hellams and W. L. Hopkins, a considerable dam across the body of the said North Raburn Creek, and thereby has and is obstructing the flow and the necessary drainage of the said lands by means of the channel of the said creek, causing the

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said channel *to fill up with sand and other rubbish above the said dam and along through the lands of these plaintiffs so as to materially injure the lands of these plaintiffs and render them useless for agricultural purposes. IV. That these plaintiffs are damaged by the said overflow of water and sand upon

their land and the obstruction of their proper drainage, by reason of the said dam erected by the said defendant, in the sum of five thousand dollars. V. These plaintiffs further allege that the said dam, obstructing the water of the said creek and causing it to spread out over so much land in and above the pond, is the cause of chills, fevers, and other malarial diseases in the country around, and makes it dangerous for their families to remain upon the premises, and that the said dam is a source of inestimable injury and damage to these plaintiffs; that said dam is a nuisance, hurtful and injurious to the health of the families and tenants of these plaintiffs, and a great damage to other property," &c. And the said plaintiffs pray that the aforesaid nuisance may be abated; that the said defendant be required to remove the said dam forthwith, and all other obstacles placed by him in said creek, and for a perpetual injunction, and for \$5,000 damages, &c.

The defendant demurred to the complaint upon the ground "that several causes of action were improperly united in this, that it appears upon the face of the complaint that the several plaintiffs are owners of separate and distinct tracts of land, and that one plaintiff has no interest in the lands of the others," &c. On the trial of the cause, the defendant interposed the further oral demurrer "that the complaint does not state facts sufficient to constitute a cause of action."

On hearing the cause, Judge Pressley passed the following order: "It is ordered and adjudged, that the first ground of demurrer be overruled. It is further ordered and adjudged, that the second ground of demurrer be sustained, with leave to the plaintiffs to amend their complaint if they desire to do so."

The plaintiffs and defendant both appeal—the plaintiffs on the ground that his honor erred in holding that the complaint did not state facts sufficient to constitute a cause of action; the defendant on the ground that his

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honor erred in overruling the *written demurrer of the defendant, and in not holding that several causes of action had been improperly united.

First. As to the alleged misjoinder of several causes of action. There is no doubt that there may be more than one cause of action in a complaint. Indeed, under the reformed procedure there may be causes of action either legal or equitable, or both, and to any number; but they must be harmonious. The code prescribes the character of those which may be thus united in the same complaint. Section 188 declares that "the plaintiff may unite in the same complaint several causes of action, whether they be such as have been heretofore denominated legal or equitable, or both, where they all arise out of (1) the same transaction or transactions connected with the same subject of action; or (2) contract

express or implied; or (3) injuries with or without force to person and property, or either, &c. * * * But the causes of action must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated," &c.

These provisions plainly indicate that there is a limit to this authorized union; and when the complaint contains more than one cause of action, the very important question may arise whether they are of such a character as may be joined in the same action. But, of course, there must be more than one cause of action stated in the complaint before that question can arise; and to be a cause of action, the matter must be stated separately—"that is, each must be set forth in a separate and distinct division of the complaint, in such manner that each of these divisions might, if taken alone, be the subject of an independent action." Pom. Rem., § 442; *Hammond v. Railroad Company*, 15 S. C. 10. If the plaintiff endeavors to state more than one cause of action, and merely fails to give them, in form and manner, distinct and separate existence, it is considered a vice in pleading; but the remedy is not by demurrer, but by notice to make the pleadings more definite and certain by separating and distinctly stating the different causes of action. Pom. Rem., § 447.

Now, as to this case, are there two or

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more causes of action *stated, or attempted to be stated, in the complaint? It seems to us not. True, there are several plaintiffs, each of whom owns a particular tract of land, without having anything in common with the other plaintiffs, other than alleged injury to health and property arising from the same cause. There is no effort to give any one of these plaintiffs a separate and distinct cause of action, alleging injury to himself, and stating the amount of damage done to him separately. On the contrary, while the complaint does state the separate ownership of the different parcels of land, it is all done jointly in the same paragraph or division, stating one single cause of action, as if they were tenants in common of the different tracts, and claiming for all together damages in solido, to the extent of five thousand dollars, without indicating what part of the common damage was the share of the plaintiffs respectively. The plaintiffs having made no effort to state, perfectly or imperfectly, several causes of action, but all having joined in one, it seems to us that this is not a case for the application of the rules which govern the joinder of actions, but rather of those which apply to the joinder of parties. If so, the written demurrer of the defendant complaining of a misjoinder of causes of action does not reach the point which the defendant manifestly intended to make, in reference to the separate ownership of the lands by the

different plaintiffs in the united action. Whether the several plaintiffs, owning the different parcels of land claimed to be damaged, could be united in one joint action, is a different question, which we will now proceed to consider.

Second. Did the complaint state facts sufficient to constitute a cause of action? We have just seen that it did not undertake to state more than one cause of action, and the question now is, whether that one was properly and legally stated, and, as we indicated before, that must be determined with reference to the law as to the joinder of plaintiffs.

In order to have a clear view of the principles involved, it will be proper to settle one or two preliminary points. So far as these plaintiffs are concerned, the alleged nuisance must be considered as private in its character, for, if a public nuisance, the only proper remedy was by indictment, unless in addition to the public offence they had alleged

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special damage to themselves, *which they did not do. *McLanchlin v. Railroad Company*, 5 Rich., 583; *State v. Rankin*, 3 S. C., 447 [16 Am. Rep. 737].

The action being for damages on account of a private nuisance and to abate the same, must be considered to be an action at law, such as, under the old procedure, would have been called "an action on the case." It is true that the code has destroyed the distinction between actions at law and suits in equity, and abolished the forms of action requiring that there shall be but one form of action for the enforcement of private rights; but the code did not undertake to destroy the inherent differences between legal and equitable rights, or to affect the primary right or the remedies, which the municipal law creates and confers. The mere formal differences between actions are abolished, while the substantial differences remain as before. The facts determine the nature of the action as being legal or equitable. The complaint does pray not only legal but equitable relief as by injunction, &c., but it will not be forgotten that one of the standing admonitions of text writers upon the codes is, not to confound the cause of action with the nature of the relief sought. They have no necessary connection. The question of nuisance or no nuisance is legal in its character, which the defendant has the right to have passed upon by a jury. In fact, as a general rule, an original action will not lie on the equity side of the court to enjoin a nuisance, unless the matter complained of is itself a nuisance per se. "When the thing sought to be restrained is not in itself noxious, but only something which may, according to circumstances, prove to be so, the Court of Equity will refuse to interfere until the matter has been decided at law by an action." See *Kennerty v. Etiwan Phosphate Co.*, 17 S. C., 411 [43 Am. Rep. 607].

Being, then, an action at law, it is perfectly plain that, according to the old procedure, it would be a misjoinder to unite in one action two or more plaintiffs, having separate and distinct rights in parcels of land claimed to be injured by the same cause. Mr. Pomeroy says: "The requirements of the common law rules that all persons jointly interested shall unite as plaintiffs in any action brought to maintain the interest, and that in the case of a several right, each separate holder of it should sue alone, was very peremptory, and upon these were based the form, extent, and

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even *possibility of the judgment to be rendered. * * * Persons jointly entitled, or having a joint legal interest in the property or other rights affected by a tort, must join in actions brought to recover damages therefor. On the other hand, when the interest and right and the damages are both several, each person who has suffered the wrong must sue separately. In accordance with this principle, two or more plaintiffs cannot in general sue for torts to the person or character, such as assaults, libels, slander, and the like," &c. Pom. Rem., §§ 184, 189.

But the code has changed in some respects the modes of procedure, and the question now is, whether it has so changed the law in relation to parties, as to allow a number of plaintiffs, having no interest in common, but separate and distinct rights, to unite in one action for damages in bulk, to their respective rights of person and property, alleged to proceed from the same cause. A careful examination of the code will disclose the fact that it does not in terms repeal the old law as to parties, which, as we suppose, is still the law wherever it has not been superseded or repealed by necessary implication. The question is really one of construction as to how far the code has abrogated or modified the old rule upon the subject. Section 138 provides that, "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title." And section 140 declares, "Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole," &c.

These provisions are certainly very vague and indefinite. The object, doubtless, was to simplify the procedure, but it seems to us that, in this instance at least, it was not attained. There is certainly upon this point as much confusion and obscurity now as before

the adoption of the code. These sections of our code are substantially the same as those

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of the code of New York, and, *indeed, of most of the States, which have adopted the reformed procedure. We might, therefore, have expected to find some uniformity in the decisions, but such is not the case. No parts of the codes have excited more discussion or difference of opinion in the courts. These provisions as to parties were manifestly modelled upon the old practice in equity, which, from the nature of its issues and especially the mode of trial, was flexible, allowing the chancellor to decide the rights of all parties whether they were before him as plaintiffs or defendants; and, therefore, while it was important to have all the parties in interest before the court, it was not considered necessary to distinguish nicely as to the nature and extent of their interest, or whether they were plaintiffs or defendants. For this reason, probably, it was soon found that there was no serious difficulty in applying the new rules of the code to proceedings which were purely equitable in their character and prayed only equitable relief. And it will be observed that the section from Pomeroy (269), cited by the plaintiffs as authority for the joinder in this case, is found under the head of parties "plaintiff in equitable actions."

But great difficulty arose in the application of the code rules taken from equity to law cases for enforcing legal rights, in which the decision is not by the chancellor, but by the jury, with less liberty of action and without the power to apportion damages among joint plaintiffs. See *Bannister v. Bull*, 16 S. C., 230. This difficulty was felt from the beginning, and at least three States (Ohio, Indiana, and Wisconsin) still hold that the provisions of the code as to parties were not intended to apply to law cases, involving rights purely legal, but only to continue the same practice which had prevailed before, in proceedings equitable in their nature, after the code prescribed one form of action for all alike. Pom. Rem., §§ 213 and 215. But the code does not make any such exception, and it seems that in conformity with its terms the weight of authority is in favor of applying the provisions, so far as practicable, to all actions alike, legal as well as equitable.

It does not, however, follow that the rules of the code abolish entirely the common law requirements in actions strictly legal. "It must be observed, in this connection, that in

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a vast number *of actions strictly legal the equitable theory of parties, as stated in these clauses, would determine the proper parties thereto, in exactly the same manner as the common law theory." Pom. Rem., § 122. This is certainly not a case under the "common or general interest" clause, in which one or more might sue for the benefit of all. *Warren v. Raymond*, 17 S. C., 204. It is a

case in which the inquiry is, whether all the plaintiffs have such "an interest in the subject of the action and in the relief demanded" as authorize them to unite in a joint action for joint damages and to abate the alleged nuisance.

Without going into the learning upon the subject, or endeavoring to reconcile the conflicting decisions, it will be sufficient for the purposes of this case to quote the rule as laid down by Mr. Pomeroy, the greatest expounder of the codes and an enthusiastic defender of its principles and procedure. In reference to actions by persons having several rights arising from personal torts, he says: "Where a personal tort has been done to a number of individuals, but no joint injury has been suffered and no joint damages sustained in consequence thereof, the interest and right are necessarily several, and each of the injured parties must maintain a separate action for his own personal redress. It follows, therefore, that when a tort of a personal nature, an assault and battery, a false imprisonment, a libel, a slander, a malicious prosecution, and the like [nuisance, we suppose] is committed upon one or more, the right of action must, except in a very few special cases, be several. In order that a joint action may be possible, there must be some prior bond of legal union between the persons injured, such as a partnership relation, of such nature that the tort interferes with it, and by virtue of that very interference produces a wrong and consequent damage common to all. * * * The doctrine above stated has been fully recognized and asserted by the courts since the codes were enacted. A fire company, a voluntary association, having been libelled, a joint action by its members to recover damages against the libeller was held improper: not being partners, and not having any community of legal interest whereby they could suffer a common wrong, the right of action was several and each must sue alone. The same rule has been applied in the case of two or more persons,

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not partners. *suing jointly to recover damages for a malicious prosecution: the action cannot be maintained." Pom. Rem., § 231; Giraud v. Beach, 3 E. D. Smith [N. Y.], 337; Hinkle v. Davenport, 38 Iowa, 355; Stepanek v. Kula, 36 Id., 563; Rhoads v. Booth, 14 Id., 576.

In the last case cited, three plaintiffs sued jointly for a malicious prosecution. Wright, justice, said: "As a rule, it is only when two or more persons are entitled to, or have a joint interest in, the property affected, or to the damages to be recovered, that they can unite in an action. Therefore, several parties cannot sue jointly for injuries to the person, as for slander or battery or false imprisonment. For words spoken of parties in their joint trade, or for slander of title, they may sue jointly; but not so when two or

more sue for slanderous words which, though spoken of all, apply to them all separately; or in a case of false imprisonment or a malicious prosecution, when each, as individuals, are imprisoned or prosecuted. The principle underlying is, that it is not the act, but the consequences, which are looked at. Thus, if two persons are injured by the same stroke, the act is one, but it is the consequences of that act, and not the act itself, which is redressed: and, therefore, the injury is several. There cannot be a joint action, because one does not share in the suffering of the other." The court further held that the objection might be taken at the trial.

The judgment of this court is, that the judgment of the Circuit Court be affirmed; that the plaintiffs may amend by striking out all the plaintiffs but one, or otherwise, if so advised.

24 S. C. 48

QUATTLEBAUM v. BLACK.

(April Term, 1885.)

[1. *Mortgages* ⇨476.]

In action for foreclosure, two parties were made defendants on the vague ground that they "claimed an interest in the land." One of these defendants admitted the allegations of the complaint, but asserted a claim which raised an issue with his co-defendant only. *Held*, that such claim could not be properly adjudicated in this action, and that this was not a case that authorized a decree between co-defendants.

[Ed. Note.—Cited in *Norwood v. Norwood*, 36 S. C. 340, 15 S. E. 382, 31 Am. St. Rep. 875; *Hunt v. Nolen*, 40 S. C. 285, 288, 18 S. E. 798.

For other cases, see *Mortgages*, Cent. Dig. § 1333; Dec. Dig. ⇨476.]

[2. *Mortgages* ⇨181.]

Where a mortgage entered upon the record of his mortgage in the proper office a receipt, upon the faith of which money was lent to the

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*mortgagor, the correctness of such entry cannot afterwards be questioned, not only as against the party so lending and those claiming under him, but also as against subsequent purchasers of the mortgaged land.

[Ed. Note.—Cited in *Jennings v. Harrison*, 33 S. C. 209, 11 S. E. 695.

For other cases, see *Mortgages*, Cent. Dig. § 435; Dec. Dig. ⇨181.]

[3. *Constitutional Law* ⇨48.]

[A statute ought to be so construed, if possible, as to bring it into harmony with the constitution.]

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. ⇨48.]

Before Cothran, J., Edgefield, June, 1884.

This was an action by R. H. Quattlebaum against J. C. C. Black, assignee of R. H. May & Co., and others. The opinion sufficiently states the case.

Mr. B. W. Bettis, Jr., for plaintiff.

Messrs. Sheppard Bros., for O. O. Barr.

Messrs. A. S. Tompkins and Ernest Gary, for J. W. Tompkins.

December 5, 1885. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action to foreclose a mortgage against J. Wesley Barr under the following circumstances: On July 13, 1872, the said Barr executed a note to the plaintiff for \$7,500, and to secure it executed a mortgage of five hundred acres of land, which was duly recorded. Quattlebaum removed to Orangeburg, but about March 1, 1873, he returned to Edgefield, and certain negotiations were had in reference to taking up the mortgage. Warren, Wallace & Co. of Augusta were the factors of J. W. Barr, and they were appealed to. The parties were present at Edgefield on March 1 and 3, and J. W. Carwile, the agent in Edgefield for Warren, Wallace & Co., was with them; for there is on the original mortgage, in the handwriting of Carwile, but signed by Quattlebaum, an indorsement in these words: "I acknowledge the receipt of fifty-one hundred dollars on the within mortgage. This 1st of March, 1873," and the same amount is acknowledged and entered by Quattlebaum on the margin of the copy of the mortgage on the record. That credit left due on the mortgage \$2,500, and for that amount Carwile drew a draft for J. W. Barr to sign (bearing date March 3) on Warren, Wallace & Co. in favor of Quattlebaum, who on the next day, March 4, went to Augusta and re-

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ceived the money, and on the next day, March 5, J. W. Barr executed to Warren, Wallace & Co. a mortgage to secure that loan of the very land which had been embraced in the Quattlebaum mortgage. The formal part of this mortgage, all but the amount, was also in the handwriting of Carwile. The original note of J. W. Barr to Quattlebaum was also credited with the fifty-one hundred dollars as of March 1, 1873, but the figure 1 was evidently written over the figure 3. Across the face of the copy mortgage on the record is written in large letters "Set," as if the first syllable of the word "Settled," and the principal question in the case was, whether or not the draft of March 3 for \$2,500, paid by Warren, Wallace & Co. to Quattlebaum, was the payment in full of the note and mortgage of Quattlebaum, to clear the way for that of Warren, Wallace & Co., and the former should have been at that time marked "settled."

On January 28, 1874, J. W. Barr executed and delivered to one Samuel Baker an absolute conveyance of the premises for the consideration expressed of \$10,000. The said Baker, as it afterwards appeared, at the same time executed to J. W. Barr a bond to reconvey the land upon the payment of \$1,500, which was really the money then due on a subsisting debt. The deed was put on record regularly, but the defeasance was not.

On April 17, 1874, J. W. Barr confessed

judgment to Jennings, Smith & Co. for something over \$3,000, and soon after other judgments were entered against him in favor of Robinson, R. H. May & Co., et al. In June, 1883, J. W. Barr was still living on the premises, and when Jennings, Smith & Co. endeavored to enforce their judgment, he claimed homestead in the land, but at the time the commissioners went to lay it off, he disclaimed the ownership of any real estate, saying that he had sold and conveyed the land to Samuel Baker, &c.

On August 6, 1883, the interest of J. W. Barr in the premises was sold by the sheriff under executions in his office and purchased by J. W. Tompkins, who took sheriff's title, and commenced an action for possession against J. W. Barr, when O. O. Barr, his son, had himself made a party defendant, and

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claimed *that he was the owner of the premises and in possession thereof under a deed from the representatives of the said Samuel Baker, who in the meantime had died; and besides, that he had an interest as assignee in the Quattlebaum mortgage to the amount of \$1,593.41, money alleged to have been paid by him to Quattlebaum in part payment of a contract to purchase the mortgage. In this action there was at first a verdict for the defendant, but Judge Aldrich ordered a new trial, and upon the second trial there was a verdict for the plaintiff.

While this action of J. W. Tompkins against J. W. Barr and O. O. Barr was pending on the law side of the court, the plaintiff, Quattlebaum, a brother-in-law of J. W. Barr, instituted these proceedings on the equity side of the court to foreclose upon the premises the old mortgage of 1872, alleging that there was still due the original sum of \$7,500, "less the sum of fifty-one hundred dollars paid on the 1st day of March, 1873." The complaint admitted that O. O. Barr had paid plaintiff, at two different times, some money on the mortgage, but claimed that he, the plaintiff, "is the lawful owner and holder of the said note and mortgage." The complaint also merely suggested that J. W. Tompkins and O. O. Barr (the other persons named were stricken from the record) "claimed an interest in the land," &c., and prayed judgment of foreclosure.

J. W. Barr answered, merely echoing the statements and prayer of the complaint. O. O. Barr did the same, with the addition of making claim that he was substantially assignee of the mortgage to the extent, at least, of the payments made by him to Quattlebaum; and again reiterating his claim to the premises under the deed of his father to Baker and thence to him. J. W. Tompkins answered, alleging and charging that the Quat-

*It appears in the "Brief" that at this sale notice was given that the Quattlebaum mortgage was unpaid.—REPORTER.

tlebaum mortgage had been paid in full, and should have been marked satisfied, when the record was credited with \$5,100 on the first of March, and the balance of \$2,500 was paid on March 3, by the draft on Warren, Wallace & Co.; and, also, that "the pretended contract of the plaintiff with O. O. Barr, as to transferring a part of the mortgage to him, was collusive and fraudulent, and the allegation was made for the purpose of defeating, delaying, and hindering the just creditors of J. W. Barr," &c.

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*It was referred to E. A. Glover, Esq., as special referee, to take the testimony and ascertain the priorities of the different liens against J. W. Barr. There was much testimony, including the records in the homestead proceedings and in the action of ejectment of J. W. Tompkins against J. W. Barr and O. O. Barr for this same land, which is all in the "Brief" and may be referred to as occasion requires. The cause came on to be heard by Judge Cothran, who considered that there were involved three questions: first, was the Quattlebaum mortgage paid off and satisfied by J. W. Barr? second, if not, has O. O. Barr acquired an enforceable interest in it, by reason of payments made on his father's account, to the extent of such payments? and, third, should the Baker claim set up by O. O. Barr be sustained? Upon the evidence, the judge held adversely upon the second and third questions, disallowing the claims made in them respectively. But as to the first, he held, with some hesitation, that the mortgage debt was not paid in full on March 3, 1873, when J. W. Barr's draft on Warren, Wallace & Co. was given for what was represented to be, and really appeared to be, the balance in full of the mortgage debt. This was held, as the judge says, "against his earlier and strong impressions," upon the force of the testimony of the plaintiff himself and of J. W. Barr, to the effect that the draft for \$2,500 upon Warren, Wallace & Co., of date March 3, had been in fact, by anticipation, included in the receipt for \$5,100 two days before, on March 1, entered on the mortgage, and also on the margin of the record in the register's office, and also on the note.

The Judge says: "The evidence to show payment, both circumstantial and recorded, is very strong, but I cannot say that it is sufficient to prevail against the most direct and positive assertions of parties whose character for veracity has not been questioned, and who, of all others, being the payee and payer of the debt in question, must have best known the fact. But suppose they are not mistaken, and that only \$5,100 was paid—it is insisted that such conclusion must, upon obvious principles well recognized in the administration of justice, be excluded. * * * It may be that in his eagerness to get the \$2,500, Quattlebaum was willing to say, and Barr to assent to it, that \$5,100 had been paid, and

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*that he would trust his debtor, a brother-in-law, to make it all right, and this not having been done as yet, consists with their assertions that only \$5,100 was paid in all by J. W. Barr on the mortgage, and this would reconcile much conflicting testimony in the case. The real question thus presented is, does this amount to an estoppel? for it is familiar law, and goes without the citation of authorities, that parol evidence is admissible to explain the terms of a receipt in writing, and there is nothing more than that. And although iterated and reiterated, it remains but a receipt still, &c. Technically speaking (for all law is technical, and that of estoppel is especially so), I am forced to contend [conclude] that this is not a case for the application of the doctrine. It is very nearly such, but one of the essential qualities to make out an estoppel is fatally wanting, and that is privity between the defendant, Tompkins, and Warren, Wallace & Co., whose agent was imposed upon by Quattlebaum and J. W. Barr in the transaction at Edgefield on March 3, 1873." &c. From this decree both parties appealed.

Exceptions of J. W. Tompkins.—I. "Because the Circuit Judge erred in concluding that the acknowledgment of a credit of \$5,100 was entered on the margin of the registered mortgage by Quattlebaum on the 3d day March, 1873, and in concluding that said entry was made at the time of the entry on the original mortgage in the handwriting of Carwile.

II. "Because his honor erred in holding that it was competent for the plaintiff, Quattlebaum, to deny and falsify his acknowledgment of the receipt of \$5,100, the same having been acknowledged by him four times in writing, and at three different times, viz.: 1st. On the margin of the record in the register's office. 2d. On the note and mortgage: and, 3d. In the allegation of his complaint, after the same had been proved by all the answers admitting the same, thereby falsifying the records of the court, viz., the record in the register's office and his own complaint.

III. "Because his honor erred in concluding and decreeing that the plaintiff, Quattlebaum, is entitled to have payment for any sum on said mortgage debt.

IV. "Because his honor erred in not hold-

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ing that said mortgage and debt had been paid in full, and ordering the same marked settled and cancelled.

V. "Because his honor erred in not directing the overplus arising from the sale of the land in question, after satisfying the mortgage debt of Quattlebaum, should be paid directly to the defendant, J. W. Tompkins, he having title to said premises, and being the assignee of the judgments against J. W. Barr."

Exceptions of O. O. Barr.—I. "Because his

honor erred in deciding that the payments made by O. O. Barr to R. H. Quattlebaum of \$348.09 and \$1,245.32, made on October 27, 1879, and December 27, 1870, respectively, were made with the funds of J. W. Barr.

II. "Because his honor erred in refusing to allow the said O. O. Barr judgment for the amounts paid Quattlebaum as aforesaid, in the foreclosure of the mortgage set forth in the complaint herein.

III. "Because his honor erred in deciding that the money paid by O. O. Barr to Samuel Baker and to his administrator and heirs at law, was derived from the property of J. W. Barr.

IV. "Because his honor erred in deciding that if the said payments made on the Baker claim were made with the money of O. O. Barr, that the said payments were a contrivance on his part to defeat the creditors of his father, J. W. Barr.

V. "Because his honor erred in refusing to allow O. O. Barr judgment for the amounts of the said payments made by O. O. Barr on said Baker claim.

VI. "Because his honor erred in deciding that the circumstances enumerated in said decree tended 'but too plainly to show on the part of the Barrs repeated and most desperate efforts to defraud, delay, and defeat the just claims of creditors.'

VII. "Because his honor erred in deciding that the claims set up by O. O. Barr were fraudulent as to creditors of J. W. Barr, when no such issue was presented in the pleadings or properly before the court."

The claim of O. O. Barr, known as the "Baker claim," originated in the deed of J. W. Barr to Samuel Baker, bearing date January 28, 1874, and really we cannot see how it can be properly adjudicated in this

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case. This is an action for the simple *and single purpose of foreclosing the Quattlebaum mortgage, in which the plaintiff impleaded not only the mortgagor, J. W. Barr, but also O. O. Barr and J. W. Tompkins, on the vague ground that they "claim an interest in the land." The interest claimed by Tompkins is as purchaser of the land under junior judgments against the mortgagor, J. W. Barr, and he antagonized the foreclosure of the Quattlebaum mortgage. But O. O. Barr set up no interest adverse to that of the plaintiff, Quattlebaum; but, on the contrary, he joined in the prayer for foreclosure. The interest which he claimed in the land made an issue only with his co-defendant, Tompkins. By the rules of pleadings a defendant is required to answer the allegations of the complaint, but not those of the answer of a co-defendant, of which he may be ignorant.

It is true that the Court of Equity may decree between co-defendants; but the limit to the power is laid down by Lord Redesdale in the case of *Chalmey v. Lord Dunsany* (2 Sch. & Lef., 710), and approved by our own court

in *Motte v. Schult* (1 Hill Eq. 146 [26 Am. Dec. 194]), where it is said that "the Court of Equity may decree between co-defendants, but it must be on evidence arising from pleadings and proofs between plaintiffs and defendants." Now, in this case, if we regard O. O. Barr, the assignee of the Baker claim, as substantially a junior mortgagee, and as such a proper party to the action, it was not alleged in the complaint that he was such mortgagee, and therefore Tompkins had no opportunity to contest that claim. If there had been a distinct allegation in the complaint to that effect, the defendant, Tompkins, would have had an opportunity to contest. As stated, there was only a vague allegation in the complaint, which was not notice to Tompkins. The claim as mortgagee first appeared in the answer of O. O. Barr, and therefore it seems to us that the question of the validity of Barr's claim as mortgagee was not properly in issue before the court, and should not have been considered or adjudged.

Then the question in the case is, whether the mortgage was satisfied on March 3, 1873, and should have been so marked. We agree with the Circuit Judge that "the evidence tending to show payment, both circumstan-

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tial and recorded, is very strong." *It is certain that if the facts were as represented, the whole mortgage debt was paid on that day, for there was on the margin of the recorded mortgage an acknowledgment of the mortgagee that \$5,100 had been paid two days before, on March 1, and on that day, March 3, a draft was drawn and delivered for what appeared to be the exact balance, \$2,500. It would seem that the official certificate of satisfaction might have been then and there entered, as indeed was contemplated, as shown by the entry across the record of the large letters "Set," which was probably the first syllable of the word "Settled," left incomplete for the moment, it may be, for the reason that the draft then given was not actually paid.

There are many circumstances which support this view, and among them the acts of the parties themselves. Up to this transaction in the register's office, the mortgagee, Quattlebaum, had not shown himself remiss in seeking payment of his debt; but from that time (1873) he seems to have made no effort to enforce his mortgage for any balance which might be due, until Tompkins sued his mortgagor for the land in 1883, a period of ten years, although during that time his mortgagor had not only mortgaged the same land to Warren, Wallace & Co., but had sold and conveyed it by an absolute deed to Samuel Baker, and, becoming deeply involved, had been sold out by the sheriff. If there was a balance still due, as alleged, on his debt, it is difficult to understand why Quattlebaum should have remained inactive even after his mortgagor had sold and conveyed the land

covered by his mortgage. But both the creditor, Quattlebaum, and the debtor, Barr, testified positively before the referee that the representations made by the parties, and placed on the record on March 1, 1873, were not true; that the amount of money which had been actually paid was not \$5,100, but \$2,600, the difference being made up by including in anticipation the amount of the draft on Warren, Wallace & Co., not given until two days after, on March 3.

It is always desirable, if it can be done, to take such view as consists with the testimony of witnesses, whose character for truthfulness has not been impeached. Assuming, then, that the statement now made, although

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in conflict with the facts as represented in 1873, is true, the question is whether they are estopped from falsifying their own representations as then committed to writing and placed on the record. We suppose, if Warren, Wallace & Co. were before the court enforcing their mortgage, there could not be the least doubt that the parties would not be heard to contradict the acknowledgment on the registry of \$5,100 on March 1, for the very good reason that it was upon the faith of that representation that W. W. & Co. acted in advancing \$2,500 to satisfy the balance of the debt, and in taking a mortgage of this same land to secure it. Carwile testified that "this draft (\$2,500) was given for the purpose of getting money to settle the mortgage that Quattlebaum had against Barr. I think that this money is no part of the first credit of \$5,100, the acknowledgment of which I have said was in my handwriting. I am satisfied that it is no part of it. I was at the time the authorized agent of Warren, Wallace & Co.; I never had any instructions from them to take mortgages on any encumbered property, but to take unencumbered property. As their agent I would not have negotiated a loan from them to J. W. Barr, if I had thought the property was encumbered." Mr. John W. Wallace, connected with the firm of Warren, Wallace & Co., testified that "the \$2,500 was to relieve the property from the mortgage of Quattlebaum, which would free the premises from all liens. And to our knowledge this Quattlebaum mortgage was the only encumbrance on the place. If there had been any other, we certainly would not have advanced the money. The funds advanced by the firm of Warren, Wallace & Co. to Barr, was for no other purpose than to satisfy the Quattlebaum mortgage," &c. So that it is perfectly clear that Warren, Wallace & Co. were imposed upon to their injury by the representations of March 1, 1873, in writing and on record.

It is, however, urged that J. W. Tompkins is not in privity with Warren, Wallace & Co., and therefore is not entitled to the estoppel which clearly exists as to them; that as Tompkins does not hold under Warren, Wal-

lace & Co., the aforesaid misrepresentations in their effect do not reach to Tompkins, but as to him they were nothing more than an ordinary receipt between creditor and debtor, which, under the law, may be explained or

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even *contradicted. This point is certainly not free from difficulty. It is undoubtedly true, that generally a mere receipt for money is not conclusive between the parties; but it seems to us, that in this respect, there may be a difference between a simple receipt for money on a note, and a receipt on a mortgage deed of land, especially when the acknowledgment is entered on the registry of the deed, thereby giving notice of the fact to the world, and partaking somewhat of the nature of satisfaction of the lien. There is such a thing as privity in estate. True, Tompkins does not hold under Warren, Wallace & Co., but he does hold the land, in reference to which (or to a lien on it) the misrepresentation was made. Whatever touches the existence of a lien on land, must affect the interest of a purchaser of that land. Suppose, instead of \$5,100, the acknowledgment had been of the whole debt and interest; whether true or false, it would have been the duty of the register to enter satisfaction on the mortgage, which would have cancelled the lien as to all the world. If so, does it not follow that the acknowledgment on the record of the receipt of \$5,100 was, in effect, satisfaction of the mortgage to that extent?

As was said in *Wood v. Seely*, 32 N. Y., 105: "Estoppels by record or by deed, as is well known, run in favor of and against the privies in estate of the immediate parties to the estoppel, as well as for and against the parties personally; and I see no reason why estoppels in pais should not be within the rule, as they clearly are within its principle. Cases of dedication often rest upon the principle of estoppel in pais, it being considered fraudulent on the part of one dedicating his land to public uses, to retract to the prejudice of parties who have purchased on the faith of such dedication. It has frequently been held that the estoppel attaches itself to the land and can be asserted on behalf of the grantee of the immediate purchaser," &c. *Big. Estop.*, 449. The acknowledgment on the registry was a continuing representation to all concerned, and must be considered as made, not only to Warren, Wallace & Co., but to any one who might purchase the land. Ignorance of the true state of facts, still wrapped up in the breast of the parties, placed Tompkins in a position somewhat analogous to that

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of a purchaser for valuable *consideration without notice. It will be found, upon a careful examination of the authorities, that wherever the rights of other parties have intervened by reason of a man's conduct, he will then not be permitted to disturb the state of things, whatever may have been his rights at first. See *Big. Estop.*, 508, and notes.

But if we are mistaken in this, and the acknowledgment on the record should be regarded merely as a "receipt in parol" for so much money on the note, we do not think it necessarily follows that the parties now must be heard to contradict it. The rule that a receipt is not conclusive between the parties is not without exceptions. From the peculiar nature of the transactions, it has been held not to apply to warehouse receipts and for premiums upon a policy of marine insurance, and some others. Mr. Bigelow states the doctrine as follows: "The general rule that an acknowledgment of receipt in a sealed instrument may be controverted, is, we apprehend, only a rule of interpretation, and not an arbitrary doctrine of the law, even in cases where there are no extraneous circumstances to make the admission binding. There is no reason why the parties should not be able to agree that there shall be no disputing the admission; and if the parties should, by apt terms in the instrument, promise not to question the receipt, the courts could not fail to consider the acknowledgment as binding." Bigelow, p. 284, and notes.

Now, we think there are "extraneous circumstances in this case to make the admission binding." The single fact that the receipt was not only entered on the note and the mortgage, but acknowledged on the registry, shows that it was intended to be something more than a simple receipt for so much money, which appeared abundantly by the indorsements on the note and mortgage. It is not usual to enter receipts in part payment of a note upon the record of the mortgage given to secure it. Ordinarily the record is not touched unless to make some entry looking towards satisfaction. The note is for the debt, and the mortgage is a lien upon property to secure it. It appears that the entry on the record was made at the instance of Mr. Carwile, who was there for the very purpose of clearing the office of all liens, in order to make way for the mortgage to be given to

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*Warren, Wallace & Co.: and it would seem that the object of the parties in making the entry on the record was to clinch the matter and make it an absolute verity, beyond all possible doubt or future cavil. Whatever may have been the understanding or the rights of the parties as between themselves, this was their solemn declaration made on the public registry, and it seems to us that they thereby estopped themselves from now retracting it; and that to allow them to withdraw or qualify it now, after the land mortgaged has been transferred to another, would operate as a fraud upon rights which have been acquired upon the faith of it.

This view of the main question makes it unnecessary to consider whether the defendant, O. O. Barr, had an enforceable interest in the mortgage.

The judgment of this court is, that the judgment of the Circuit Court as to the claim of O. O. Barr be set aside without prejudice; and that the judgment as to the mortgage of Quattlebaum be reversed, and the complaint dismissed.

24 S. C. 60

COLUMBIA & GREENVILLE R. R. COMPANY v. GIBBES, Treasurer.

(April Term, 1885.)

[1. *Constitutional Law* ⇨48.]

An act of the legislature will not be declared unconstitutional unless it is clearly so.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. ⇨48.]

[2. *Constitutional Law* ⇨125.]

The State may grant a charter to a corporation upon such terms as she pleases, and the conditions so imposed become binding on the corporation upon an acceptance of the charter. The State may grant a franchise conferring vested rights beyond future legislative control, but to have such effect it must be clear, explicit, and unconditional.

[Ed. Note.—Cited in *Kaminitsky v. Northeastern R. Co.*, 25 S. C. 63; *Charleston v. Werner*, 38 S. C. 495, 17 S. E. 33, 37 Am. St. Rep. 776; *D. W. Alderman & Sons Co. v. Wilson Lumber Co.*, 77 S. C. 168, 57 S. E. 756.

For other cases, see *Constitutional Law*, Cent. Dig. § 362; Dec. Dig. ⇨125.]

[3. *Constitutional Law* ⇨126.]

Where a railroad company holding a charter that was, in express terms, not liable to amendment, was sold out under orders of the court, and the purchasers formed a new corporation under a general law permitting it in such cases, with all the rights, immunities, &c., possessed by the old corporation previous to the sale under its charter, and amendments thereto, and of other laws of the State, the new corporation became subject to all laws on the statute book, applicable to railroads, at the date of their organization.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 369; Dec. Dig. ⇨126.]

[4. *Railroads* ⇨19.]

Where an act created a railroad commission

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and provided that the *expenses thereof should be borne by the several railroads of the State according to their gross income, this statute became a part of the charter of every railroad company thereafter incorporated, and assessments for this purpose annually included in the several tax acts were not successive amendments of these charters, but merely a provision to carry into execution a law already enacted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 62; Dec. Dig. ⇨19.]

[5. *Taxation* ⇨144.]

An exaction of a yearly contribution laid by the legislature upon a railroad corporation is not unconstitutional where the corporation accepted its charter subject to such an exaction.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 250, 251, 258½, 259; Dec. Dig. ⇨144.]

6. This case distinguished from *Railroad Company v. Howe*, 32 Kan. 737 [5 Pac. 397].

Mr. Justice McIver dissenting.

[7. *Constitutional Law* ⇨48.]

Where a corporation claims that its vested rights are impinged by a law on the statute book, the burden is upon the corporation to show that its charter antedated the statute.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 46; Dec. Dig. ⇨48.]

[8. *Appeal and Error* ⇨836.]

This court cannot, even with the consent of parties, authoritatively determine general propositions not involving points fairly arising upon the record of the case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3253; Dec. Dig. ⇨836.]

[9. *Appeal and Error* ⇨832.]

Petition for rehearing refused, no important fact or principle having been overlooked.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. ⇨832.]

Before Witherspoon, J., Richland, April, 1885.

[For subsequent opinion, see *Charlotte, Columbia & A. R. Co. v. Gibbes*, 27 S. C. 385, 4 S. E. 49.]

The opinion fully states the case. Upon the points considered by the court, the arguments were as follows:

Mr. C. R. Miles, attorney general, for appellant.

The amount paid by the plaintiff corporation to the county treasurer, and which this action is brought to recover, was a liability to the State, imposed by an amendment of its charter, as a condition upon which it shall exercise its corporate franchise of operating a railroad within the State, accepted by it; and was therefore not illegally or wrongfully collected; and the plaintiff cannot maintain an action to recover it. Gen. Stat., §§ 1416, 1453; 18 Stat., 810. The Columbia and Greenville Railroad Company was established in 188 , and chartered under the provision of the general law, "to enable the purchasers of railroads to form corporations, and to exercise corporate powers, and to define their rights, powers, and privileges," approved March 24, 1876 (16 Stat., 160), and is therefore expressly subject to the liabilities and provisions contained in the "general rail-

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road law" *of the State, which, if inconsistent with its said charter, are to be taken as in alteration and amendment thereof. As to the inherent power of the State to subject corporations chartered by it to such new regulations as may, from time to time, be considered necessary for protection and safety of the public, without thereby violating the contract created by the charter, see *Cooley Cons. Lim.*, 576.

The constitution of 1868, art. XII, sec. 1, declares that "corporations may be formed under general laws; but all such laws may from time to time be altered or repealed." Section 5 of the same article declares that "the legislature shall regulate the public use of all franchises, and limit all tolls, imposts,

and other charges and demands under such laws." The provisions of the act of December 17, 1841, are incorporated in section 1361 of General Statutes, which declares that "it shall be deemed a part of the charter of every corporation created under the provisions of any general law, and of every charter granted, renewed, or amended by act or joint resolution of the general assembly (unless such act or joint resolution shall in express terms declare the contrary), that such charter and every amendment thereof shall always remain subject to amendment, alteration, or repeal by the general assembly." This section was construed by the Supreme Court of the United States in the case of *Hoge v. Railroad Co.*, 99 U. S., 348.

The legislature having created railroad commissioners, and made it their duty to exercise a "general supervision of all railroads in the State operated by steam, and to examine the same, and keep themselves informed as to their condition and the manner in which they are operated with reference to the security and accommodation of the public and the compliance of the several corporations with the provisions of their charters and the laws of the State;" and having declared that all the provisions of the general law on this subject shall apply to all railroads, and to the corporations or others owning or operating the same (Gen. Stat., § 1455), has required that the entire expenses of the said railroad commissioners in performing these duties, shall be borne by the several corporations owning or operating railroads within the State; and has made these sev-

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eral provisions a part of the charter of every corporation operating a railroad within the State over which it possesses the power of control.

Now, do not these several provisions of the general railroad law, made part of the charters of the plaintiff railroad corporation, "prescribe the way in which it shall exercise its corporate powers"? Do they not "require the compliance with these provisions as a condition upon which the corporation shall exercise the privileges granted it;" and having been accepted by the corporation, may they not be "exactcd, not because the legislature had a right to impose them, but because the corporation has agreed, as one of the conditions of its being, to assume them as matter of contract and for value"? Is the plaintiff entitled to recover back, as illegally and wrongfully collected from it, the amount which it has paid in discharge of its liability to the State imposed by these provisions of law, which it has accepted by acting under its charter? A constitutional provision designed solely for the protection of the property rights of a citizen may be reviewed. *Cooley Cons. Lim.*, 185. *Sedg. Stat. and Con. Law*, 111.

Mr. J. C. Haskell, contra.

Is section 1453 an amendment of the charter of the railroad company? The answer to this claim is, I think, readily found by an examination of section 1361, General Statutes of South Carolina, which provides that "all charters and amendments, or renewals thereof, shall always remain subject to amendment or repeal or alteration by the general assembly." Now, if this gives the power to exact additional taxes to those which others bear, it means that the legislature has reserved to itself the right to confiscate; for if it can exact one extra dollar, it can exact all, and take the entire property of a corporation without compensation or process of law, in direct violation of article I., section 23, of the constitution of South Carolina. If it can amend or repeal as it will, it can act judicially and declare forfeited a charter, and so, by violating section 26, article I., of the constitution, it destroys or takes at will private property and that of corporations without process of law or that adequate compensation imperatively required by the constitution. It may be answered that corporations take their charters in full view of the re-

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served power of the legislature; but the legislature cannot reserve a power which it never possessed, nor even by the consent of a party assume a power prohibited by the constitution.

None will question that the forfeiture of a charter is a judicial act, or that the legislature is forbidden by the constitution to act judicially. No one will contend as an abstract proposition that the legislature can by act take private property or that of a corporation; and no one will deny that uncontrolled extra taxation is pro tanto confiscation. The fact that the amount is small does not effect the principle one particle, for there is no limit once the right is established, save the uncontrolled and fickle whims of each new legislature, and what to-day is comparatively a trifle may to-morrow be an overwhelming burden, breaking down and destroying both the rights of the owners and the security of creditors, who extended the credit in full view of ordinary taxes, but with no thought or possible foresight of extraordinary taxes, which, if unpaid, will take the whole of the property which is their security. They can, it may be said, protect themselves by paying the taxes. So they can, and must, as to ordinary taxes; but once let them become liable for extraordinary taxes, and their liability is practically unlimited, and the securities on which they have relied may at any time become worthless by reason of those arbitrary burdens which no prudence could foresee and against which they have the right to expect full protection from the law.

The question then may arise, What can the legislature do under section 1361? And

the answer is, *it can act as it will in all special rights conferred by the charter where such action does not conflict with the constitution*, and no consent of the corporation can extend or amplify its powers as to points covered by the constitution. The acceptance of the charter subject to section 1361 only estops the corporation from claiming that the special and extraordinary corporate rights granted by the charter are matters of contract and not special grants which are subject to modification by the very terms of the act granting them. But section 1361 cannot, nor can any other legislative act, take from a corporation the right to the protection of the constitution; and whenever an act of the legislature infringes upon constitu-

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tional rights, whether of an artificial or of a natural person, such act is pro tanto absolutely null and void. When a corporation is created, the act, says Kent, clothes bodies of men with the qualities and capacities of one single being. "The object of incorporation is to bestow the character and properties of individuality upon a collective and constantly changing body of men." *Providence Bank v. Billings*, 4 Pet., 561.

Once let a corporation be formed and it at once by the mere act of its creation acquires the rights and powers of natural persons, except as limited by the act of its creation. The act which creates a corporation prescribes usually the way in which it shall exercise its corporate powers, but at the same time it invests it ipso facto with personal rights and obligations. The first the legislature can under section 1361 amend; the second it can only alter in such matters as are not controlled by the constitution; and any act which in its direct effect impairs a constitutional right or immunity is as unwarranted as one which directly takes it away. In the exercise of its corporate powers, a corporation acts under a special grant. In its rights, obligations, and immunities as an artificial person, it acts and exists under the general law of the land. The first, being special powers, can be affected by special act; the last only by an act of equal force with the constitution itself.

Section 1453 is no amendment of the charter—it does not claim to be so—and imposes no additional duties on it for the protection of the public; it simply takes from it so much of its property, without process of law, and in violation of the constitution. The power given to the legislature by article XII., section 5, of the Constitution, and reserved by section 1361, General Statutes, refers only to the special corporate powers of the company, and is no sanction of any act touching those rights which are protected by the constitution.

December 5, 1885. The opinion of the court was delivered by

Mr. Justice McGOWAN. The Columbia & Greenville Railroad Company, in paying their taxes to the defendant as treasurer of Richland County for the year 1884, paid, among

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others, an *item of \$1,061.40, being the proportion of the expenses of the railroad commission of the State, assessed upon the said corporation by the comptroller general, and charged up against said corporation as directed by the appropriation act, approved December 24, 1884, which provides that, "For the salaries of the railroad commissioners, six thousand three hundred dollars; for the clerk of the railroad commissioners, twelve hundred dollars; for rent of office, if so much be necessary, four hundred dollars; and three hundred and fifty dollars to pay the contingent expenses of the office for the year 1885, if so much be necessary; to be advanced by the State, until the same shall have been collected from the railroad companies of the State, in the manner prescribed by law, and when collected the same shall be replaced in the State treasury." &c.

The item aforesaid was paid under protest, and this action was brought under the "act to facilitate the collection of taxes" (incorporated in the General Statutes as section 268), to recover back the sum so paid, on the ground "that the act, by virtue of which it was claimed and collected, is unconstitutional, null, and void, and said collection was wrongful and illegal." The defendant, Gibbes, as treasurer, answered, denying that the law under which the said item was assessed against and collected from the said corporation, is unconstitutional and void, or that the same was illegally and wrongfully collected.

The cause came on for trial before Judge Witherspoon, and the defendant made requests to charge as follows:

I. "That the presumption is in favor of the constitutionality of the acts of the legislature of the State, and the burden is upon the plaintiff to show beyond a reasonable doubt that they are unconstitutional.

II. "That the amount collected from the plaintiff, a corporation operating a railroad within this State, as its just proportion of the expenses of the railroad commission, having been apportioned upon its gross income proportioned to the number of miles in this State, if regarded as a tax, is not a tax upon property, but upon 'an occupation' or business, and being regulated according to the amount of business done as ascertained by its gross income, and being uniform and equal in its

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operation *upon all of that class without discrimination, was lawfully assessed and collected.

III. "That the amount collected from the plaintiff, a corporation operating a railroad within this State, being its proportion of the expenses necessarily incurred in the enforcement of the laws enacted by the State for the

inspecting and regulating of the business carried on by the plaintiff for the safety and protection of the public and of the individual citizens of the State, was lawfully assessed and collected, under the police power of the State.

IV. "That the provisions of the general railroad law of the State, under and by virtue of which the amount was collected from the plaintiff, are part of the charter of said company, and the plaintiff cannot maintain this action to recover back the amount paid by it.

V. "That he should instruct the jury to find a verdict for the defendant."

The judge reports that "after hearing counsel for the plaintiff and attorney general for the defendant, I must conclude that the assessment made and the amount collected from plaintiff under section 1453 of the General Statutes is the imposition of an extra or additional tax, illegal and unjust, and in violation of the provisions of the constitution, above cited (sections 23 and 36, of article I., and also section 1, article IX.). This assessment is referred to as a tax, and the same means are provided for enforcing and collecting it as provided for collecting other taxes for the State." &c. Under this charge of the judge there was a verdict for the plaintiff for the amount claimed, and the defendant appeals to this court upon the ground of error in the charge.

The action was brought under section 268 of the General Statutes, to recover back "a tax wrongfully collected under protest," and cannot be sustained, unless it appears that the exaction complained of was unconstitutional. The appropriation was made in accordance with the act of 1879, "to create a railroad commissioner for the State of South Carolina and to define his duties" (16 Statutes, 789, and now section 1453 of the General Statutes), which, among other things, provides that "the entire expenses of the railroad commissioner, including all salaries

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*and expenses of every kind, shall be borne by the several corporations owning or operating railroads within this State, according to their gross income proportioned to the number of miles in this State, to be apportioned by the comptroller general of the State, who, on or before the first day of October in each and every year, shall assess upon each of said corporations its just proportion of such expenses, in proportion to its said gross income for the current year ending on the thirteenth day of June next preceding that on which the said assessment is made; and the said assessment shall be charged up against the said corporations respectively, under the order and direction of the comptroller, and shall be collected by the several county treasurers, in the manner provided by law for the collection of taxes from such corporations, and shall be paid by the said treasurers as collected into the treasury

of the State, in like manner as other taxes collected by them for the State," &c.

The assessment was made by the appropriation act in accordance with this law. It is manifest that the provision requiring the State to advance the expenses and to be reimbursed by the railroad companies, was merely an arrangement of convenience, being substantially a requirement that the railroad companies of the State should pay the expenses of the railroad commission. The single question, therefore, is whether the aforesaid act of 1879, under and by authority of which the appropriation was made, is binding on the plaintiff corporation, or is wholly null and void as being unconstitutional. As we have several times had occasion to repeat: "It is an axiom in American jurisprudence that a statute is not to be pronounced void on this ground, unless the repugnancy to the constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in favor of the enactment. The particular clause of the constitution must be specified and the act admit of no reasonable construction in harmony with its meaning. The judicial function involving such result is one of delicacy and to be exercised always with caution. *Township v. Talcott*, 10 Wall., 673 [22 L. Ed. 227]."^{*} *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 S. C., 533 [40 Am. Rep. 705].

The argument at the bar was able and took a wide range, embracing the questions whether the exaction complained of, was

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*merely an assessment imposing the expenses upon a railroad company for its own supervision and regulation, as it is sometimes required to bear the expenses of erecting and maintaining fences, enclosing their own right of way, and other like safeguards; or whether it was a technical tax for revenue, and if the latter, whether it was a tax on "an occupation" or a tax on property, and as such in conflict with section 1 of article IX. of the Constitution, requiring all taxes on property to be uniform; and also in conflict with sections 23 and 36 of the Bill of Rights, which require all property taxed to be taxed in proportion to its value, and denounce the taking of private property for public uses without the consent of the owner or a just compensation being made therefor. But it will be observed, that all these questions rest upon the view of prior vested rights as in an individual, and that they cannot arise in reference to a corporation, unless such rights have been already secured to it, by the law giving it existence. It seems to us, therefore, that there is a question lying further back as to whether the plaintiff corporation had any vested right, of which the exaction complained of was an infringement.

All corporations are artificial bodies, merely creatures of the State; and as the State may or may not call them into existence, so

she may limit their existence and mould and form them in precise accordance with her view of what is right or politic. A corporation, therefore, is purely statutory. It has no physical existence, and its legal entity being invisible, its powers, duties, obligations, and immunities must be looked for alone in the laws which create it. In most essential matters, the terms upon which the franchise is granted appear in the charter and constitute a contract between the State and the corporations, which is under the protection of the provision in the Constitution forbidding the passage of a law impairing the obligation of contracts. But inasmuch as the State, one of the contracting parties, has the power of legislation and is charged with exercising that power for the welfare of her citizens, a very nice question often arises as to how far and in what particulars, she may amend a charter which she had previously granted. Without, however, going into that matter now, we merely say that, although the

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State has the general power of legislation, she may grant a franchise in such manner as to confer vested rights and to exclude herself from afterwards abridging them by legislation. But for reasons most obvious, such grant, to have the effect of excluding legislation by the State, must be clear, explicit, and unconditional. If the State, in creating a corporation, expressly reserves to herself the right in future to amend the charter generally or in any particular indicated, and such charter is accepted, that corporation may not afterwards object to the exercise of that reserved power, subject to which the charter was accepted, thereby making it a part of the fundamental contract. See *Big. Estop.*, 515, and authorities.

What, then, was the contract of the State as contained in the charter of the plaintiff corporation? In order to determine this, it will be necessary to ascertain the terms of the charter, interpreted in the light of the time and circumstances under which it was granted. The pleadings in the case are short, merely making the constitutional question, without undertaking to set out with particularity the date or terms of the plaintiff's charter. It is not stated in the complaint that the plaintiff, "The Columbia and Greenville Railroad Company," is a corporation under the laws of the State, but the answer admitted that the plaintiff was such corporation, without, however, stating when and where it became such. There is on the statute book no act expressly chartering such company, and it must therefore have become a corporation under the general law of 1876, to which more particular reference will be hereafter made. The proceedings by which the plaintiff secured its charter are not set out in the case, but it was stated at the bar, and as we understand conceded, that they took place in the year 1880; but whether it

was so conceded or not, it was not made to appear that it was at an earlier day, and, as we conceive, it was incumbent upon the plaintiff to show that it had corporate existence at the time of the passage of the act, which it claims to be unconstitutional.

The old "Greenville and Columbia Railroad Company" was chartered as far back as 1849, and, as the charter shows, was originally exempt from the provisions of section 41 of the act of 1841 (now section 1361 of the General Statutes), which declares that "every charter of incorporation granted, renewed, or modi-

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fied, shall at all times remain subject to amendment, alteration, or repeal by the legislature." But the old company afterwards (1869) consented, for a consideration, that their charter should be so amended as to make its property subject to taxation in conformity to section 2, article 12, of the Constitution of 1868, which declares that "the property of corporations now existing or hereafter created shall be subject to taxation except in cases otherwise provided for in this constitution." While its franchises and immunities were in this state and condition, the old company became involved, and the road was sold under orders of the court. At that sale it was purchased by certain persons, who formed a new company in the name of the "Columbia and Greenville Railroad Company," under the "act to enable purchasers of railroads to form corporations and to exercise corporate powers, and to define their rights, powers, and privileges," approved March 24, 1876 (16 Stat., 160, and now part of the general railroad law as sections 1420, 1, 2, 3, and 4 of the General Statutes).

That act provides "that in case of the sale of any railroad * * * by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceedings, * * * the purchaser or purchasers thereof, or his or their survivors, representatives, or assigns, may, together with their associates (if any), form a corporation for the purpose of owning, possessing, maintaining, and operating such railroad * * * by filing in the office of the secretary of State of this State, &c. Such corporation shall possess all the powers, rights, immunities, privileges, and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under and by virtue of its charter and any amendments thereto, and of other laws of this State." &c. The charter granted to the new company under the provisions of this act could confer no other franchises and immunities than those which were possessed at the time of the sale by the old Greenville & Columbia Railroad Company, and contained no negation whatever of the power of the

State to legislate upon the subject; and therefore it is clear, indeed it seemed to be

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assumed in the *argument, that the charter of the new company was taken subject to the law now embraced in section 1361 of the General Statutes, making it "at all times subject to amendment, alteration, or repeal, by the legislature."

But it is strongly urged upon us that the exaction complained of, being an assessment in the appropriation act of successive years for so much money, to pay the expenses of the railroad commission, cannot, in any proper sense, be termed an amendment, or successive amendments, of the charter of the plaintiff corporation; but, on the contrary, is an extra tax annually imposed, and as such, is in conflict with the provisions of the constitution before referred to. From the view which the court takes it will not be necessary to determine the precise character of the exaction assailed. The appropriation act which required its payment made no independent original levy, but was merely an assessment to carry out in execution the actual provisions of the general law of 1879, now section 1453 of the General Statutes, which required all the railroad companies of the State to pay the expenses of the railroad commission. Where objection is made to the specific appropriation of the year 1884, the question is thrown back upon the general act of 1879. If that act is binding upon the plaintiff corporation, it cannot object to the clause in the appropriation act of 1884, which was a mere specification under the general authority previously given. It may be that the general law of 1879 cannot be considered as an amendment of the charter of plaintiffs, for the very conclusive reason that it was in existence at the time the charter was granted; but, as it seems to us, it was more than an amendment—it was a part of the charter itself, or at least one of the conditions upon which the charter was granted and accepted.

The plaintiff corporation is undoubtedly bound by all the provisions of the act under which it was created, one of which was that it should have only the rights, franchises, and immunities which were possessed by the old Greenville & Columbia Railroad Company at the time of the sale "under and by virtue of its charter, or any amendments thereto, and of other laws of this State." As we understand it, this was an express contract that the charter was accepted subject to all the

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laws then of force *applicable to railroads. On November 22, 1880, when the secretary of State certified that the purchasers of the Greenville Railroad had formed a new corporation under the laws of the State, there was on the statute book of the State a general law, part of what is called the general railroad law of the State, declaring that every railroad company of the State should con-

tribute its just proportion towards the payment of the expenses of the railroad commission then in existence. Under these circumstances, the charter to the plaintiff corporation was granted by the State, without any reference whatever to the aforesaid liability declared by law; and as the intention of parties must concur to constitute a contract, we are not at liberty to assume that the State intended to grant, or did grant, to the plaintiff any vested rights inconsistent with her own law then on the statute book. The purchasers who became corporators had notice of that law. They accepted the charter in full view of a public act of which all are bound to take notice, and it thereby became a condition of the charter—in a certain sense, a part of the contract—and they cannot afterwards be heard to object to the enforcement of that law. "In general, one who accepts the terms of a contract must accept the same in toto; he cannot accept part and disclaim the rest." *Big. Estop.* 514.

But it is said that the exaction is in itself unconstitutional, and, being such, the legislature could not assume a power prohibited by the constitution even with the consent of the parties concerned. We have endeavored to show that whether an exaction by the State upon a corporation is or is not constitutional must depend upon the character of the rights with which the State has endowed the corporation. If it has been invested with no rights of which the exaction would be an infringement, we do not clearly see how it could be called unconstitutional, any more than the provision in most railroad charters that the company shall at its own expense erect fences, cattle-guards, &c.

If the State were now to create a railroad corporation and insert in the charter in totidem verbis, the provision requiring that it should pay its just proportion of the expenses of the railroad commission, and the corporators should accept that charter and put the road into operation, we suppose there can

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be no doubt that they would be bound by all the provisions of the contract, and would not be heard to say that the one in reference to the payment of the expenses of the railroad commissioners was unconstitutional and void. In *Hand v. Savannah and Charleston R. R. Co.* (12 S. C. 314), the court held that a certain act of the legislature purporting to postpone a particular class of bonds was unconstitutional; but at the same time it was held that those who had by their conduct assented to the act were estopped from denying its validity as to them. In the judgment of the court the doctrine is announced in the following terms: "It is too clear for argument or the citation of authorities that one taking a provision made for himself by a statute must take upon the conditions upon which it is offered. The principle equally applies to express conditions, and such as may be fairly implied from the terms of the statute," &c.

No case upon the precise point under consideration has been brought to our attention; that of *Atcheson, Topeka & Santa Fé R. R. Co. v. Howe*, as treasurer of the State of Kansas (32 Kans., 737 [5 Pac. 397]) is in no way inconsistent with the principles herein announced. The State of Kansas passed an act concerning railroads and other common carriers, and charged the expenses of the commission established, not upon all common carriers which were to be regulated by the act, but only on railroad companies, and therefore it was held that as a tax the exaction was unconstitutional, as not being uniform. In delivering the judgment of the court, Mr. Justice Hurd said: "It is evident that the legislature regarded this tax as a property tax, and not as a license or an inspection tax, because the tax is not assessed upon all the companies, corporations, and persons subject to be regulated by the provisions of the statute," &c.

It seems that the States which have created railroad commissions to inspect and regulate railroads differ as to the manner of providing for the payment of the expenses. Tennessee, Wisconsin, Ohio, Rhode Island, Michigan, Minnesota, Illinois, Missouri, and California each defrays the expenses of its commission directly out of the public treasury; while in New Hampshire, Maine, Vermont, Alabama, and perhaps other States,

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different methods are adopted to apportion the expenses among the railroads regulated.

The judgment of this court is that the judgment of the Circuit Court be reversed and the complaint dismissed.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McIVER. I dissent, but owing to the pressure of other official duties, I cannot now undertake to give the reasons why I am unable to concur in the conclusion reached by the majority of the court.

A petition was filed by defendant asking for a rehearing, upon which the following order was passed December 16, 1885:

PER CURIAM. We have carefully read this petition for a rehearing. All the points made were considered before the opinion was filed, in which it was stated as follows: "The proceedings by which the plaintiff secured its charter are not set out in the case, but it was stated at the bar, and as we understand conceded, that they took place in the year 1880; but whether it was so conceded or not, it was not made to appear that it was at an earlier day, and, as we conceive, it was incumbent on the plaintiff to show that it had corporate existence at the time of the passage of the act which it claims to be unconstitutional," &c. In the view which the court took it was wholly immaterial whether such concession was made or not, for it was in-

cumbent on the plaintiff corporation to show that its charter antedated the "act to create a railroad commissioner for the State of South Carolina and to define his duties," &c. Until that appeared, no case was made sufficient to raise the general question of the unconstitutionality of that act.

The question was necessarily limited to the corporation making it. This court cannot, even by the consent of parties, authoritatively determine general propositions. As was said in one of our cases: "The court does not sit for the purpose of determining mere abstract questions of law, but to determine whether the law, as applicable to a particular case, has been correctly stated," &c. The single question made in the pleadings was

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whether the *exaction upon the Columbia and Greenville Railroad Company was wrongfully and illegally collected because the act by virtue of which it was collected was unconstitutional and void. That was the only "point fairly arising upon the record of the case," and it was considered and decided. No important fact or principle having been overlooked, there is no ground for a rehearing. The petition is dismissed.

24 S. C. 76

OWENS v. WATTS.

(April Term, 1885.)

[1. *Limitation of Actions* ⇨100.]

Where a ward after his majority, by his attorney in fact, makes a settlement with his guardian and receives and receipts for a sum of money and a claim in judgment as a compromise and settlement in full, the statute of limitations then commences to run in favor of the guardian; and action for account, brought by the ward more than seven years afterwards is barred, he having sufficient information at the time of the receipt to put him upon inquiry as to all matters of fraud now claimed as an avoidance of the settlement.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 488; Dec. Dig. ⇨100.]

[2. *Witnesses* ⇨175.]

In such action against the executor of the deceased guardian, plaintiff is incompetent to testify to communications made to him by the deceased upon the matter of the compromise and the value of the estate, notwithstanding returns of the guardian had previously been introduced in evidence by the executor.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 711; Dec. Dig. ⇨175.]

Before Fraser, J., Laurens, April, 1884.

In this case, Honorable B. C. Pressley, the Judge of the First Circuit, sat in place of the Chief Justice, who had been of counsel in the cause.

To the statement of the case made in the Circuit decree, it will be necessary to add only that the receipt signed by W. G. Rudd, attorney, was not under seal, and that the

returns of J. D. Williams, as guardian, were introduced by the executor—matters relied upon by counsel for appellants as bearing upon the points decided by the court. The Circuit decree was as follows:

The case came up on a report of M. A. Carlisle, to whom as special referee all the issues of law and fact had been referred, and exceptions by both plaintiff and defendant.

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The deceased, *John D. Williams, was appointed guardian of the plaintiff in 1849, and entered into bond for the faithful discharge of his duties as such. He died in June, 1870, leaving a solvent estate, and the defendant is his surviving executor. Plaintiff was born September 20, 1847, and therefore came to the age of twenty-one years September 20, 1868. This action has been brought for a full and final accounting for the estate of the plaintiff, which went into the hands of the guardian, and for the payment of the amount found due. The action was commenced November 11, 1876.

The defendant answering, admits that John D. Williams was the guardian as stated, and took possession of the estate of his ward; but alleges that on December 11, 1868, the guardian paid to his said ward, represented by W. G. Rudd as his attorney in fact under a power executed after he became of age, the sum of \$3,440.55 in money, and assigned to him a judgment against one R. S. Phinney, as a settlement in full and compromise of his said guardianship accounts, and pleads the statute of limitations. It will be seen from the dates here given that seven years and a little over eleven months elapsed between the date of the alleged settlement and the commencement of this action.

There is nothing in the pleadings which indicates the particulars in which the plaintiff intended to assail this alleged settlement, but it has been attacked both in argument and by testimony in the progress of the cause mainly, as I understand the parties, on the grounds that the settlement of December 11, 1868, was a mere affirmation of another settlement made between the plaintiff while a minor and John D. Williams in their own names, and which plaintiff was induced to make by his being away from his home in Texas, and badly in want of money; by his being under the influence of strong drink, and having it intimated to him by his guardian that unless he agreed to the settlement, he would run the risk of losing a large part, if not the whole, of this estate. These statements are not corroborated, and depend entirely on the testimony of the plaintiff himself. A wise provision of the law, as I construe it, renders such testimony inadmissible, now that one of the parties to the

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transaction can no longer give his version of the occurrences which led to that first agreement.

Whatever may have been the other objections to that agreement, which was made August 23, 1867, it was not binding, being made by the plaintiff during his minority; his subsequent acts show that he did not regard himself as bound by it. His power of attorney to W. G. Rudd, under which the next and last settlement was made, made no allusion to it, and in fact W. G. Rudd, notwithstanding his testimony on this subject, exacted not only the full balance of the money agreed upon on August 23, 1867, but took an assignment of a judgment against R. S. Phinney, dated November 11, 1867, for \$2,828.59, with interest from that date, and which was a part of the ward's estate. What that judgment may have been worth may not be material except to show that W. G. Rudd under the power of attorney made a new and independent settlement. It is as well, however, to say that at a date subsequent to the date of this judgment, Phinney gave to Copeland another lien on his property, and on Phinney going into bankruptcy, Copeland got the proceeds of the sale of the property.

That original agreement is important in another aspect. While W. G. Rudd clearly appears from the settlement made by him not to have considered that first agreement as binding, he says that he settled by it, and must have, from its contents and the reasons therein given why he should do what he did do—enter into a compromise and settlement in full of his guardianship accounts with John D. Williams on behalf of his principal, the plaintiff in this case. He had, in that original settlement made by his principal in his minority, sufficient information to put him on the inquiry, and he should have made it. It may be that if he had proceeded at once to investigate, he might have demanded the opening of these accounts so solemnly settled and compromised; but that settlement was in its nature final, and after it was made, the guardian and his ward were at arm's length, and the statute of limitations commenced to run.

The language used by Chancellor Harper, in *Moore v. Porcher* (Bail. Eq., 197), that when a trustee does an act which purports to be a final execution of his trust, the statute

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begins to run from *that time, so as to bar an account, has become the well-established law of the land, and by subsequent cases the principle has been extended to credit done in a public office having cognizance and jurisdiction over the matter of the trust in question. *Motes v. Madden*, 14 S. C., 188. The receipt in this case would have been sufficient, if it had never been filed in the probate's office. There is in this case no subsequent discovery to affect the rights of the parties. Plaintiff either did know, or by proper diligence could have known, everything material to the claim at or soon after the date of this compromise and settlement.

I think, therefore, that the statute of limitations is a bar to any further accounting in this case.

At the same time, I incline to the opinion that after the disasters of the war, and the commercial ruin which followed it at the South, the plaintiff was fortunate to have so much of his estate as has been turned over to him by his guardian in this; but it is not necessary to answer the other question in the case. The exceptions are therefore overruled, except so far as are accordant with this decree; and the report of the special referee is set aside; and it is ordered and adjudged, that the complaint be dismissed with costs, to be paid by the plaintiff.

From this decree, the plaintiff appealed upon the following exceptions:

1. Because his honor erred in deciding that the statute of limitations barred the plaintiff's claim.

2. Because his honor erred in deciding that the plaintiff's testimony as to what transpired between him and his guardian in regard to the compromise is inadmissible under section 400 of the code, notwithstanding the defendant introduced and relied upon the acts and declarations of said deceased guardian as to said transactions, and the plaintiff's testimony was simply in reply thereto.

3. Because his honor erred in not sustaining the four exceptions of the plaintiff to the report of the referee, which are as follows: [Omitted, as involving only errors of calculation.] And then confirming said report so modified; the testimony showing most clearly that the plaintiff did not understand his

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rights, and *that he had no means of ascertaining them fully except from his guardian, who failed to give him the necessary information to enable him to understand his rights.

4. Because his honor erred in not holding that the payments made by the plaintiff, being only a part of his estate, could not operate as in full of his whole estate.

5. Because his honor erred in not holding that the agreement of compromise was a nudum pactum, being without any consideration, except the payment to ward of a part of what was due him.

6. Because his honor erred in not holding that it was the duty of the guardian to show that he invested ward's funds as required by law, and not having done so, that he is liable for the whole amount as for money used by him.

7. Because his honor should have held that the alleged release by ward of part of his estate was not binding, because he was a minor at the time and it was not under seal.

Messrs. Jones & Jones and Geo. S. Mower, for appellants.

Messrs. Holmes & Simpson, Ball & Watts, and John W. Ferguson, contra.

January 8, 1886. The opinion of the court was delivered by

Mr. Justice PRESSLEY. Plaintiff seeks in this case to recover a balance claimed as due to him by his deceased guardian. The answer alleges a compromise with plaintiff by his said guardian and full settlement thereof on December 11, 1868, and pleads the statute of limitations. There is no reply to that answer, nor was there any motion to amend the complaint so as to allege fraud at the time of said compromise and recent discovery of said fraud. Notwithstanding the absence of such allegations, the referee admitted testimony (chiefly of the plaintiff, which was incompetent) tending to show that the said compromise had been obtained from him by false representations by his deceased guardian. The Circuit Judge sustains the plea of the statute of limitations, and further holds that plaintiff had sufficient information, before his final settlement with his guardian, to put him upon inquiry into the matters of fraud which he now attempts to prove.

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*After careful examination, this court concurs in the decision of the Circuit Judge, and his decree is therefore affirmed and the appeal dismissed.

24 S. C. 81

ELLIOTT v. POLLITZER.

(April Term, 1885.)

[*Executors and Administrators* ⇨443.]

Where an administrator sues as such on a promissory note properly described and alleged to have been endorsed to him in his representative capacity, of which note he claims to be the legal owner and holder as administrator, the complaint states a cause of action.

[Ed. Note.—Cited in *Harle v. Morgan & Co.*, 29 S. C. 259, 7 S. E. 487.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1799; Dec. Dig. ⇨443.]

[2. *Appeal and Error* ⇨70.]

An order refusing an oral demurrer is appealable, even before final judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 372; Dec. Dig. ⇨70.]

[3. *Appeal and Error* ⇨460.]

A notice of appeal, orally given, from an order refusing an oral demurrer, stays the further hearing of the cause on Circuit. Mr. Justice McGowan, dissenting.

[Ed. Note.—Cited in *McCown v. McSween*, 29 S. C. 134, 7 S. E. 45; *National Exchange Bank of Augusta v. Stelling*, 32 S. C. 106, 10 S. E. 766; *Sullivan v. Latimer*, 32 S. C. 285, 10 S. E. 1071; *Kaminisky v. Trantham*, 45 S. C. 10, 22 S. E. 746; *Rhodes v. Southern Ry.*, 68 S. C. 502, 47 S. E. 689; *Liles v. Harris-Grimes Co.*, 76 S. E. 116.

For other cases, see *Appeal and Error*, Cent. Dig. § 2219; Dec. Dig. ⇨460.]

Before Hudson, J., Beaufort, September, 1885.

The opinion states the case.

Messrs. Verdier & Talbird, for appellant.
Mr. J. B. Howe, contra.

February 26, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On June 30, 1877 the defendant gave his promissory note to D. McPherson for \$1,000. Afterwards "the said note was endorsed and delivered by the said McPherson to the plaintiff herein, as administrator of R. C. McIntire, deceased; and he, the said administrator, is now the legal owner and holder thereof." The plaintiff, as administrator, sued upon the note, and upon the call of the case the defendant moved to dismiss the complaint upon the ground that "it did not state facts sufficient to constitute a cause of action." The presiding judge overruled the motion or verbal demurrer; and to this order defendant excepted, and gave verbal notice of appeal to this court, upon the ground that the judge erred in re-

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fusing the *motion. The defendant also claimed that all further proceedings in the case should be stayed until his appeal from the order refusing the motion could be heard and decided here. Against the objection of the defendant, the judge submitted the case to the jury. The defendant offered no evidence, and the plaintiff had a verdict.

The defendant appealed to this court on two grounds: "I. Because his honor erred in overruling the defendant's oral demurrer. II. Because his honor erred in ordering the cause to trial against the objection of the defendant's counsel after the demurrer was overruled, and notice of appeal given from that ruling."

I think that the Circuit Judge was right in refusing the motion to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. I see no good objection to the complaint, and none was stated. Indeed, the question seemed to be abandoned, and was not argued at the bar.

But it was earnestly urged that the verbal notice of appeal from the order refusing the motion to dismiss the complaint should have stayed all further proceedings in the court below until that appeal was decided in this court. This involves a very important point of practice. In respect to its appealable character, the order refusing the motion to dismiss the complaint, because it did not state facts sufficient to constitute a cause of action, cannot fall under subdivision 3 of section 11 of the Code, for the reason that it was not made in a special proceeding; nor can it fall under subdivision 2 of that section, because it did not "in effect determine the action or prevent a judgment from which an appeal might be taken." But it does fall within subdivision 1 of that section, which provides as follows: "The Supreme Court

shall have exclusive jurisdiction to review any intermediate judgment, order, or decree involving the merits * * * and final judgment; Provided, if no appeal be taken until final judgment is entered, the court may, upon appeal from such final judgment, review any intermediate order or decree necessarily affecting the judgment not before appealed from," &c.

It is clear that this section provides for the review of all "intermediate orders," but the point is when and how the matter

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*should be brought up for that purpose—after final judgment in the case or at the time made; and if the latter, whether such appeal must necessarily stay further proceedings in the case until the appeal is disposed of? In regard to reviewing an "intermediate order" on appeal from the final judgment, the terms of the provision are not mandatory, but permissive; and from this it would seem to be inferrible that a party may, if he chose, appeal from an intermediate ruling at the time it is made. From the manner in which it is expressed, we do not feel authorized to hold that this may not be done. But I fully agree with Mr. Wait when he says: "It is not the policy of the code, with reference to appeals, to allow a review of intermediate orders, unless they are such as in effect terminate the action and prevent a judgment from which an appeal will lie, or unless upon appeal from final judgment." Wait Anno. Code, 663, and authorities.

If the motion to dismiss the complaint had been granted, the order would have had the effect of terminating the case and of preventing a judgment from which an appeal would lie, and under the terms of the law cited, would have been appealable at once. But it seems to us that it was very different when the motion was refused, for then the case was not terminated, but might go on to judgment, an appeal from which would bring under review the intermediate order as well, as appears in the very case before us, in which there is an appeal both from the final judgment and the intermediate order. There should certainly not be two separate appeals in the same case, but the intermediate order might be, and in my judgment should be, reviewed, if at all, under the appeal from the final judgment. This is, as it seems to me, the view of the code, for otherwise there would necessarily be great delays in the administration of justice, and this court would often be called upon to decide cases by piece-meal, and, indeed, to decide questions which, as tested by the final result, were entirely unnecessary.

But in case the party does not choose to await the final judgment before prosecuting his appeal from an intermediate order refusing to dismiss the complaint, what effect should such appeal have upon the further

proceedings in the cause? Must they stop at that point until the appeal is disposed of?

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Does the *notice of appeal *proprio vigore* stay all further proceedings, or may they proceed in the usual way at least to final judgment? I do not think it necessarily follows that because an intermediate order may be appealed from, all further progress in the cause is thereby stayed pending the appeal. The fact that the code allows an intermediate order to be reviewed on appeal from the final judgment would seem to indicate an intention that the cause may proceed to judgment, notwithstanding the notice of appeal; provided, always, that the order is of such a character as not in effect to terminate the case or to prevent a judgment from which an appeal lies. I fail to find the authority that such appeal must operate as a stay to further proceedings in the case short of judgment.

As I understand it, there is an essential difference between a stay of further proceedings in a cause and a stay of execution upon final judgment. Several of the sections of the code declare what shall be necessary (giving bond, &c.) to procure a stay of proceedings on particular judgments, as, for instance, where the judgment is for the delivery of personal property or the execution of a conveyance, &c.; and then section 356 provides as follows: "In cases not provided for in sections 346, 350, 351, 352, and 353, the notice of appeal shall stay proceedings in the court below upon the judgment appealed from," &c. The case before us can only fall under this section, and it becomes necessary to determine what was meant by the words "upon the judgment appealed from." I incline to think that the intention was to refer to the final judgment in the case which might be enforced, and not to dignify into "a judgment" a simple order refusing to dismiss the complaint, especially as such an order does not allow of further proceedings, but is purely negative in character and needs no stay. The code manifestly does not contemplate two appeals at the same time in the same case, one after the other indefinitely on negative intermediate orders. It seems to me the Circuit Court might, notwithstanding notice of appeal from such an intermediate order, proceed with the cause at least to final judgment. "This court has no authority to review an order for judgment on demurrer, unless plaintiff should amend; the order is not reviewable until final judgment

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in the case is entered." *Adams v. Fox, 27 N. Y. (13 Smith), 640; Wait Anno. Code, 662, and authorities.

In reference to the review of an intermediate ruling, refusing to dismiss the complaint, I think the proper practice is to except at the time of the ruling, and then await the final judgment from which, if favorable,

there will be no need of an appeal; but if adverse, the party may appeal, and in doing so have the intermediate rulings reviewed also, as was always done under the old practice in reference to a ruling at the trial refusing to admit testimony, to grant a non-suit, &c. Our books of reports since the code are full of cases in which this practice was followed. See *Hyatt v. McBurney*, 17 S. C., 143; *Dial v. Tappan*, 20 Id., 167; *Crouch v. Railroad Company*, 21 Id., 495, and numerous other cases; while, on the other hand, I know of no case in which an appeal from an order made on motion at the trial refusing to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action, was held to stay further proceedings up to the rendition of the judgment. I think this is the first case in which the question has been distinctly made in this State.

The case of *Hammond v. Railroad Company* (15 S. C., 35), was very different from this. As I understand it, the demurrer in that case was a regular written demurrer. The fact is not expressly stated in the report, but enough appears to show it. The demurrer was not aimed at the whole complaint, but at only one of the two causes of action contained in it, and when overruled it is stated that the defendant "declined to answer over." There are essential differences between a written and verbal demurrer. The former is a pleading and makes an issue. It must be filed within a prescribed time after service, and be accompanied by a certificate of the counsel filing it, that it is meritorious, and not intended merely for delay (see rule XVIII. of the Circuit Court), while the latter has not thrown around it any such safeguards. It is simply a motion at the trial without notice, and being easily made, may be entirely without merit, and only intended for the purpose of delay.

Both upon the construction of the statute

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and strong considerations of inconvenience and delay, I think the judgment below should be affirmed.

Mr. Chief Justice SIMPSON. I concur in so much of this opinion as holds that the Circuit Judge was right in refusing to dismiss the complaint upon the demurrer. Also, in so much as holds that the order appealed from was such an intermediate order as under the code may be the subject of an appeal before final judgment. But I cannot concur in the holding, that the case below could proceed, notwithstanding the appeal from the intermediate order. I think the case of *Hammond v. Railroad Company* (15 S. C., 35) is conclusive of this point. See, too, *LeConte v. Irwin*, 23 S. C., 106. On this ground, in my opinion, the judgment below should be reversed.

Mr. Justice McIVER. I concur in the views presented by the Chief Justice in his dissenting opinion.

The judgment of the Circuit Court reversed, and the case remanded for a new trial.

¹This completes the cases of April term, 1885.—REPORTER.

24 S. C. 86

AGNEW v. ADAMS.

(November Term, 1885.)

[1. *Appeal and Error* ⇨70.]

A ruling of the Circuit Judge that the defendant is properly in court may be appealed from before final judgment.

[Ed. Note.—Cited in *National Exchange Bank of Augusta v. Stelling*, 32 S. C. 106, 10 S. E. 796.

For other cases, see *Appeal and Error*, Cent. Dig. § 368; Dec. Dig. ⇨70.]

[2. *Appeal and Error* ⇨70.]

A refusal to grant a motion for non-suit is a mere ruling and not appealable until after final judgment.

[Ed. Note.—Cited in *Jones v. Trumbo*, 20 S. C. 30, 6 S. E. 887; *Bryson v. Railway Co.*, 35 S. C. 608, 14 S. E. 630.

For other cases, see *Appeal and Error*, Cent. Dig. § 372; Dec. Dig. ⇨70.]

[3. *Appeal and Error* ⇨627.]

Appeal dismissed, the return not having been filed within the time prescribed by Rule II.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. ⇨627.]

This was a motion to dismiss an appeal, upon the ground that the return had not been filed within the time prescribed, and upon the other ground stated in the opinion.

Messrs. Bachman & Youmans, for the motion.

Mr. A. C. Moore, contra.

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*December 14, 1885. The opinion of the court was delivered

PER CURIAM. In this case a motion is made to dismiss the appeal upon two grounds, 1st. Because the matters appealed from are not appealable. 2d. Because appellant has failed to comply with the requirements of rule II. of this court.

For a proper understanding of the point made by the first ground upon which the motion is based, it will be necessary to make a brief statement of the facts. The action in this case was brought originally against Robert Adams, and he having died during its pendency, an order was granted by Judge Hudson, within a year, continuing the action against Evelyn Adams, as administratrix of said Robert Adams. Thereupon a notice was served upon said Evelyn Adams, together with copies of the original summons and complaint, of the order of Judge Hudson, and

that the plaintiff would apply for judgment against her as administratrix as aforesaid. At the trial, the counsel for defendant contended that the action could not be maintained in the then state of the pleadings, inasmuch as, though there was an order authorizing the continuance of the action against the administratrix, yet the proper steps had not been taken to make her a party, inasmuch as no amended or supplemental complaint had been filed, or amended summons served upon her. The Circuit Judge ruled otherwise and the defendant excepted.

At the close of the plaintiff's case the defendant moved for a non-suit on several grounds, which it is not material to set out here. The defendant then introduced her testimony, and the jury rendered a verdict for the defendant, which, upon motion of plaintiff's counsel, was set aside and a new trial ordered by the Circuit Judge. The defendant appeals, substantially upon two grounds. 1st. For error on the part of the Circuit Judge in holding that the action was properly continued against her as administratrix. 2d. For error in refusing her motion for nonsuit.

It will be observed that the only question which we are now called upon to decide is, not whether there is merit in the grounds of appeal, but whether the matters complained of are appealable. The first matter complained of presents the important question, vital to the jurisdiction of the court, whether

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the defendant has *been made a party to the action in the manner prescribed by law, and we are not prepared to say that the decision of such a question is not appealable before final judgment is rendered.

The next inquiry is, whether the refusal of a motion for a nonsuit can be appealed from before final judgment has been rendered. The code, in section 11, prescribes what is appealable and when the appeal may be taken. In its first subdivision it provides that an appeal may be taken, first, from "any intermediate judgment, order, or decree involving the merits," &c. Second, from the final judgment. The second subdivision of that section provides for an appeal from "an order affecting a substantial right made in an action, when such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part thereof, or any pleading in an action." The cases provided for in subdivision three of this section need not be stated, as they are plainly inapplicable to our present inquiry. It is very clear that the refusal of a motion for non-suit cannot be brought under any of the cases provided for in subdivision 2, for while it may affect a substantial right, it does not in effect determine the action, or prevent a judgment from

which an appeal might be taken, nor does it discontinue the action: and it certainly does not fall under any of the other cases provided for in that subdivision.

The only remaining inquiry is, whether it can be brought under the first class of cases provided for in subdivision 1, as it clearly is not a final judgment. The inquiry is therefore narrowed down to the question whether the refusal of a motion for a non-suit is an "intermediate judgment, order, or decree, involving the merits." It certainly cannot be classed as either an intermediate judgment or decree, for a judgment is defined in Code, section 266, to be "the final determination of the rights of the parties in the action," and it is not and cannot be pretended to be a decree. Is it an order involving the merits? In section 401 of the Code it is declared that "every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." Now, the

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refusal of a motion *for a non-suit is never "made or entered in writing," and therefore cannot be "denominated an order." It is in fact nothing more than a mere ruling, like a ruling as to the competency of testimony, which, if excepted to at the time, may be made the basis of an appeal, after final judgment has been entered, but not before. To stop the trial of a case by allowing an appeal from the refusal of a motion for a non-suit, or a ruling as to the competency of testimony, would lead to interminable delays, and so far as we know has never been allowed, either before or since the adoption of the code. If, however, the non-suit is granted, then it is clearly appealable, under the first class of cases provided for in subdivision 2 of section 11 of the Code, as it "in effect determines the action."

Counsel for appellant contended in the argument of this motion that this court, in several cases, in the very last volume of our Reports, the 21st, had considered on appeal alleged errors in the refusal of motions for a non-suit. Turning to that book we find eight cases in relation to this subject. In *Felder v. C. & G. R. R. Co.* (21 S. C., 35 [53 Am. Rep. 656]); *Davis v. C. & G. R. R. Co.*, at page 93; *Glenn v. C. & G. R. R. Co.*, at page 466; and *Hooper v. C. & G. R. R. Co.*, at page 541 [53 Am. Rep. 691] the appeals were from orders granting non-suits. In *Freer v. Tupper*, 21 S. C., 75; *Wilson & Co. v. Dean*, at page 327; *Crouch v. C. & S. R. R. Co.*, at page 495; and *Altee v. S. C. R. R. Co.*, at page 550, the appeals were from final judgments, and there the court could, and did, consider and determine whether there was error in refusing the motion for non-suit, just as it could consider any other alleged error, if properly excepted to at the time, which might have been committed in the progress of the proceedings towards final judgment, because such error, if any there

should be, would necessarily enter into and vitiate the final judgment, and hence upon an appeal from such judgment, any error that may have been committed in refusing a motion for non-suit, or in admitting or rejecting testimony, could be considered.

While, therefore, we think that the alleged error in determining that the action was properly continued against the present defendant as administratrix of Robert Adams, may be appealable at this time, yet we cannot

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hold that the defendant can appeal *from the refusal of her motion for non-suit until after final judgment has been entered.

The respondent, however, claims that the appeal should be dismissed for failure on the part of appellant to comply with the requirements of rule II. of this court. It is not and cannot be denied that there has been such failure on the part of the appellant, and where respondent claims, as he has done in this case, the protection of that rule, we feel bound to accord it to him. We are the less reluctant to enforce the rule in this case, because we do not see how the substantial rights of appellant can be prejudiced by the dismissal of her appeal. The Circuit Judge has already ordered a new trial, and if upon such trial the judgment should go against the defendant, she can then, by appeal from such judgment, raise all the questions presented by this appeal.

The judgment of the court is that the appeal be dismissed.

24 S. C. 90

GREGORY v. RHODEN

(November Term, 1885.)

[1. *Courts* 201.]

Under a proceeding in the Court of Probate by a creditor, who was also administrator, to sell land in aid of assets, that court has jurisdiction to determine in the first instance the validity of an alleged deed under which one of the defendants claimed to hold title from the intestate.

[Ed. Note.—Cited in *Haley v. Thames*, 30 S. C. 273, 9 S. E. 110; *South Carolina Western Ry. v. Ellen*, 95 S. C. 77, 78 S. E. 963.]

For other cases, see *Courts*, Cent. Dig. § 86; Dec. Dig. 201.]

[2. *Executors and Administrators* 334.]

An intestate gave his sealed note to his son in April, 1866, and in July, 1866, conveyed his lands to his wife at his death, which took place in the following November. The widow held possession of these lands as her own until her death in 1879. Afterwards this son administered on his father's estate, and in 1883 filed a petition in the Court of Probate to sell these lands in aid of assets. *Held*, that he had been guilty of laches, and could not invoke the aid of equity.

[Ed. Note.—Cited in *Abercrombie v. Abercrombie*, 25 S. C. 51; *Gibson v. Lowndes*, 28 S. C. 301, 5 S. E. 727; *Hodge v. Weeks*, 31 S. C. 282, 9 S. E. 953; *Sullivan v. Latimer*, 35 S. C. 431, 14 S. E. 933; *Brook v. Kirkpatrick*,

72 S. C. 505, 52 S. E. 592; *Tucker v. Weathersbee*, 98 S. C. 410, 82 S. E. 640.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1378; Dec. Dig. 334.]

3. This case distinguished from *Suber v. Chandler*, 18 S. C., 528.

Before Kershaw, J., Aiken, July, 1884.

The opinion states the case. The Circuit decree was as follows:

The defendants insist that this obligation was conditioned on the performance by the plaintiff of the considerations expressed

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*therein, and that performance has not been proved. In the year 1865 intestate made a will leaving all his property to the plaintiff, or, at least, the land now in question, assigning as a reason that plaintiff was the only one of his children who resided with and rendered him service, and that he desired to compensate him in that way. In March, 1866, the will was destroyed, and plaintiff thereupon told the laborers whom he had employed to work on the farm that year that they must look out for themselves, as he also had to do. Afterwards, when the obligation here set up had been executed, plaintiff continued to serve his father as he had done before. From this, it appears to me that plaintiff, before the destruction of the will, was performing these services gratuitously, but in expectation of being compensated eventually by the provisions of the will; that after the will was destroyed, he declined to continue his services, and only resumed them when other provision for his compensation had been made by this writing. This accounts well for the making of the contract, and also furnished a good reason for considering the services of plaintiff to his father after that time as having been rendered in performance of his duty thereunder. I consider the evidence sufficient to establish plaintiff's claim, even if we consider it as conditioned on performance on the part of plaintiff.

If I were left in doubt as to the sufficiency of the evidence on this point, it would be a proper case in which to frame an issue for the decision of a jury, as was directed by the court on the appeal in *Shaw v. Cunningham* (9 S. C., 271), as suggested by counsel for defendants, but I cannot say that I entertain any doubt on the subject. This is just one of those cases in which juries are apt to be governed by some supposed principles of natural justice or equality rather than by the rules of law, and such a reference ought not to be made unless clearly required for the solution of a question of fact which the court is led to hesitate about by the evidence.

I now pass to the consideration of the points made by the plaintiff's appeal. The case of *Faust v. Bailey* (5 Rich., 107), taken in connection with section 60 of the Code of Procedure, seems to me conclusive on this

point. The judge of probate ought to have considered the question of title raised, and

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his failure to do so was error. According, however, to the view I have taken of the legal aspects of the case, it will not be necessary to remand the matter for a further hearing in the court below. The results will depend on questions of law rather than of fact.

The deed upon which the defense rests was made by a husband to his wife before the common law relations of married women had been changed in this State. As the law then stood, if the grant was intended to operate in present, it was void, because a husband could not make such a grant to his wife after coverture, unless in pursuance of articles entered into before marriage and in consideration of marriage. On the other hand, if it was testamentary in its character, it was ineffectual, because it was not executed with the formalities required in the case of a will. Moreover, being a voluntary deed, it would have been void as to existing creditors under the statute of 13th Eliz. and the decisions thereon; if properly assailed by the creditors, it could not prevail against them. *Twyne's Case*, 3 Co., 80; 1 Sm. Lead. Cas., 1.

Nevertheless such grants are supported in equity, under certain circumstances, when they would be void at law. Says Mr. Story: "A grant of a reasonable provision to a wife would be enforced in equity though void at law; but if a husband, by deed, grant all his estate or property to his wife, the deed would be held inoperative in equity as it would be at law." *Story Eq. Jur.*, § 1373. See also *Beard v. Beard*, 3 Atk., 72; *Davidson v. Graves*, *Riley Eq.*, 232. It is intimated in *Price v. Price* (12 Eng. L. & E., 144) that even a grant of the husband's whole estate to his wife would have been supported if there had been proof that the grantor, who was illiterate, knew what he was about.

There may be a gift made by a husband to his wife which, though bad at law, would be supported in equity; but, as was stated in *McLean v. Longlands* (5 Ves., 78), nothing less will do than a clear, irrevocable gift, either to some person as a trustee (for the wife) or some clear and distinct act of the husband by which he divested himself of the property and engaged to hold the same as a trustee for the separate use of his wife. *Lord Hardwicke*, in the case of *Lucas v.*

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Lucas (1 Atk., 271), which *has been referred to, distinctly says that in this court gifts between husband and wife have often been supported, though the law does not allow them to pass the property. Though the property does not pass at law, yet, in equity, a husband, being the owner at law, may become a trustee for his wife; and if by clear and irrevocable acts he has made himself

such trustee, the gift to his wife will be conclusive. *Mews v. Mews*, 21 Eng. L. & E., 558.

Here the intention is plain to give to the wife, by an irrevocable instrument, an estate to vest in possession at his death. Such an estate cannot be supported without a trustee, but equity will not suffer a trust to fail for the want of a trustee. In the present case, the husband would be considered a trustee for his wife. *Cloud v. Calhoun*, 10 Rich. Eq., 362; *Ellis v. Woods*, 9 Rich. Eq., 24.

This deed might, therefore, be sustained on these principles so far as regards the common law disabilities of husband and wife to contract with each other. But it is liable to another objection, in that it is a marriage settlement, requiring to be recorded as such, and void as to creditors for the want of such recording. *Bank v. Brown*, 2 Hill Eq., 558 [30 Am. Dec. 380]. Yet it was good between the parties and would remain so until set aside or superseded by some action on the part of the creditors. As said by Chancellor Harper, in *Fripp v. Talbird* (1 Hill Eq., 142), "creditors may treat it as void—they are not compelled to avoid it, but may seize the property as if there was no deed; but until they do seize the property, the deed remains perfectly good." He was speaking of a post-nuptial settlement not recorded, and of judgment creditors.

The deed here being good between the parties, the property passed to Mrs. Gregory, at the death of her husband, subject to be divested by proper proceedings on the part of creditors taken in due time. Has this plaintiff proceeded in due time? Having notice of the deed, he ought to have proceeded within four years thereafter. *Lott v. DeGraffenreid*, 10 Rich. Eq., 346. In fact, no proceedings were had until the commencement of this action in 1883, a period of nearly seventeen years after the plaintiff had notice of

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the deed. During all these years there *has been possession under the deed, and plaintiff has stood by in silent acquiescence. True, there was no administrator of the estate of Richard Gregory until recently, but that need not have prevented a proceeding in equity against Margaret Gregory in her life-time, or against her heirs after her death, to subject the land in question to the plaintiff's claim. *Vernon & Co. v. Valk*, 2 Hill Eq., 257. I am of the opinion that, after so long a delay, plaintiff ought not now to have the aid of the court in enforcing his demand. Upon the ground of laches, as applied in the courts of equity, the complaint must be dismissed. 2 *Story Eq.*, § 1520, et seq., and notes; *Mobley v. Cureton*, 2 S. C., 149. In that case the doctrine was applied when the statute of limitations was held not to be a bar.

I am the less reluctant to dismiss the action on account of the nature of the plaintiff's claim. He will suffer no great loss, for

the services rendered to his father, under the contract, could have been of little value, inasmuch as the father died within a very few months after they commenced. Perhaps it was this view of the matter which induced the plaintiff to delay action for so many years.

It is ordered and adjudged, that the complaint be dismissed, and that the plaintiff do pay the costs of this action. Let the judgment be certified to the Probate Court.

Messrs. Henderson Bros., for appellant.
Mr. G. W. Croft, contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On April 2, 1866, Richard Gregory, sr., as alleged, executed and delivered to his son, Richard Gregory, jr., the following note or obligation, viz.: "One day after date I promise to pay Richard Gregory, jr., or bearer, the sum of two thousand dollars, to support me my life-time, including to let him use my farm and implements my life-time, and it is to come out of my land and other property that I hold at this time. Witness my hand and seal this 2 April, 1866.

"Richard Gregory, Sr., [L. S.]"

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*On July 7, 1866, the said Richard Gregory, sr., executed and delivered to his wife, Margaret, a paper which, in consideration of love and affection, and of five dollars acknowledged to have been paid, purported to convey to her, the said Margaret, all his personal property and five hundred acres of land described, "to have and to hold the said plantation and all the personal property that I may be possessed of at my decease, unto the said Margaret Gregory, her executors, administrators, and assigns forever." &c. This paper contained a warranty, was delivered, probated, and recorded, but had but two witnesses.

In November, 1866, the said Richard Gregory, sr., died intestate, and his widow, Margaret, continued to live on the land included in the paper delivered to her as aforesaid, until she also died intestate on December 19, 1879. On the estate of Richard Gregory, sr., no administration was granted until after the death of the widow, Margaret, when, on February 12, 1880, letters were granted to Jonathan Gregory, but he died before administering the estate, and letters de bonis non were granted to Richard Gregory, jr., who, as creditor and administrator, on March 8, 1883, instituted these proceedings in the Probate Court in the nature of a bill to marshal assets; but there being no personal estate, it was manifestly for the purpose of setting aside the deed to Margaret, and making the land covered by it still the property of his father, Richard Gregory, sr., and as such liable for his debt. The other

heirs of Richard Gregory, sr., and of his widow, Margaret, were made parties, and they denied that the plaintiff was a creditor of his father, Richard; but if so, that the said Richard did not die seized and possessed of the lands, which he had previously given to his widow, Margaret, and that they, the said lands, belong not to the heirs of Richard, the father, but to those of Margaret, the mother. And further, they insisted that the judge of probate had not jurisdiction to decide that point, as it involved a question of title to land.

The creditors of Richard Gregory, sr., were called in, and the probate judge, after taking much testimony, held that two debts of the intestate were established, viz., that of the plaintiff for \$2,000, and interest, upon the obligation before referred to, and one of J. G. Steadman, on a balance of two notes, one

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for \$221.77, *and the other for \$341.95; but he held that the Probate Court had not jurisdiction to determine the title to the land. Both parties appealed to the Court of Common Pleas—the plaintiff on the question of jurisdiction, and the defendants on the ground that the plaintiff's claim was not established as a debt by the evidence. Judge Kershaw concurred with the probate judge, that the plaintiff's claim was established as a debt of the intestate, but he held further that the probate judge ought to have considered the question of title raised, and his failure to do so was error. But taking the view that there was involved a question of law, which should finally dispose of the litigation, he thought it unnecessary to remand the case for a further hearing in the court below, but decided it on the ground that, after so long a delay, the plaintiff ought not now to have the aid of the court in enforcing his demand, and that upon the ground of laches, as applied in the courts of equity, the complaint should be dismissed. The plaintiff appeals to this court upon several grounds, which will be considered in their order.

The first exception is, "That his honor erred in not holding that the paper from Richard Gregory, sr., to Margaret Gregory, bearing date July 7, 1866, was testamentary in its character, and hence void, as against the claims of the plaintiff and other creditors, because it had but two witnesses." &c. It does not appear that this point was made in the Probate Court, or in the grounds of appeal from that court. But it may possibly be considered as embraced in the question of jurisdiction, because the title to land was involved. Considering it as involved in that objection and before the court, we concur with the Circuit Judge that the Probate Court should have decided the question. It may be conceded that, if the proceeding had been instituted simply for the purpose of setting aside the deed, in order to make the lands in the possession of the heir or donee

liable for a debt of the ancestor, it would have been purely equitable in character and not within the constitutional jurisdiction of the Probate Court.

But the proceeding is in form, at least, for the purpose of marshalling the assets of the estate of Richard Gregory, sr., under section 40 of the Code, which gives to the Probate Court jurisdiction for that purpose.

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"And whenever it shall appear to the *satisfaction of any judge of probate that the personal estate of any person deceased is insufficient for the payment of his debts, and all persons interested in such estate, being first summoned before him, and showing no cause to the contrary, such probate judge shall have power to order the sale of the real estate of such person deceased, or of so much thereof as may be necessary for the payment of the debts of such deceased person, upon such terms," &c. It seems to us that in such cases this provision necessarily gives the right to determine, at least in the first instance, what is "the real estate of such person deceased," subject, of course, to the right of appeal to the Court of Common Pleas, where a trial by jury may, if desired, be demanded. Any other construction would tend to make the whole jurisdiction nugatory. Besides, while it may be that title to land was involved in the decision of the question, it is clear that it was one of law as to the proper construction of the paper in contention, viz., whether it was valid or void, or merely voidable as against prior creditors of the donor. See *Faust v. Bailey* (5 Rich., 107), where it was held that in an application for partition the old Court of Ordinary had jurisdiction to decide in the first instance upon a question of title, subject, of course, to appeal.

The second exception is, "That his honor erred in holding that the plaintiff's complaint should be dismissed upon the ground of laches on the part of the plaintiff in prosecuting his claim," in that it is submitted that the plaintiff was guilty of no laches, for the testimony shows that he acted within the statutory period, and within the time required by good faith and conscience," &c. In respect to a question of laches, we do not understand that a proceeding to make land liable for the obligation of a deceased debtor, is identical with an action on the obligation itself against the personal representative of the deceased debtor. In the latter case there is privity of contract, and the action must be at law, while in the former there is no privity, and the proceeding is in equity. Where a legacy has been delivered to a legatee, and he has had separate and exclusive enjoyment thereof for more than four years, the Court of Equity will not allow it to be recovered back for the purpose of paying a debt of the deceased, although the debt is in the form of a bond, and not subject to the

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statute of limitations. **Brewster & Dickson v. Gillison*, 10 Rich. Eq., 435. Even where the land sought to be charged has descended to the heirs, upon whom the law imposes certain liabilities to the creditors of the ancestor, it has been held that it cannot be sold under a judgment against the administrator, if it has passed into the actual and exclusive possession of the heirs before the judgment was recovered. In such case the land can only be reached by the usual proceeding to subject real estate in the hands of the heir to the payment of the debts of the ancestor, in which proceeding the heir must, of course, be a party, with the opportunity to defend himself. *Huggins v. Oliver*, 21 S. C., 159, and the authorities cited.

This being the principle as to lands devolving upon the heirs, it would seem to apply with increased force to one who is in exclusive possession of land claiming as donee of the deceased debtor, and, therefore, this proceeding must be regarded as having a double aspect, first, to marshal the assets of Richard Gregory, sr., and then, as incidental thereto, to set aside his deed to the widow, Margaret. In this view, the case is not analogous to that of *Suber v. Chandler*, 18 S. C., 528, cited by the appellant. The proceeding in that case was simply to remove an obstacle in the way of enforcing a judgment, and was substantially *inter vivos*. It is true that the defendant in execution was dead at the time the bill was filed, but he was living at the time the debt was sued and until a short time before judgment was recovered; while the proceeding in this case was primarily to marshal assets, and only for that reason was maintainable in the Probate Court. To enable him to institute such a proceeding, it was not necessary that the creditor should have a judgment at all. He might file a creditor's bill upon a simple note of the deceased. The appellant had the same right to institute this proceeding at the death of his intestate, Richard Gregory, sr., that he has now. If his right of action could not accrue until he had judgment and a return of *nulla bona*, it has not yet accrued, for there was no such proof in the case. If administration was indispensably necessary, he might have taken out letters at any time after the death of the intestate, as he has lately done. Without stopping to consider the peculiar character of the deed to Margaret, or whether the Circuit Judge was right in holding that it was good be-

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tween the parties until *set aside by proper proceedings, it is certain that the widow, holding under that deed, had exclusive and adverse possession for more than ten years, and with full knowledge of the plaintiff.

The Judge held as matter of fact, "That no proceedings were had until the commencement of this action in 1883, a period of nearly seventeen years after the plaintiff had no-

tice of the deed. During all these years there has been possession under the deed, and the plaintiff stood by in silent acquiescence. True, there was no administrator of the estate of Richard Gregory until recently, but that need not have prevented a proceeding in equity against Margaret Gregory in her life-time or against her heirs after her death, to subject the land in question to the plaintiff's claim. *Vernon & Co. v. Ehrlich's Ex'rs*, 2 Hill Eq., 257." As a rule, ten years adverse possession of land gives title as against all who are capable of suing and do not. If such possession is held under a defective deed, it cures the defect and gives good title; *Lyles v. Kirkpatrick* (9 S. C., 265), in which the court say: "In itself, the deed is deficient in point of proof for want of two subscribing witnesses; but inasmuch as a possession of upwards of ten years had been held under it of an adverse character, without the assertion of title in opposition to it, the validity of the deed cannot be disputed at this time."

It is true this proceeding to make the land liable is equitable in its character, to which the statute of limitations, as such, has no proper application. But if the creditor has been guilty of laches in asserting his equity, the court may refuse him its aid, and bar the equitable remedy at a period short of that, which would raise a presumption of payment. *Lott v. De Graffenried*, 10 Rich. Eq., 346; *Mobley v. Cureton*, 2 S. C., 148; *Blackwell v. Ryan*, 21 S. C., 112; *Smith v. Smith*, McM. Eq., 134. In this last case Chancellor Dunkin said: "In regard to equitable titles, courts of equity are to be considered as affected only by analogy to the statute of limitations. If a party be guilty of such laches in prosecuting his equitable title as would bar him if his title was solely at law, he shall be barred in equity."

The third exception charges that there was another debt proved, against which no objection was made, and therefore, in any view, the land should be sold for the payment of

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that debt. It is true *that the probate judge held as proved a debt of the intestate to one A. G. Steadman, but the Circuit Judge made no separate reference to it in his decree. Upon looking to the proof, it seems to have been the balance of a debt older than that due to the plaintiff, and we assume that the judge considered his ruling as applying alike to both.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 100

WILLIAMSON v. GASQUE.

(November Term, 1885.)

[Dower ⇐ 116.]

A sum of money assessed in lieu of dower does not constitute a specific lien upon the land

in the possession of an alienee, but only a judgment taking rank as such; but if the sum so assessed be not in fact paid, the widow still has her right of dower in the land itself.

[Ed. Note.—Cited in *Shell v. Duncan*, 31 S. C. 567, 10 S. E. 330, 5 L. R. A. 821; *Elder v. McIntosh*, 88 S. C. 290, 70 S. E. 897.

For other cases, see *Dower*, Cent. Dig. § 374; Dec. Dig. ⇐ 116.]

Before Hudson, J., Marion, July, 1885.

The opinion states the case. The Circuit decree was as follows:

Emily Williamson brought this action against W. E. Gasque, who is in possession of a tract of land of which the husband of the demandant was, in his life-time, seized in fee, but which he aliened, the purpose of the action being to recover her dower. In the action in the Court of Probate, the judge decreed dower to the demandant, and issued his writ to have the same admeasured. The commissioners, in their return, recommended and assessed a sum of money in lieu of dower, and this return was confirmed by the judge of probate, who, instead of entering up judgment and issuing execution to enforce the same, proceeded to order the land to be sold, and directed the proceeds to be applied in the first instance to the payment of dower and costs, and the balance to be paid to the owner of the land, &c. The appeal is from this order as being irregular.

There are, it is said, existing liens on this land, a mortgage, and perhaps liens by judgment, and these should first be paid from the proceeds; at all events, the question is argued before me on that assumption, and the

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appellant contends, that to enforce the payment of the sum assessed in lieu of dower, these proceedings can only be by judgment and execution; and that the lien of such judgment will take rank from its date of entry, and will be postponed to older liens. In other words, that such a judgment for assessment in lieu of dower is not a specific and superior lien on the land, but only a general lien as other judgments, and takes rank in the same manner as other money judgments. This view of the matter is correct.

But it is said that in case of the insolvency of the respondent, by reason of older existing liens, the demandant in dower, to whom a sum of money is assessed in lieu thereof, would in this manner be often entirely defeated, and that such a construction of the law would work great hardship upon the widow. Not at all. The money is assessed to her in lieu of dower. If it is paid, the estate in dower in the land is extinguished; but if not paid, her estate is as before, and she can still demand admeasurement as before. Her dower is extinguished only by actual payment. Now, if she desires to enforce payment of the assessment, she can on-

ly do so by judgment and execution. If that fails, she can fall back upon the unsatisfied dower, and demand an admeasurement. She is in no worse condition than before. It is a mistake to suppose that a judgment for damages in an action for dower, or for a sum of money assessed in lieu of dower, is a specific lien upon the land, and is to be preferred to older liens. That it is not a specific lien is expressly decided in the case of *Bauskett v. Smith*, 2 Rich., 164. No other doctrine than that of this case has ever been recognized in our State.

The appeal is sustained, and the order of the Court of Probate directing a sale of this land is set aside, and it is so ordered, adjudged, and decreed. The case is remanded to that court with leave to the demandant, if she so desire, and if it be a fact that she cannot recover her money by judgment and execution, to renew her demand for the admeasurement of her dower in and out of the land.

Messrs. Johnson & Johnson, for appellant.
Mr. C. A. Woods, contra.

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*January 5, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. Joseph Williamson departed this life in 1883, seized and possessed of a tract of land containing 333 $\frac{1}{3}$ acres. In some way not explained the land was afterwards bought by the wife of the defendant, W. E. Gasque, and they went into the possession. The wife died, leaving the land in possession of W. E. Gasque, which was admitted to be subject to the lien of a mortgage. The plaintiff, Emily Williamson, widow of Joseph Williamson, petitioned the Probate Court for dower in the said premises, making W. E. Gasque, who was in possession, the defendant. The probate judge issued a writ for the admeasurement of the dower. The commissioners made return, assessing in lieu of dower in the land, the sum of \$85, with interest thereon from May 2, 1883. The return was confirmed, and the said amount ordered to be paid by W. E. Gasque, as well as the costs of the case, \$55.50.

Afterwards, the judgment and costs not being paid, the probate judge ordered as follows: "Whereas the commissioners, to whom a writ for the admeasurement of dower in the case was directed, made their return, which by order of this court was confirmed, and by the same the defendant was required to pay the petitioner herein the sum of \$85, with interest, &c.; and whereas the defendant, W. E. Gasque, has failed and neglected to pay the sum so assessed in lieu of dower, and the costs taxed as aforesaid; now, therefore, it is ordered that the lands mentioned in the petition and writ be sold on Monday, March 2, 1885, or on some convenient sales-day thereafter, before the court house door at Marion in said State, within the legal sale

hours, for cash, after due advertisement. Ordered further, that out of the proceeds of sale the sum of eighty-five dollars, with interest thereon, &c., together with the costs of sale, be paid to the parties entitled thereto, &c. Ordered further, that any surplus remaining after the payment of the said sum and costs, be paid to the legal owner or owners of the said lands, who shall apply for and establish his or her rights to the same."

From this judgment of the Probate Court the defendant, Gasque, appealed to the Court of Common Pleas, and Judge Hudson reversed the judgment and set aside the order di-

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recting "a sale of the land, and remanded the case to the Probate Court, "with leave to the demandant, if she so desire, and it be a fact that she cannot recover her money by judgment and execution, to renew her demand for the admeasurement of her dower in and out of the land." From this judgment the plaintiff, Mrs. Williamson, appeals to this court, upon the following grounds:

"1. Because his honor erred in holding that the payment of the assessment of the commissioners could only be enforced by judgment and execution.

"2. Because his honor erred in holding that a judgment for damages in an action for dower, or for a sum of money assessed in lieu of dower, is not a specific lien upon the land, and to be preferred to older liens.

"3. Because his honor erred in holding that the order of the judge of probate was irregular and void.

"4. Because his honor erred in holding that if the payment of the sum of money assessed for dower could not be enforced by judgment and execution against the property of the defendant, the only remedy for the demandant would be to renew her demand for the admeasurement of dower in and out of the land, which she might do indefinitely, under the forms of law, without securing her dower."

It is true that dower at common law is a right of the widow to have the use for life of one-third of the lands of which her husband was seized during the coverture. This right is in the land itself wherever it may be found; but our statute upon the subject has enlarged somewhat the manner of enforcing it, by providing that, "when the same [land] cannot, in the opinion of a majority of the commissioners, be fairly and equally divided without manifest disadvantage, then they, or a majority of them, shall assess a sum of money to be paid to the widow in lieu of her dower, by the heir at law or such other person or persons who may be in possession of said land," &c. Gen. Stat., § 2288. As dower proper is an interest in the land itself, it would seem that "the sum assessed in lieu of dower" should also adhere to the land, and accordingly it has been held that, when the claim is set up against the estate of the de-

ceased husband, the assessment, in marshaling the assets, must be considered in the

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nature of a *charge to the extent of one-third upon the lands, to the relief of the personality. See *Stock v. Parker et al.*, 2 McCord Eq., 376; *Witherspoon v. Watts*, 18 S. C., 396. The view was clearly expressed by Chancellor Johnson in the case of *Stock v. Parker*, supra, as follows: "The right of dower consists of a property in the soil itself, and although the act of the legislature regulating the admeasurement has, under particular circumstances, authorized the substitution or assessment of a sum of money in lieu of it, yet the character of the right is unchanged, and it operates as a charge upon the land itself, and not upon the general funds of the estate," &c.

But we do not think it necessarily follows that the assessment constitutes a specific lien upon the land, which may be enforced by selling it, where the land has been alienated, and the claim is made against one in possession, who is neither heir nor devisee of the deceased husband, and who may have placed encumbrances upon the land before the assessment was made or even the right of dower had accrued. The statute authorizing the assessment as a substitute for dower certainly does not expressly give it any such specific lien, nor indeed any special means for its enforcement: but, on the contrary, simply characterizes it as "a sum of money to be paid to the widow in lieu of her dower." We know of no principle which would allow the court to supplement the act by giving the assessment any higher force than that which arises from its being reduced to judgment against the person who happens to be in possession of the land. The act seems to assume that the sum of money assessed would be "paid to the widow in lieu of her dower," and until that is done the substitute contemplated has not been given or accepted, and the right to dower, not having been extinguished, still exists. As was said in the case of *Banskett v. Smith*, 2 Rich., 167: "In any view the assessment is to be in lieu of dower. That is, when it is paid it is in discharge of the claim of dower. There may be cases in which the heir at law or purchaser, being insolvent, could not pay the sum assessed. In such case the widow would have a clear right to fall back on her absolute right in the land, which can neither be defeated by the alienation of the husband nor by the insolvency of the purchaser. She would have the option

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to take the per*sonal obligation of the party, and might sue on it and recover judgment; but if she were to do so, she would have to stand on the footing of all other judgment creditors quoad her judgment," &c.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

24 S. C. 105

McNAIR v. TUCKER.

(November Term, 1885.)

[1. *Venue* ⇨67.]

An affidavit that defendant cannot obtain a fair trial before a trial justice because of plaintiff's influence "with the persons who are likely to be on the jury at the trial," is not sufficient to obtain a removal of the cause under a statute which requires such removal upon affidavit that the affiant "does not believe that he can obtain a fair trial before the trial justice" (Gen. Stat., § 840), the ground stated being an objection to the jury and not to the officer.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 114; Dec. Dig. ⇨67.]

[2. *Judges* ⇨51.]

A motion to transfer a cause from one trial justice to another should be made before the day appointed for trial, unless based upon facts discovered later.

[Ed. Note.—Cited in *Fishburne v. Minott*, 72 S. C. 576, 52 S. E. 646; *Mayes v. Evans*, 80 S. C. 365, 61 S. E. 216.

For other cases, see *Judges*, Cent. Dig. §§ 224-231; Dec. Dig. ⇨51.]

[3. *Venue* ⇨67.]

It would seem that the affidavit for removal should disclose the reasons that induced the belief that a fair trial could not be had; but certainly where the first affidavit stated a reason which was insufficient, and a second affidavit followed the words of the statute, and stated no reasons, a removal of the cause may be refused.

[Ed. Note.—Cited in *Bacot v. Deas*, 67 S. C. 249, 45 S. E. 171.

For other cases, see *Venue*, Cent. Dig. § 114; Dec. Dig. ⇨67.]

[4. *Venue* ⇨67.]

To entitle one to a removal of his case under the statute, the affidavit must be made before the trial justice who issued the papers; an affidavit made before a clerk of court or notary public is insufficient.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. § 114; Dec. Dig. ⇨67.]

Before Hudson, J., Chesterfield, May, 1885. The opinion states the case.

Mr. E. J. Kennedy, for appellant.

Mr. R. T. Caston, contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The sole question raised by this appeal is, whether there was

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error in refusing the motion of *defendants to have this case transferred from the trial justice who issued the original papers to the nearest trial justice for trial under the provisions of section 840 of the General Statutes, as amended by the act of December 26, 1884, 18 Stat., §63.

It appears that the original summons was issued by A. M. Rankin, Esq., as trial justice, on December 26, 1884, and served on January 5, 1885. It was returnable on January 25, 1885, but by agreement of the parties the case was set down for trial on February 16, 1885, on which day, the defendants failing to appear, the case was, on motion of the

defendants' attorney, and with the consent of plaintiff, continued until February 21, 1885. Two days before the day to which the case had thus been continued, the trial justice was served with the answer of defendants, accompanied with an affidavit of defendants, sworn to before the clerk of the court, "that they do not believe they can obtain a fair trial of the case above stated before the trial justice who issued the papers in said case and commenced said action, owing to the influence of the plaintiff in said action with the persons who are likely to be on the jury at the trial thereof." On the day of trial the defendants submitted an additional affidavit, sworn to by them before a notary public, "that they do not believe that they can obtain a fair trial before the trial justice who issued the papers in this case, and therefore ask that the papers be turned over to the next nearest trial justice in the county."

The trial justice ruled that the last affidavit came too late, and that the first affidavit showed on its face that the objection was not to the trial justice, but to the jury; and, further, he ruled that the affidavit should have been filed and motion made before return day, and not having been then made, the defendants, by their own laches, were debarred from now making the motion. He therefore refused to transfer the case to the nearest trial justice, and the case having been tried and judgment rendered in favor of the plaintiff, the defendants appealed to the Circuit Court upon various grounds, which need not be set out here, as the only question we are called upon to consider is the propriety of refusing the motion to transfer the case to another trial justice. The Circuit Judge dismissed the appeal upon the ground that the act above cited was not de-

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signed to confer upon a party the *right to remove the case to the nearest trial justice "through caprice or a mere whim. There must be a reason for the belief that he cannot get a fair trial before the original trial justice, and such reason must be disclosed in the affidavit. An attachment can be sued out on information and belief, but the affidavit must disclose the sources of information and grounds of belief. The act, in the case before the court, was not designed to give a party to a civil action before a trial justice the license to trifle with the fitness of that officer for the hearing of a cause, and the right to cast an imputation upon his impartiality without any reason therefor." From this judgment defendants appeal upon the several grounds set out in the "Case."

The section of the general statutes, as amended by the act of 1881, upon which this motion is based, reads as follows: "Whenever a person charged with crime, to be tried, or to be examined under section 829 hereof before a trial justice, or whenever ei-

ther party to a civil action which is to be tried before a trial justice shall make and file before the trial justice issuing the papers an affidavit to the effect that he does not believe that he can obtain a fair trial or examination before the trial justice, the papers shall be turned over to the nearest trial justice of that county, who shall proceed to try the case, or hold the examination, as if he had issued the papers." There is no doubt that the first affidavit submitted by the defendants was wholly insufficient to secure a transfer of the case, for it showed upon its face that the objection was not to the trial justice, but to the persons who were likely to compose the jury, and as the statute makes ample provision to secure an impartial jury, in subsequent sections of the same chapter, it is very clear that the section now under consideration was not designed to effect any such purpose.

We are also inclined to agree with the view taken by the very intelligent trial justice who originally heard the motion, that the second affidavit came too late. It is true that the act does not indicate any particular time at which the motion to transfer should be made, but courts of justice must necessarily establish rules for the orderly and proper transaction of business which come before them, even when statutes are silent upon the subject. It must be remembered that both

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parties to a cause have rights *which must be protected by the court, and neither party should be subjected to any unnecessary expense or delay in the prosecution or defence of his rights. Now, if a party can, without sufficient cause, delay making his motion to transfer until the very day set for the trial, he may thereby subject his adversary to expense and delay, which should, if practicable, be avoided. We think, therefore, the proper practice, in a case like this, is that the party who proposes to make a motion to transfer should be required to do so before the day appointed for the trial, unless he makes affidavit that he could not, and did not, know before that time the facts which induce him to believe that he could not obtain a fair trial before the trial justice who issued the papers.

We are also inclined to the view taken by the Circuit Judge, that a mere statement that a party believes he cannot obtain a fair trial before a given trial justice, without any reasons given for such belief, is not sufficient. The legislature could scarcely have intended to put it in the power of a party to cast a grave imputation upon a judicial officer by a mere affidavit as to his belief, upon which, if untrue, it would be very difficult, if not impossible, to assign perjury. But, as has been argued by the appellants' counsel, the language of the statute is very plain, and does not require anything more than a mere statement, "to the effect that

he does not believe that he can obtain a fair trial or examination before the trial justice," and, therefore, we are not disposed to rest our decision upon this ground. Where, however, as in this case, there are two affidavits before the court, in one of which the reason for the belief that the defendants cannot obtain a fair trial is given, and in the other no reason whatever is stated, the natural conclusion is that the reason given is the only, or at least the best, reason for the alleged belief; and where, as here, the reason given shows on its face that the real objection was to the jury, and not to the trial justice, it does not appear to us that the case is brought within the terms of the statute relied upon.

But there is another ground which is conclusive against the appellants. The statute requires that the affidavit upon which the motion to transfer was based, should be made before the trial justice who issued the papers. The language of the act is: "Whenever either party to a civil action which is

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to be tried before a trial justice shall make and file before the trial justice issuing the papers an affidavit," &c. Now, in this case, neither of the affidavits submitted were made before the trial justice issuing the papers, one being made before the clerk of the court, and the other before a notary public, and therefore appellants have not brought themselves within the terms of the statute upon which they rely. It is true that this is a literal construction of the act, but as appellants can only maintain their position by a like literal construction of the terms of the act as to the nature of the affidavit required, they cannot complain if a like construction is applied in determining the officer before whom the affidavit must be made. They rely upon a purely statutory right, and the rule is well settled that he who invokes such a right must take care to bring himself within all the terms of the statute invoked.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

24 S. C. 109

STATE v. ANDERSON.
(November Term, 1885.)

[1. *Criminal Law* ⚭1159.]

On appeal to this court from a conviction and sentence in the Court of Sessions, questions of fact cannot be reviewed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3074; Dec. Dig. ⚭1159.]

[2. *Criminal Law* ⚭824.]

Omission by the Circuit Judge to charge upon points not requested is not error of law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1996; Dec. Dig. ⚭824.]

[3. *Criminal Law* ⚭344.]

Political feelings should be excluded from courts of justice, but one charged as accessory

before the fact may be shown to be a leader of influence among people of his class.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 795; Dec. Dig. ⚭344.]

[4. *Witnesses* ⚭77.]

Where the only evidence of a witness's conviction of manslaughter is his own statement on the stand, he is competent to testify, he having further stated that he had been pardoned.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 199; Dec. Dig. ⚭77.]

[5. *Criminal Law* ⚭889.]

The foreman of the jury may be called upon in open court to correct a mere informality in a verdict just rendered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2110; Dec. Dig. ⚭889.]

[6. *Criminal Law* ⚭528.]

The confession of a defendant not on trial cannot be proved in behalf of the other defendants.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1002; Dec. Dig. ⚭528.]

[7. *Criminal Law* ⚭757.]

The Circuit Judge committed no error in refusing to charge the jury that they are not bound to accept as true the testimony of a witness unless they believe with good reason that he is telling the truth. What kind of reasons should influence a jury is a matter exclusively for them.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1772; Dec. Dig. ⚭757.]

[8. *Burglary* ⚭4.]

A house in which no one slept, within a few

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yards of a dwelling-house, but not appurtenant to it, used for storage of goods by a person who resided in the dwelling-house and rented one of its rooms for a store, is not the subject of burglary.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 17; Dec. Dig. ⚭4.]

Before Wallace, J., Edgefield, October, 1884.

The opinion states the case. The Circuit Judge reported as follows:

The testimony relating to the first ground of appeal will be before the court, and I need not, therefore, say anything in regard to it.

As to the second and third grounds of appeal, I will say that it did not occur to me to charge the jury upon the subject of corroboration of material parts of the testimony of an accomplice. I suppose that it did not was because there was no difficulty in my own mind upon that subject in this case. The testimony of the accomplices, who used no horses themselves, in relation to the horses and mules used by some of the appellants, was corroborated in a striking way by the testimony of other witnesses. One of these witnesses, who was a blacksmith, and had shod some of the animals, recollected peculiar marks upon the shoes he had put on them and identified these marks upon tracks that had been traced from where the accomplices say the animals were to an unfrequented road in which there were no other

tracks, and by the side of these tracks there were traces of spilled flour. All this testimony will be before the court, and I only mention it by way of explanation.

The fourth and eighth grounds of appeal relate to the sufficiency of the testimony.

Touching the fifth ground, I will say that Augustus Glover was indicted as an accessory before the fact—as having procured the felony to be committed. I thought that the fact of his having been a man of influence, a leader among his people in that neighborhood, was a fact relevant to the charge. The testimony objected to will be before the court, and, among other things, it will be observed that no witness testified as to the side of political questions espoused by Glover.

As to the sixth ground, Oliver Williams himself testified that he had been convicted of manslaughter and confined in the peni-

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*tentary for eighteen months, and then pardoned. The record of conviction and sentence was not produced; neither was the pardon. The testimony of the pardon was as full as the testimony of the sentence. Besides, manslaughter is not of that class of crimes, conviction and sentence for which disqualifies an otherwise competent witness.

As to the seventh ground, the appellants can hardly make a verdict of not guilty a ground for a new trial.

The ninth ground alleges as error of law the exclusion of proof of the declarations of Edward Anderson, who, although included in the indictment, had escaped, and was not upon trial. This testimony was excluded, because proof of the confession of an accomplice is only competent against himself, and as to everybody else it is hearsay.

The tenth ground alleges as error the refusal to charge the following words: "Where a witness testifies on the stand, the jury are the sole judges of his honesty and veracity and are not bound to take everything he may say as true, unless they do believe with good reason that he is telling the truth." The jury were told that they were the sole judges of the credibility of the witnesses; that they were to reject what they believed to be untrue, and accept only what they believed to be true; and the request as framed was refused only because it held the jury bound to accept testimony as true or reject it as incredible for reasons of a particular nature and quality—"for good reason;" the law does not fetter the jury by imposing so stringent a rule upon their grounds of belief.

Mr. Arthur S. Tompkins, for appellant.
Mr. Solicitor Bonham, contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The indictment in this case contained five counts. In the first

count all of the defendants were charged as principals with burglary in breaking and entering, in the night time, "an outhouse, situate within two hundred yards of the dwelling-house of Mrs. E. A. Buzzard and

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appurtenant *thereto and a parcel thereof, the said outhouse being used as a house for storing flour, sugar, and such like articles, there situate, * * * with intent the goods and chattels of Miss Julia Buzzard, in the said outhouse then and there being, then and there feloniously and burglariously to steal." &c. In the second count all of the defendants were charged with the larceny of certain goods of the said Julia Buzzard. In the third count, the defendant Glover was charged with receiving stolen goods. In the fourth count, said Glover was charged as accessory before the fact to the burglary charged in the first count; and in the fifth count Glover was charged as an accessory before the fact to the larceny charged in the second count.

The testimony was that Miss Julia Buzzard lived with her mother, Mrs. E. A. Buzzard, the owner of the dwelling, and used one of the rooms of said dwelling as a store. The outhouse which was broken open was in the same enclosure with the dwelling, some ten or fifteen yards distant from it, and was used for no other purpose except as a place of storage for groceries constituting a part of the stock of goods of Miss Julia Buzzard. On the trial, against the objection of defendant's counsel, a witness was asked by the solicitor whether the defendant Glover was not a recognized leader among the colored people, and in response to an inquiry from the witness whether he meant a political leader, was told, "Well, if you will have it so, say whether he is a political leader; but I mean, and you so understand me, to ask whether he is not a leader in the church, politically and socially, and in everything which constitutes a leader."

The jury returned a verdict of guilty as to all the defendants, except Augustus Glover, on the first and second counts, and a verdict of guilty as to Augustus Glover on the fourth and fifth counts, saying nothing as to the third count. Thereupon the Circuit Judge said to them that he supposed, from their silence as to the third count, they meant to find not guilty as to that count; and, if so, the foreman of the jury could come up to the clerk's desk and write "not guilty" as to that count, which was accordingly done in open court. A nolle prosequi was entered as to Oliver Williams, who was used as a witness for the State; and when offered as such, his competency was objected to on

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the *ground that he had been convicted of manslaughter and confined in the penitentiary for eighteen months and then pardoned. Neither the record of his conviction and sen-

tence nor the pardon was produced, and it only appeared from his own testimony that he had been so convicted and sentenced, and it also appeared by the same testimony that he had been pardoned. The other defendant, Edward Anderson, having escaped soon after he was arrested, was not on trial.

The defendants, Green Simkins, Augustus Glover, William Blocker, Thomas Smith, and William Zimmerman, appeal upon ten grounds, but as several of these grounds raise only questions of fact, over which we have no jurisdiction, they need not be further noticed. The second and third grounds complain of omissions in the charge as to certain points upon which the Circuit Judge was not requested to instruct the jury, and therefore present no questions for us to adjudicate.

The fifth ground imputes error to the Circuit Judge in admitting testimony as to the "political standing" of the defendant, Augustus Glover. The language of this exception does not properly represent the nature of the testimony objected to. Properly speaking, there was no testimony as to the political standing of Glover, for, as the Circuit Judge very properly remarks, no testimony was given which would show the political party to which the accused belonged. Inasmuch as he was charged with being an accessory before the fact, and as such with having counselled and procured the offence to be committed, it was manifestly pertinent to inquire whether he had obtained such an influence over his fellows as would render it probable that he could induce them to do the act in question; and this appears to have been the sole object of the testimony—to show that he was a leader among people of the class to which he and the other defendants belonged. While, therefore, we could not too strongly condemn the introduction of political feeling or prejudice into the trial of causes in the courts of justice, we cannot say that there was any error of law in admitting testimony tending to show that a person charged as an accessory before the fact possessed such influence amongst the

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people of his class as would *render it likely that he would be able to induce others to do that which perchance he might be unwilling to do himself.

The sixth ground raises the question of the competency of Oliver Williams to testify, by reason of his having been convicted of a felony. If the record of the conviction and sentence of this witness had been offered, then it would have been necessary to produce like evidence of his pardon. But inasmuch as the only evidence of such conviction and sentence was derived from the witness's own testimony, accompanied with the statement that he had been pardoned, it seems to us that his whole declaration should have been taken together, from which it appeared

that his competency to testify had been restored by a pardon, and therefore we think there was no error of law in permitting him to testify.

The seventh ground of appeal complains of error in allowing the jury to reform their verdict after they had returned from their room. It is quite clear that there is nothing in this ground, for, as is said in *State v. Corley* (13 S. C., 5), "The power of the court to allow a jury to correct informalities in their verdict before it is recorded, and before the jury have dispersed, is undoubted." Where, as in this case, the correction is of a mere informality, this may be done in open court as well as by sending the jury back to their room.

The ninth ground raises the question as to the competency of the confessions of Edward Anderson, one of the parties charged in the indictment. It being well settled that the confessions of one of several defendants can only be received as evidence against himself (*State v. Workman*, 15 S. C., 540), and Edward Anderson not being on trial, there was no error in excluding his confessions. If offered in favor of the other defendants, they could not be received under the rule excluding hearsay evidence.

The tenth ground imputes error to the Circuit Judge in refusing to charge as follows: "Where a witness testifies on the stand, the jury are the sole judges of his honesty and veracity, and are not bound to take everything he may say as true, unless they do believe with good reason that he is telling the truth." In response to this request, "the jury were told that they were the sole judges of the credibility of the

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witnesses; that they were to *reject what they believed to be untrue and accept only what they believed to be true; and the request as framed was refused only because it held the jury bound to accept testimony as true, or reject it as incredible, for reasons of a particular nature and quality—for good reason." The law does not fetter the jury by imposing so stringent a rule upon their grounds of belief." In view of the very stringent provisions of our constitution, which forbids the judges from charging juries "in respect to matters of fact," we cannot say there was any error in refusing to charge in the language of the request. The jury were properly told that they were "the sole judges of the credibility of the witnesses," and it would have been an invasion of their exclusive province if the Circuit Judge had gone further and undertaken to instruct them as to the kind of reasons which ought to influence them in reaching a conclusion as to a question of which they were the sole judges.

The only remaining inquiry is that presented by the first ground of appeal, which is in these words: "Because, as matter of law,

no burglary was committed under the proof, and it was misdirection in the court so to charge." It appears from the statement hereinbefore made that the house which was broken into was an outhouse, and though within the same enclosure, and but a few yards distant from the dwelling-house, there is no evidence whatever tending to show that it was appurtenant to the dwelling. It does not appear that it was used for any purpose connected with or contributory to the dwelling-house. On the contrary, the undisputed testimony is that it was used for no other purpose but as a place of storage for the goods of Miss Julia Buzzard, who was not the owner of the dwelling, and who was merely permitted to use one of the rooms of the dwelling, in which she resided with her mother, as a store, and that there was no internal communication between the outhouse and the dwelling-house. The most that can be said of it, therefore, is that it was a store, and as there is no pretence that any one slept in the outhouse, it is clear, under the authority of the case of *State v. Ginns* (1 Nott & McC., 583), recognized in *State v. Evans* (18 S. C., 137), that it is not burglary to break and enter such a house in the night time with intent to commit a felony. Nor

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*can the case be brought within the provisions of the statute enlarging the limits within which burglary may be committed. For, as held in *State v. Evans*, supra, it is not only necessary that the house broken into should be within two hundred yards of the dwelling-house, but it must also be appurtenant to it. See also *State v. Sampson*, 12 S. C., 567 [32 Am. Rep. 513]. Hence, though the house here in question was within two hundred yards of the dwelling-house, yet, as it was not appurtenant to it, the case cannot be brought within the provisions of the statute. Upon this ground, therefore, there must be a new trial.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

24 S. C. 116

STATE v. CLARY.

(November Term, 1885.)

[1. *Burglary* ⚭46; *Criminal Law* ⚭772.]

In charging the jury, the judge is not compelled to define a criminal offence in the very words of elementary writers. Burglary was properly defined in this case to be the breaking into a dwelling-house in the night time with a view to commit a felony; especially so, as other parts of the charge showed that the word *view* was used as synonymous with the word *intent*.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 112; Dec. Dig. ⚭46; *Criminal Law*, Cent. Dig. § 1816; Dec. Dig. ⚭772.]

[2. *Burglary* ⚭2; *Criminal Law* ⚭27.]

Petit larceny is not made a misdemeanor by our statute (Gen. Stat., § 2498) unless it be also

a simple larceny. Breaking into a dwelling-house and stealing therefrom an article of less value than \$20, is compound larceny, and therefore a felony as at common law; and breaking in at night with intent to steal such article is burglary.

[Ed. Note.—Cited in *State v. Johnson*, 45 S. C. 488, 23 S. E. 619.

For other cases, see *Burglary*, Cent. Dig. §§ 1-3; Dec. Dig. ⚭2; *Criminal Law*, Cent. Dig. §§ 29-31; Dec. Dig. ⚭27.]

[3. *Criminal Law* ⚭419, 420.]

On a trial for burglary, defendant cannot prove that one W., on the night of the crime, had applied to the witness to borrow money, promising to return it in corn—which was the article stolen by the burglar—such testimony being hearsay.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 973; Dec. Dig. ⚭419, 420.]

Before Fraser, J., Aiken, April, 1885.

The opinion states the case.

Messrs. Devore & Woodward, for appellant.

Mr. James Aldrich, acting solicitor, contra.

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*January 5, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. As well as we can gather from the extremely meagre statement of facts contained in the "Case" as prepared for argument here, we understand that the defendant was convicted of burglary, under the statute, in breaking and entering a corn house, within two hundred yards of the dwelling-house, in the night time, and stealing therefrom a small quantity of corn, of the value of less than twenty dollars. On the trial, appellant offered to prove certain declarations made by one Jack Williams to two of the witnesses, for the purpose of raising the presumption that he, and not the defendant, was the guilty party. These declarations were to the effect that on the night the burglary was committed, said Jack Williams applied to these two witnesses to borrow some money and pay them in corn, and not to the effect that he was the guilty party. The Circuit Judge, in his charge to the jury, instructed them that "burglary is the breaking into and entering a dwelling-house of another in the night time with a view to commit a felony." He also said to the jury that "it has been contended in argument here that the defendant could not have intended to steal twenty bushels of corn, as he had made no arrangements for carrying out such a purpose. That is not necessary in a case like this. Where the larceny is from the dwelling-house or the person, the old common law applies, and not the statute, as to what amount constitutes a felony."

The defendant appeals substantially upon three grounds. 1st. Because the Circuit Judge erred in defining burglary to be the breaking and entering a dwelling-house in

the night time "with a view" to commit a felony, whereas he ought to have said "with intent" to commit a felony. 2nd. Because he erred in saying to the jury in effect that it was immaterial whether the property stolen, or intended to be stolen, exceeded or was less in value than the sum of twenty dollars. 3rd. Because of error in refusing to admit the declarations of Jack Williams.

As to the first ground of appeal, we have only to say that we know of no rule of law or reason which requires a Circuit Judge, in defining a criminal offence, to use the precise words employed by elementary writers in giving the definition of such criminal offence. If he explains to the jury in plain language

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the elements necessary to constitute the offence charged, it is quite sufficient; and this we think was done in this case. To say that a certain thing was done with a *view* to commit a felony, is the same thing as to say that it was done with *intent* to commit a felony. In the connection in which the word "view" was used, it is manifestly synonymous with the word "intent"; and we cannot believe it possible that even the plainest mind could have been misled by its use. Indeed, in a subsequent part of the charge the judge in effect declared that he used the word "view" as synonymous with the word "intent," for he said: "If a man breaks into a house at night with the *view* or *intention* of committing a felony, and if he is stopped the very moment he gets in, or runs away before he puts his hands upon a single thing, he would be guilty, if the criminal *intent* was there to commit a felony." It is quite clear, therefore, that the first ground of appeal cannot be sustained.

The second ground seems to have been taken under a misapprehension of the distinction between simple and compound larceny. Our statute does not make every petit larceny a misdemeanor, but only simple larceny. Gen. Stat., § 2498. Where, therefore, the larceny in question is aggravated by some special circumstance which renders it compound, the provisions of the statute do not apply, and the offence remains, as at common law, a felony, and is not reduced to the grade of a misdemeanor. Hence, where a person breaks and enters a dwelling-house in the night time with the intent only to steal a particular article of a less value than twenty dollars, and actually steals such article, his intent is to commit not merely a simple but a compound larceny, and it is, therefore, entirely correct to say that his intent is to commit a felony and not merely a misdemeanor.

The only remaining inquiry is as to the competency of the declarations of Jack Williams. He was clearly a competent witness, and we do not see how it was possible to admit his declarations without violating the rule as to hearsay testimony. The fact that

Williams was in the neighborhood of the place where the burglary was committed about the time it was committed was allowed to be proved, but his declarations were no more competent than those of any other third

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person. See the case of State v. Terrell (12 Rich., 321), where, in a much stronger case than this, the declarations of a third person were held inadmissible.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

24 S. C. 119

SEGLER v. COWARD.

(November Term, 1885.)

[1. *Appeal and Error* ⇨185.]

A question of jurisdiction may be raised at any time.

[Ed. Note.—Cited in Chapman v. City Council of Charleston, 28 S. C. 380, 6 S. E. 158, 13 Am. St. Rep. 681.

For other cases, see Appeal and Error, Cent. Dig. § 1166; Dec. Dig. ⇨185.]

[2. *Judges* ⇨27.]

A Circuit Judge has jurisdiction at chambers to hear and determine a motion to vacate a warrant of seizure issued by the clerk of court to enforce an agricultural lien.

[Ed. Note.—Cited in Mixson v. Holley, 26 S. C. 256, 257, 2 S. E. 385.

For other cases, see Judges, Cent. Dig. § 110; Dec. Dig. ⇨27.]

[3. *Agriculture* ⇨15.]

An affidavit to obtain a warrant to enforce an agricultural lien is fatally defective where it contains no statement that defendant is about to dispose of his crop, or has done, or is about to do, any act which would defeat the lien; also, where it fails to state the amount due.

[Ed. Note.—Cited in Sharp v. Palmer, 31 S. C. 450, 10 S. E. 98.

For other cases, see Agriculture, Cent. Dig. § 47; Dec. Dig. ⇨15.]

[4. *Agriculture* ⇨15.]

In determining whether the clerk was justified in issuing his warrant upon the affidavit submitted to him, the judge cannot consider facts stated in an affidavit made at the hearing before the judge.

[Ed. Note.—Cited in Sharp v. Palmer, 31 S. C. 451, 10 S. E. 98.

For other cases, see Agriculture, Cent. Dig. § 47; Dec. Dig. ⇨15.]

[5. *Agriculture* ⇨15.]

The remedy given to the lienor by section 2404 of the General Statutes is not exclusive of other remedies; where a warrant of seizure has been unlawfully issued, a motion to vacate may be made.


[Ed. Note.—Cited in Kennedy & Son v. Dunbar, 46 S. C. 522, 24 S. E. 383; Townsend v. Sparks, 50 S. C. 383, 27 S. E. 801.

For other cases, see Agriculture, Cent. Dig. § 45; Dec. Dig. ⇨15.]

[6. *Agriculture* ⇨13.]

An agricultural lien for rent, with a printed provision for advances erased, contained a covenant that the lienor should return all the cotton seed used by him, and gave to the licensee, in printed words, a lien for rent and advances—

held, that the lien did not cover the cotton seed, which was to be returned in kind.

[Ed. Note.—For other cases, see *Agriculture*, Cent. Dig. § 32; Dec. Dig.  13.]

[This case is also cited in *Mixson v. Holley*, 26 S. C. 257, 2 S. E. 385, as to facts.]

Before Hudson, J., Aiken, October, 1884.
The opinion states the case.

Messrs. Croft & Dunlap, O. C. Jordan, for appellant.

Messrs. Henderson Bros., contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. On the 30th day of April, 1884, plaintiff and defendant executed an agreement, styled an "agricultural lease and lien," prepared on a printed form, where-

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by *plaintiff agreed to lease to the defendant a certain tract of land until December 31, 1884. Immediately following that part of the agreement which provided for the lease, were the following printed words, which were erased before the paper was signed, to wit: "And said lessor agrees to make advances to the lessee during the current year, in money or supplies, to be used and expended in the cultivation of such soil; the said advances not to exceed in all the sum of dollars." The agreement then proceeds as follows: "And the lessee, on his part, agrees to pay to the lessor, as rent for the same, ten bales of good lint cotton, averaging in weight four hundred and fifty pounds, and to return all the cotton seed used by him, with ten bushels per hundred additional, which shall become due and payable on or before the 1st and 15th days of October, A. D. 1884, at ———." And then follows the following words in print: "And it is agreed that, to secure payment of said rent, and the repayment of said advances, the lessor shall have an agricultural lien on the crop produced on said land during the year, and all the remedies to enforce the same as provided by law."

The ten bales of cotton, as rent, seems to have been paid, and there is no controversy as to that; but a dispute having arisen as to the cotton seed to be returned, the plaintiff, on the fifteenth day of October, A. D. 1884, made an affidavit before the clerk that the defendant was indebted to him "for twelve hundred bushels of cotton seed advanced by the said G. P. Segler to the said G. G. Coward for agricultural purposes for the year 1884;" that "to secure said cotton seed," said Coward executed to said Segler an agricultural lien on his crop in accordance with the provisions of "an act to secure landlords and persons making advances," and that said Coward "refuses to pay said cotton seed with intent to defeat said lien." Upon this affidavit the clerk issued his warrant to

the sheriff, requiring him "to seize the said crop, and, after due notice, sell the same for cash, and pay over the net proceeds thereof, or so much thereof as may be necessary to pay for twelve hundred bushels of cotton seed, to G. P. Segler, or order, together with the costs of these proceedings." Under this warrant the sheriff, on October 16, 1884, seized and took into his possession 250

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bushels of corn, more or less, and 300 *bushels of cotton seed, more or less, of the crop of the defendant.

Thereupon the defendant, on October 21, 1884, gave notice that he would move before his honor, Judge Hudson, at chambers, for an order "vacating the warrant of seizure herein, and requiring the release of the property taken thereunder by the sheriff." At the hearing before Judge Hudson the plaintiff submitted additional affidavits, wherein, amongst other things, it was stated "that the said defendant, before the issuing of the warrant herein, was about to defeat the lien herein by making way with and by selling the crops covered by said lien, and by refusing to pay the plaintiff. That there was due the plaintiff at the time of issuing said lien twelve hundred bushels of cotton seed, worth the sum of two hundred and forty dollars." The judge, after hearing argument, granted an order "that the warrant of seizure herein made by the clerk of the court for Aiken County, of date October 21, 1884, be vacated and set aside, and that the levy made by the sheriff of said county be released," assigning as his reasons for so doing: "1st. The affidavit is fatally defective, in that it does not show that any steps by the tenant have been taken to defeat the lien. Simple refusal to pay does not impair nor defeat a lien. 2d. The contract of lease contains no clause setting forth such an agreement as constitutes the prerequisite to the special statutory lien. A mere promise to return cotton seed in kind is not such an agreement for advances as will support or create the statutory lien for advances. Persons expecting the benefits of the statute must comply with its requirements."

From this order the plaintiff appeals, substantially, on four grounds: 1st. Because his honor erred in holding that the original affidavit upon which the warrant was issued was fatally defective. 2d. Because, even if the original affidavit was fatally defective, yet the defects were supplied by the plaintiff's supplementary affidavit offered at the hearing, and his honor erred in not so holding. 3d. Because of error in holding that "the contract of lease contains no clause setting forth such an agreement as constitutes the prerequisite to the special statutory lien." 4th. Because his honor was without jurisdiction to hear this motion at chambers.

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*We will first consider the fourth ground of appeal. This ground does not appear to have been taken in the court below, and ordinarily it could not, for this reason, be considered here. But as it presents a question of jurisdiction, which may be raised at any time, we will proceed to its consideration. Section 402 of the Code of Procedure provides that "motions may be made to a judge or justice out of court, except for a new trial on the merits;" and as this was clearly not a motion for a new trial on the merits, we think that the statute, in terms, authorized it to be heard at chambers.

As to the first ground of appeal, we agree with the Circuit Judge that the original affidavit was fatally defective in that it contained no statement to the effect that the defendant was about to sell or dispose of his crop, or that he had done, or was about to do, anything else which would defeat the lien. A simple statement that the defendant refused to pay what the plaintiff alleged to be due was certainly not sufficient. The statute never was designed to operate as an expeditious mode of collecting money, but its manifest purpose was to prevent the lienor from taking any steps to defeat the lien provided for, by placing the property beyond the reach of the lien. The warrant was not intended as a substitute for an ordinary execution, and hence until it is shown by affidavit that the lien is about to be defeated by the removal or disposition of the property, the lienor must, like all other creditors, pursue the ordinary means for enforcing payment of his debt, and cannot avail himself of the very stringent and summary remedy provided by the act.

We think also that the affidavit was fatally defective in not stating the amount due under the alleged lien. This the act expressly requires and very properly requires, for without a statement of the amount then due, the sheriff would have no means of ascertaining how much property it would be necessary for him to seize or how much to sell. The original affidavit only stated that Coward was indebted to Segler for twelve hundred bushels of cotton seed, without any statement whatever as to their value, and in the absence of such statement who was to determine the amount that the sheriff was required to collect?

As to the second ground of appeal, we do

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not see how the supplementary affidavit submitted by the plaintiff at the hearing could supply the defects in the original affidavit. The question before the judge was whether the warrant was lawfully issued, and as the act only makes it lawful for the clerk to issue the warrant when it shall be proved by affidavit to his satisfaction, "that the person to whom such advances have been made is about to sell or dispose of his crop,

or in any other way is about to defeat the lien hereinbefore provided for, accompanied with a statement of the amount then due," if he undertakes to issue such warrant without the affidavit required, his act in so doing is clearly unlawful, and it cannot be rendered lawful by any subsequent showing which in this case was not made to the clerk, but to the judge who was called upon to determine the lawfulness of the act of the clerk in issuing the warrant.

The argument that the remedy provided by section 2404 of the General Statutes is exclusive of all other remedies cannot be maintained. That section only purports to provide a mode by which the lienor may regain possession of his crop after it has been seized, and applies as well to a lawful as to an unlawful seizure, and does not purport to afford the means of setting aside a warrant unlawfully issued.

But what is perfectly conclusive to our minds is that we do not think that there was any lien given or intended to be given for anything but the rent, and that the agreement to return the cotton seed used was an independent covenant, for the breach of which an ordinary action would lie, but which could not be enforced under the provisions of the lien law. The agreement of the parties being in writing, its proper construction and intent must be determined by the terms used. The very fact that the printed words in the form used, which contained an agreement on the part of the lessor to make advances to the lessee in money or supplies, to be used in the cultivation of the land leased, were erased, is conclusive to our minds that the parties did not intend that any advances were to be made or secured by any lien; and the fact that in a subsequent part of the agreement the printed words are found, "that to secure the payment of said rent, *and the repayment of said advances*, the lessor shall have an agricultural lien," &c., is not inconsistent with such conclusion,

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for the **words* which we have italicised in the last preceding quotation were manifestly intended only to be effective where the preceding covenant to advance constituted part of the agreement. This is evident not only from the use of the words, "*said advances*," but also from the whole frame-work of the instrument. So that where, as in this case, the preceding covenant to advance has been erased, the subsequent words above italicised become wholly ineffective. It is difficult to conceive why the parties should have deliberately erased the words providing for advances to be made by the plaintiff to the defendant, unless it was their intention that no such advances were to be made. And when to this is added the fact that the claim now made for advances is only for the cotton seed, which the agreement provided should be returned in kind, we cannot resist the con-

clusion that the effort now made to bring this claim under the provisions of the lien law is altogether an afterthought, and that no such purpose was in the contemplation of the parties when the agreement was executed.

The judgment of this court is that the order appealed from be affirmed.

24 S. C. 124

CAROLINA, CUMBERLAND GAP & CHICAGO RAILWAY CO. v. SEIGLER.

SAME v. HENDERSON.

(November Term, 1885.)

[1. Evidence ⇨448.]

A subscription in writing being made to the capital stock of a railroad company, "provided that the line of said road run on the east side of Shaw's Creek," oral testimony is inadmissible to show the meaning of the paper; the words of the proviso not being susceptible of a double signification, nor shown to be applicable to more than one subject. The rule of evidence involved considered generally.

[Ed. Note.—Cited in *Nettles v. Marco*, 33 S. C. 50, 11 S. E. 595.

For other cases, see *Evidence*, Cent. Dig. §§ 1760, 2066-2082, 2084; Dec. Dig. ⇨448.]

[2. Evidence ⇨455; Railroads ⇨15.]

Evidence of the location of defendant's lands, if intended to show that the subscription was made with the understanding that the road was to run by these lands, was incompetent because it added terms to the written paper; and if not so intended, was irrelevant.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2104; Dec. Dig. ⇨455; *Railroads*, Cent. Dig. § 31; Dec. Dig. ⇨15.]

[3. Railroads ⇨15.]

For the same reason evidence of the location of lands through which the defendants and others had given a right of way, and of the nature of the country through which one of the surveys ran, was improper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 31; Dec. Dig. ⇨15.]

[4. Evidence ⇨263.]

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*The complaint having alleged a payment by defendant on his subscription, and plaintiff having given in evidence its president's version of what was then said in reference to the terms of the subscription, defendant may then be permitted to testify his version of this same transaction.

[Ed. Note.—Cited in *Charles v. Byrd*, 29 S. C. 558, 8 S. E. 1; *Cape Fear Lumber Co. v. Matheson*, 69 S. C. 99, 48 S. E. 111.

For other cases, see *Evidence*, Cent. Dig. § 1023; Dec. Dig. ⇨263.]

[5. Railroads ⇨16.]

Evidence that no work had been done towards grading the road was relevant to the issue of location.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 34; Dec. Dig. ⇨16.]

[6. Evidence ⇨469.]

Declarations of the president of the company at the time of a part payment by defendant on his subscription, may be proved to explain the payment, but cannot be used to affect the written paper of subscription.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2148; Dec. Dig. ⇨469.]

[7. Trial ⇨295.]

A single sentence of the charge, susceptible when detached of a meaning different from that which it has when considered in connection with the context, must be given the latter meaning.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. ⇨295.]

Before Witherspoon, J., Aiken, April, 1884.

In this case Mr. Justice McGOWAN, having an interest in the plaintiff corporation, declined to sit. The other two justices heard and decided the case. The opinion sufficiently states the case.

Messrs. Aldrich & Ashley, Croft & Dunlap, for appellant.

Messrs. Henderson Bros., contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendants in the above cases became subscribers to the stock of the Edgfield, Trenton & Aiken Railroad Company to the amount of five hundred dollars (\$500) each, by signing a paper, of which the following is a copy: "We, the undersigned, citizens of Aiken and Edgfield Counties, agree to subscribe the amount set opposite our names to the stock of the Edgfield, Trenton & Aiken Railroad (to be paid either in cash or work), provided that the line of said road run on the east side of Shaw's Creek;" the defendants with others having subscribed said paper, with \$500 set opposite their names respectively. This paper passed into the hands of the plaintiff, after the consolidation of the Edgfield, Trenton & Aiken Company, first into the French Broad and Atlantic Railway Company, and

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*then into the plaintiff company. After which the actions below were brought on said subscription.

The complaint of plaintiff alleged that the terms of the subscription had been fully complied with by the previous companies and the plaintiff, and that although the amount subscribed had become due and payable when the line of said road was run and located on the east side of Shaw's Creek, and that defendants had been requested to pay their subscriptions, upon which payment stock would be issued, yet that defendants had neglected and refused to pay the same, except that defendant, Seigler, had paid the sum of one hundred and fifty dollars; wherefore the plaintiff prayed judgment in the case against Seigler for the sum of three hundred and fifty dollars, and in the case against Henderson for the sum of five hundred dollars, and for costs and disbursements.

The answer of Seigler admitted the execution of the paper in suit, also the merger and consolidation of the railroad companies as set forth in the complaint, and relied principally upon a defence, that when he signed the paper, he was induced to believe by the

parties who circulated said paper that the line of the Edgefield, Trenton & Aiken Railroad would run on the east side of Shaw's Creek to, or near to, the Steedman & Weeks mill on said Shaw's Creek, which was partly owned by this defendant, which it was alleged had not been done, and that it was upon this representation alone that defendant signed said paper. He also set up a counter claim for the repayment of the one hundred and fifty dollars paid by him on his subscription, on the ground that when he paid the same, it was upon the express and renewed promise of the president of the company, Mr. Lewis Jones, that the line of said road was to run on the east side of Shaw's Creek to, or near to, the Steedman & Weeks mill, &c.

The complaint in the case against Henderson is a copy of the complaint against Seigler, except that there is no payment alleged on the \$500 subscription; and the answer of Henderson is a copy of Seigler's answer except that no counter claim is set up.

At the trial certain evidence was introduced by the defendants, to be more particularly noticed hereafter, which constitutes the grounds of appeal here, with an exception also to a portion of the charge of his honor, the presiding judge. The verdict having

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*been rendered for said defendants, the following are the grounds of plaintiff's appeal:

That his honor erred in overruling plaintiff's objection to the defendants introducing evidence to show:

I. Where the land of defendants and others, who signed the subscription paper, the cause of action, was situated in reference to the railroad, as located and graded on the east side of Shaw's Creek.

II. In allowing evidence as to what the defendant, A. S. Seigler, said was his understanding of the meaning of the subscription paper at the time he made the payment thereon. Also, in allowing evidence as to what Seigler said at the time of said payment to the president of the railroad company, and as to statements and promises alleged to have been made by Lewis Jones, as such president, made at the time of said payment, as to what the railway company had done and would do.

III. In allowing defendants to introduce evidence to show that since the consolidation of the said railway company into the plaintiff's corporation no work had been done by plaintiff toward grading of the road-beds.

IV. In allowing the defendants to introduce evidence to show when and where certain experimental lines were run by surveyors under their direction and at their request.

V. To show location of the lands through which A. S. Seigler and others gave the right of way.

VI. As to the declarations of Lewis Jones as to his views, as to where the said road

should run, his reasons sustaining his views, and effect it would have upon the road and adjacent land owners.

VII. As to assurances of Lewis Jones made after the subscription paper was executed and delivered to the Edgefield, Trenton & Aiken Railroad Company as to where the road would be located.

VIII. Evidence to show the nature of the country through which the Gardner survey was made.

IX. In allowing Augustus Cochran to testify as to the declarations of Lewis Jones, made to him while at work upon the road as an employé of the company, in regard to locating the line of the road by Seigler's mill.

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*X. That his honor erred in charging the jury, "That the acceptance of the paper and adoption of the line of road should have been in a formal writing, or some formal manner."

It is a general rule of evidence, long since established and now well settled, that parol testimony cannot be introduced to vary, add to, or alter a written instrument, which in itself is plain and free from doubt. The parties themselves having reduced their contract to writing, they are supposed to have done so in part, at least, with the view to exclude everything else but the writing itself in determining their contract, which writing must be interpreted by the court according to certain well established rules not necessary to be here considered. This rule, it will be observed, is directed only against the admission of any other evidence of the language employed by the parties in making the contract, than that which is furnished by the writing itself. 1 Greenl. Evid., § 277. It, therefore, does not prevent the writing from being read in the light of surrounding circumstances, if need be, in order the more perfectly to understand the intent and meaning of the parties. The writing, however, being the act and instrument of the parties finally and solemnly agreed upon, no other words than those found therein can be added to it or substituted in its stead by oral testimony. Nor can oral testimony of a previous colloquium, or of conversation or declarations at the time when completed, or afterwards, be offered to explain it. On the contrary, the instrument must stand upon its own terms.

In looking at the terms of an instrument, however, doubts may arise, first, as to the proper signification to be given to the words used, and, second, as to the application of the instrument to external objects. An example of the first class of cases is where the words used are susceptible of a double signification, having a plain and ordinary meaning when used generally and yet a technical meaning when used with reference to particular trades or branches of business. An example of the second is where the language of the instrument is applicable to two or more subjects or objects, raising a latent ambiguity, and there-

fore necessitating an inquiry de hors the instrument for a subject-matter to satisfy said instrument. In both of these classes of cases, under certain rules and restrictions, oral

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testimony is admissible, of the surrounding circumstances, including the situation of the parties and their relations to persons and things around them, with the view to enable the court, called upon to interpret the paper, to reach its true meaning and intent; and this, as is said by Mr. Greenleaf (Vol. 1, § 288), without any infringement of the general rule, stated above, that parole testimony is inadmissible to vary, add to, or contradict a written instrument, that rule being confined to the exclusion only of all parole testimony of any other language, showing the meaning of the parties, than that used in the instrument itself.

In other words, the effect of the rule is, that while the court, in endeavoring to reach the true meaning and intent of an instrument before it, is confined to the terms used, excluding all testimony intended to add to, omit, vary, or contradict said terms, yet where the terms are doubtful in either of the senses referred to above, then oral testimony—not of the understanding of the parties, one or more, or of their declarations or conversations at the time or afterwards in reference thereto, but of the facts and circumstances surrounding them and connected with the transaction—may be admitted, so that the contract may be read in the light of such surrounding circumstances. There are some other cases, too, mentioned by Chancellor Wigram in his seven propositions found in that admirable treatise of his on the interpretation of wills, where, under certain circumstances, oral testimony is allowed bearing upon a written paper; but they have no application here, and therefore need not be considered.

Now, let the exceptions in this case, as to the evidence admitted below, be tested by the above principles. In the first place, are the terms employed in the instrument in suit doubtful in either of the senses mentioned above, and therefore requiring the admission of oral testimony as to matters de hors said instrument to remove said doubt? The terms are contained in the proviso, and are as follows: "Provided, that the line of said road run on the east side of Shaw's Creek." Are these words susceptible of a double signification, or can it be claimed that they are applicable to more than one subject? Not so. The words are plain, and have but one meaning, and there is no claim that there are two creeks named Shaw's, requiring evi-

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dence outside of the paper showing which was meant and where a line on the east side should run. There was no room, then, for the admissibility of oral testimony to clear away the doubts mentioned, as no such

doubts existed, or could exist in a paper so plain and unambiguous.

The first exception complains that his honor erred in admitting testimony by the defendants to show where the lands of defendants lay with reference to the line of the road located on the east of Shaw's Creek. What was the object of this testimony? Was it not to show that defendants subscribed with the understanding that the road was to run not only on the east side of this creek, but to, or near to, these lands? If this was not its object, it was entirely irrelevant, and therefore inadmissible; and if this was its object, did it not tend to add other words to the instrument than those found therein? It is urged by respondent, however, that this exception cannot be considered, because the evidence referred to was admitted without objection below. But appellant claims that he did object, and he refers to the folio in the "Case" where his objection appears, especially folios 62 and 152. On examination of these folios, an objection is found entered. True, the precise point raised is not very distinctly made, but yet there is enough stated, we think, to sustain appellant that objection was made to the introduction of the testimony in question.

Exceptions 4, 5, and 8 object to the evidence showing that certain experimental lines had been run under the direction and at the request of the defendants; also the location of the lands through which defendant Seigler and others had given the right of way; and also the nature of the country through which the Gardner survey was made. That in reference to the experimental lines was abandoned, because no objection was interposed at the trial. The other two, however, have been insisted upon, and we think the objection to these must be sustained on the same ground as the first exception discussed above. We can see no purpose for the introduction of this testimony but to sustain defendant's allegation in his answer that the line of the road, as he understood, was to run not only on the east side of Shaw's Creek, but to, or near to,

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his property, the Steedman & Weeks mill. This was the main defence relied on by the defendant, and this in effect was claiming that the paper in suit needed additional terms than those found therein to show the contract of the parties; and the evidence objected to must have been intended to supply these terms, which is the very thing the rule of evidence referred to above absolutely forbids. If this testimony was not intended to have the effect suggested, and therefore incompetent, then it was wholly irrelevant, having no application whatever to the case, and on that account incompetent. Upon the whole, we may say that the main question before the court as to the paper in suit being its interpretation and construction, and

that paper being plain and unambiguous in terms, both as to the meaning of the words employed therein and as to their application, it was incompetent to admit any oral testimony intended to aid in said interpretation, the rule being in such cases that the paper alone must govern.

Exception 2 raises a question of competency as to what defendant "Seigler said was his understanding of the meaning of the subscription at the time he made the alleged payment thereon, also in allowing evidence as to what he (Seigler) said to the president of the road at that time, and as to what the president then said as to what the railroad company would do or had done." A payment by Seigler was alleged in the complaint. It seems that this payment was made to Mr. Lewis Jones, the president, and in his testimony for the plaintiff he was allowed to state the facts connected therewith. The testimony of the defendant objected to in the above exception seems to have been in reply to this testimony of Jones, in which the defendant gave his version of what occurred at this payment as a part of this transaction; and in reply, we think it was competent.

Exception 3 objects to testimony tending to show that no work had been done by the plaintiff toward grading the road. One of the questions in the case was whether the line had been permanently located. The testimony objected to, it seems to us, was pertinent to that issue and therefore competent.

Exceptions 6 and 7 object to certain declarations of Mr. Jones, the president of the company. These declarations were brought out in the testimony of the defendant Seig-

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ler, and were made, as he testified, in connection with the payment by him on his subscription. As a part of that transaction, and explanatory thereof, they were competent. They could not, however, affect the original paper or be used in any way in the interpretation of said paper.

Exception 9 seems to have been founded upon a misconception as to Cochran's testimony. We have not found in the case any evidence from him in which the declarations of Jones were stated as to the location of the line of the road by Seigler's mill. On the contrary, such declarations seem to have been expressly excluded.

The tenth exception is founded upon a single sentence or expression in the charge of the judge, which, standing alone, might possibly be objectionable, to wit: "That the acceptance of the paper and adoption of the line of road should have been in a formal writing or some formal way." When this sentence, however, is considered in connection with other portions of the charge and with the whole charge, in which, after explaining what was meant by acceptance and

what by location of the line, he left both on this matter to the jury as questions of fact, we cannot say that this sentence should be regarded as error.

Certainly so much of the testimony as was admitted in the case of Seigler, in connection with the payment by him on his subscription, was incompetent in the case of Henderson, as he, Henderson, had made no payment on his subscription, nor had any conversation with Mr. Jones on this subject.

It is the judgment of this court that the judgment below, in both cases, be reversed on the ground of the incompetent testimony herein above mentioned, and that the case be remanded for a new trial.

24 S. C. 132

FULLER v. PORT ROYAL & AUGUSTA RAILWAY CO.

COCKRANE v. SAME.

(November Term, 1885.)

[*Railroads* ⌘ 447.]

In an action against a railroad company for killing a horse, the defendant requested the judge to charge the jury: "That when the plaintiff proves the ownership and the fact of the

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killing, he makes out a prima facie case, and negligence is presumed; but when the defendant introduces evidence and explains the fact of the killing, the plaintiff is required to prove by a preponderance of testimony that the defendant was negligent." *Held*, that this charge was properly refused, as the rule in *Danner's Case* (4 Rich., 329 [55 Am. Dec. 678]) makes the proof of ownership, and the fact of killing, prima facie evidence of negligence, which prima facie showing must therefore stand until overthrown by counter proof.

[Ed. Note.—Cited in *Joyner v. South Carolina Ry. Co.*, 26 S. C. 56, 1 S. E. 52.]

For other cases, see *Railroads*, Cent. Dig. § 1645; Dec. Dig. ⌘ 447.]

Before Fraser, J., Hampton, March, 1885.

These were two actions against the defendant, tried together, for killing, in each case, a horse, one being brought by Henry M. Fuller and the other by Jack Cockrane. The opinion states the case.

Messrs. Elliott & Howe, for appellant.

Mr. C. J. C. Hutson, contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. These two cases, being based very much upon the same facts, were tried together below, and they have been heard together in this court on appeal. The actions were brought to recover the value of a horse, in each case alleged to have been killed by a train of defendant company in October, 1882.

At the close of the testimony his honor, the presiding judge, was requested by the counsel of the defendant to charge the jury: "That

when the plaintiff proves the ownership and the fact of the killing, he makes out a prima facie case, and negligence is presumed; but when the defendant introduces evidence and explains the fact of the killing, the plaintiff is required to prove by a preponderance of testimony that the defendant was negligent." The judge did not charge this in terms, but read a portion of the opinion of this court in the case of *Jones v. C. & G. R. R. Co.* (20 S. C., 258), "saying that he could not state it any clearer than that." The portion read was as follows: "The rule in *Danner's Case* required him to say, when the killing was proved, that the plaintiff might

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rest, and if the defendant failed to explain this killing so as to exculpate the company, either by proof that the killing was accidental, unavoidable, or free from negligence, then the fact of the killing, with the prima facie case it made, was sufficient, as it furnished all the proof which the case in the first instance required." The jury found for the plaintiffs, and the defendant appealed upon the single exception: Because his honor erred in declining to charge as requested above.

We do not know that we understand clearly appellant's exception. We suppose, however, that it is meant that the rule in *Danner's Case*, which raises a presumption of negligence, upon proof by the plaintiff of ownership and the fact of killing, applies only in cases where the defendant introduces no evidence explaining the fact of the killing; that where such explanation is given by the defendant, the presumption is gone, and this, whether the explanation exculpates the defendant or not, and that in such case the plaintiff cannot rely upon the presumption, but must introduce other and affirmative evidence, showing by its preponderance actual negligence. In other words, that upon the defendant explaining the killing, the onus is then thrown upon the plaintiff to show by a preponderance of testimony other than the presumption that the defendant had been negligent; that in such case he cannot claim even the aid of the presumption, but that it is gone and out of the case, and cannot be considered in weighing the testimony.

Thus understood, the exception cannot be sustained. The issue in all of these cases is negligence, with the onus upon the plaintiff. The rule in *Danner's Case* is nothing but a rule of evidence, bearing upon the issue of negligence, and it has established the proposition as matter of law, that in such cases the proof of ownership and the fact of killing shall be sufficient to establish negligence prima facie. And the plaintiff in the first instance need go no further. Now, what is the effect of a prima facie showing? Does it not always stand until it is overthrown by counter proof? Does it not throw the onus of removing it upon the other party?

It is true that when the prima facie case is overthrown by counter evidence, then the plaintiff will fail to recover unless he, by the

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proof of additional facts, overthrows the counter evidence. But until his prima facie case is removed he may stand upon it.

The mistake in the exception, as it seems to us, turns upon the word explain. The appellant claims that plaintiff's prima facie case, when made out, requires the defendant to do nothing more than to explain the killing, which, when done, requires the plaintiff in every such case to prove by a preponderance of testimony the fact of negligence, or he will fail to recover. Now, the term explain means, to state the facts, to show all of the circumstances and conditions of a transaction, to show fully how it occurred. When this is done, as to a matter involving alleged negligence, this explanation will either inculcate the defendant, fail to exculpate him, or exculpate him. It can have no medium status. It must necessarily prove or disprove the alleged negligence. If it fails to exculpate the defendant from the prima facie showing of plaintiff, would it not be error to say that notwithstanding this failure of defendant to exculpate himself by his explanation, that still the presumption is gone and the plaintiff must introduce additional evidence, so as to show by the preponderance of such additional evidence the fact of negligence? And, on the other hand, suppose the explanation shows negligence, where, then, would be the necessity of the plaintiff supplementing his case by any other testimony than that upon which he had rested? If, however, the explanation clearly exculpated the defendant, then the presumption under which the plaintiff had rested would be removed, and he would have to act further. But up to this point could he not fold his arms in safety?

If the appellant had called upon the presiding judge to charge that in case the explanation disproved negligence, then the presumption could have no avail, but that plaintiff's case should then depend upon the preponderance of his evidence weighed with defendant's evidence; or if the judge had been requested to charge that upon the defendant introducing evidence to explain the killing, that then whether the presumption of negligence arising from plaintiff's proof of ownership and the fact of killing was overthrown, would depend upon the preponderance of the evidence, and the judge had declined to so charge, his appeal would be sustained. But this was not the request. The request

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*was, that in every case where the defendant explained the killing, whether his explanation had the effect of failing to exculpate, of exculpating, or inculcating the defendant, the presumption is expunged from the case, and that the plaintiff is then "re-

quired to prove by a preponderance of testimony other than the presumption that the defendant had been negligent." We can see no error in the judge declining to charge in the terms requested.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

24 S. C. 136

COVAR v. SALLAT.

(November Term, 1885.)

[1. *Appeal and Error* ⚭832.]

A rehearing of the case of Covar v. Sallat (22 S. C., 265) granted, certain exceptions properly before the court having been inadvertently overlooked.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. ⚭832.]

[2. *Appeal and Error* ⚭819.]

Where an appeal was suspended so that appellant might move on Circuit for a new trial upon one of the issues involved, the result of which was to be certified to this court, until such certificate is furnished, the appeal cannot be heard on its merits.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3200; Dec. Dig. ⚭819.]

This was a motion for the rehearing of the case of Covar v. Sallat (22 S. C., 265), under the order permitting such motion to be found appended to the judgment then rendered.

Mr. P. A. Emanuel, for the motion.

Mr. D. S. Henderson, contra.

January 5, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This is a petition for a rehearing of the above case by this court, on the ground that certain exceptions which the appellant had been allowed to add by way of amendment to those originally filed, had been overlooked by this court in the judgment recently rendered, and which judgment the petition seeks to open. On April 28, 1885, this court, after considering the petition, ordered it to be set down for argument on the first day assigned for the

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hearing of cases from the *second Circuit next ensuing.¹ This argument has been heard, and the court now being satisfied that the exceptions referred to in the petition were overlooked by this court in its recent judgment, deems it proper to open the same and to reinstate the case upon the docket.

It is not necessary here to explain how it was that these exceptions were overlooked. This has been done in the order of April 28, supra, wherein it appears also that the hearing of the appeal at the term of the court was premature, this court having granted an order on January 26, 1883, continuing the case, and suspending the appeal, with leave

to the appellant to apply to the Circuit Court for a new trial of the question of the payment of the bond in suit, on the ground of after discovered evidence, requiring that the result of such application should be certified to this court, which order was not brought to the attention of the court, and which, if it had been brought to its attention, would certainly have prevented the hearing of the appeal, as is manifest from the ruling of the court when the original application to suspend the appeal, as to one of the points made in the case (to wit, payment of the bond), was made.

The order of January 26, 1883, hereinbefore referred to, having expressly required that the result of the application to the Circuit Court should be certified to this court, and no certificate having yet been filed as to whether the new trial granted has been had, nor if so, what was the result, and this court not yet being informed as to said result either by the certificate from the Circuit Court, as required by the order of January 26, 1883, or otherwise, and consequently the original appeal not being ripe for hearing, it must be reinstated under the order of January 26, 1883, awaiting the final result of the application for a new trial below.

And to this end it is the judgment of this court, that the judgment hereinbefore rendered in this case, dated February 27, 1885,² be set aside, and that the case be reinstated upon the docket of this court as if no appeal therein had been heard and such judgment had been rendered.

²See 22 S. C., 268.

24 S. C. *138

*CLARK BROS. v. WIMBERLY.

(November Term, 1885.)

[1. *Appeal and Error* ⚭807.]

A motion to dismiss an appeal was granted, counsel for appellant appearing and resisting the motion. On motion by appellant to reinstate this appeal on the docket, *held*, that judgment having already been rendered dismissing the appeal, the matter is res judicata. *Hyrne v. Erwin*, 22 S. C., 587.

[Ed. Note.—Cited in *Tribble v. Poore*, 28 S. C. 566, 571, 572, 6 S. E. 577; *Dial v. Dial*, 33 S. C. 607, 12 S. E. 474, 475.

For other cases, see *Appeal and Error*, Cent. Dig. § 3177; Dec. Dig. ⚭807.]

[2. *Appeal and Error* ⚭807.]

Failure to file affidavit of inadvertence in resistance of the motion to dismiss cannot, after judgment rendered, be relieved against under section 349 of the Code of Procedure, as there is no appeal pending or to be perfected after judgment of dismissal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3177-3188; Dec. Dig. ⚭807.]

[3. *Appeal and Error* ⚭807.]

Appellant having been represented by counsel when the appeal was dismissed, section 195

¹See 22 S. C., 273.

of the Code does not apply. *Quere*: Does this section apply to the Supreme Court in any case?

[*Ed. Note.*—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3177-3188; Dec. Dig. § 807.]

4. A court of justice must always bear in mind that both parties to a cause have rights, and that unlimited indulgence to one will operate injustice to the other.

This was an original motion before this court, and the facts connected therewith are fully stated in the opinion.

Messrs. J. C. Davant and F. W. Fickling, for the motion.

Mr. J. J. Brown, contra.

January 25, 1886. The opinion of the court was delivered

PER CURIAM. In this case a motion to dismiss the appeal on the ground that appellants had failed to serve their exceptions within the time required by law was heard by this court on November 24, 1885. At that hearing, the motion to dismiss was resisted by counsel representing the appellants upon the ground that the omission to serve the exceptions within the prescribed time was owing to the inadvertence of the counsel of record for appellants, but no motion to amend and no evidence that the omission occurred through inadvertence was presented to the court. It is true that counsel then representing appellants did ask, verbally, that the court would allow an amendment, but it did not then appear that any notice of a motion to amend had been served upon the attorney for appellants, and no affidavit of inadvertence was either served or presented. Un-

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der these circumstances, this court had no other alternative but to dismiss the appeal, and an order to that effect was accordingly entered.

On January 2, 1886, counsel for appellants duly served respondents' counsel with a notice of motion to rescind the former order dismissing the appeal and to restore the case to the docket for hearing, accompanied by affidavits setting forth fully and clearly the circumstances under which the omission to serve the exceptions occurred, and showing that it was through inadvertence. In the affidavit of the counsel of record for appellants, it is not only stated that the omission to serve the exceptions occurred through his inadvertence, but also that he "misapprehended the necessity for and requirement of an affidavit of inadvertence upon the motion of respondents' attorney to dismiss the appeal, and by inadvertence omitted to file the motion to amend and the affidavit of inadvertence," and also states that he was unavoidably absent when the motion to dismiss the appeal was heard, and hence, as it appears from the other affidavit submitted, the case was turned over to another member of

the bar, who did represent the appellants at the hearing of the motion to dismiss the appeal.

The motion to restore the case was resisted by counsel for respondents, upon the ground that this court having already rendered judgment dismissing the appeal, the matter is *res adjudicata*; and in support of this motion cited the case of *Hyrne v. Erwin* (22 S. C., 587), which seems to us conclusive of the question. In that case the appeal was dismissed by the clerk for failure to file the return; and afterwards, after regular notice, the case was, on motion of the appellant, restored to the docket, respondent having failed to appear and resist said motion. The respondent afterwards moved to dismiss the appeal so restored, which motion was dismissed, the court holding that, if the default of appellant occurred since the appeal was restored, it might be considered, but it is based entirely on alleged omissions which occurred before the restoration, and which could and should have been interposed when the motion to restore was heard. The respondent, however, failed to appear when the motion to restore was heard, and the judgment of the court restoring the appeal to the docket must be regarded as *res ad-*

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judicata, and not subject to review on a motion of this kind. It was further said that even if the motion could be considered as a petition for a rehearing, there was nothing in the facts presented to authorize the court to grant a rehearing, there being no allegation that any matter of law or fact appearing in the case when the motion to restore was made had been overlooked by the court.

The case now under consideration seems to us stronger than that of *Hyrne v. Erwin*. There the order to restore was granted by default, as it were, the respondent not appearing when the motion was made. Here, however, both parties were represented by counsel when the motion to dismiss the appeal was made, and the motion was stoutly resisted by counsel for appellants. This court, upon a full hearing, having rendered its judgment dismissing the appeal, it seems to us conclusive of all matters which could and should have been presented at such hearing.

There is no doubt that appellants were originally in default, and we suppose there is as little doubt that if they had, before the judgment dismissing the appeal was rendered, availed themselves of the privileges conferred by the act of 1880, now incorporated in the code, and presented the showing which they now submit, they could have obtained the relief which that act was designed to confer. But this they neglected to do in the manner prescribed by that act and the rules of this court. It is true that it appears from the affidavits submitted in sup-

port of this motion that this omission also occurred through the inadvertence of counsel for appellants, inasmuch as he states that he "by inadvertence omitted to file the motion to amend and the affidavit of inadvertence." But the act of 1880 was only designed to relieve a party from the effects of an omission, mistake, or inadvertence in doing any act or acts necessary to perfect an appeal by conferring upon this court authority to permit such acts as may be necessary "to perfect the appeal" to be done even after the time prescribed for doing such acts. So that the act can only apply to a pending appeal in which such defects have been discovered as would render it necessary to have supplied in order to perfect the appeal. But after an appeal has been dismissed by the judgment of the court, there is no appeal to be perfected.

Finally, it is urged that appellants are

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entitled to relief under *the provisions of section 195 of the Code of Procedure, which provides that "the court may likewise in its discretion, * * * and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." It may be questioned whether this section applies to the Supreme Court, even in the exercise of its original jurisdiction; but as that question has not been argued, we do not deem it necessary to express any opinion upon it now. For even if it does apply, it cannot avail the appellants in this case, for, as was held in *Steele v. Railroad Company* (14 S. C., 331-2), that section was designed only "for the relief of parties who, by reason of some mistake, inadvertence, &c., may have lost the opportunity to be present at the trial, or to be represented there, as is suggested by the words, 'taken against him.' * * * If the parties are represented at the trial, they can obtain relief by an application made in conformity to the rules of procedure provided by law in reference to new trials." In this case, however, the judgment which it is sought to set aside was rendered after full hearing, the appellants being represented by able and experienced counsel, and not being a judgment by default, or rendered in the absence of appellants, section 195 of the Code does not apply.

It is always a matter of regret when parties lose their right to have their appeals heard by reason of a failure to comply with some technical rule, but it seems to us that the act of 1880, having afforded ample means of obtaining relief from the consequences of any inadvertent omission or mistake, which every one is liable to, there is no real hardship in requiring parties to use the means which the law has provided for obtaining relief from the consequences of their own

omissions. A court of justice must always bear in mind that both parties to a cause have rights, and that unlimited indulgence to one will operate injustice to the other.

The judgment of this court is that the motion to rescind the order dismissing the appeal in this case be refused.

24 S. C. *142

*STATE v. HUTCHINGS.

(November Term, 1885.)

[1. *Criminal Law* ⇨678.]

A party cannot be convicted on one indictment of more than one offence; where the evidence discloses two assaults at different times upon independent quarrels, the solicitor should be required to elect the assault on which he rests.

[Ed. Note.—Cited in *State v. Howard*, 32 S. C. 94, 10 S. E. 831.

For other cases, see *Assault and Battery*, Cent. Dig. § 114; *Criminal Law* Dec. Dig. ⇨678.]

[2. *Criminal Law* ⇨369.]

A second assault upon the prosecutor by one of the defendants on a new quarrel afforded no evidence of his complicity with the other defendants in a first assault committed some time before, in which he took no part.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. ⇨369.]

[3. *Assault and Battery* ⇨96.]

The assault and battery having been committed upon the prosecutor while he was advancing upon the defendant, the defendant was entitled to have the jury charged upon the law of self-defence.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 144; Dec. Dig. ⇨96.]

[4. *Criminal Law* ⇨826.]

The request to charge in this case should have been considered by the Circuit Judge, it having been made before the jury retired, although not before the arguments or charge.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2008; Dec. Dig. ⇨826.]

Before Aldrich, J., Greenville, November, 1884.

This was a prosecution of Benjamin F. Hutchings, John Q. Roark, and William W. Baswell, for assault and battery with intent to kill, and of a high and aggravated nature. The opinion states the case.

Mr. W. L. Wait, for appellant.

Mr. Solicitor Orr, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This opinion cannot be made intelligible without a short outline of the facts. It was an indictment for assault and battery upon the person of J. Washington Goodgion, and contained two counts; one with "intent to kill and murder," and the other charging an assault and bat-

tery of "a high and aggravated character."

The Forks Shoals Factory belongs to John H. Latimer, trustee, James H. Latimer, and Mrs. Fannie A. Goodgion, in common; the two Latimers owning one-half, and Mrs. Goodgion (wife of the prosecutor) the remainder.

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It seems that the parties *could not work together agreeably, and some arrangement was made by which the different parties were to have possession and operate the factory one after the other, according to their respective shares. James H. Latimer was running it at the time the alleged assault and battery was committed, and he had given orders to the superintendent, B. F. Hutchings, not to allow the prosecutor, J. W. Goodgion, to come into the mill.

On the day of the difficulty Goodgion entered the mill, and Roark, an employé, who had received orders not to admit him, requested him to leave the mill, and, upon his refusal, took hold of him and carried him out into the public road. In the meantime a lad, Smith, seeing the scuffle ran down and informed Hutchings and Baswell that Roark and Goodgion were fighting in the cloth room, and they, with the other employés, rushed to see what was going on. As soon as Goodgion (now in the road) saw Hutchings, he shook his stick at him and dared him out. Hutchings declined to go, but said to him that he must not come back into the house. Upon that Goodgion said he would return, and when he was in the act of opening the gate, Hutchings struck him over the head a severe blow with a stick, which knocked him down. At that time Baswell neither said nor did anything, but simply looked on. Afterwards the wife of Goodgion came, and they together went in and through the mill, staying some time. The witnesses differ as to the time, but some of them say over two hours. While they were in the mill some words about a different and independent matter took place between Goodgion and Baswell, in which Goodgion gave the lie to Baswell, and the latter shook his fist in his face, &c.

The defendants requested the judge to charge, "that unless the jury find that there was collusion between the defendants to commit an assault upon the prosecutor, they cannot be held jointly responsible for the separate assaults alleged to have been committed by the defendants individually at different times, and the solicitor must elect for which assault he will try them." The judge refused to charge as requested. At the close of the charge one of the defendants' counsel requested his honor "to charge the jury that they could consider whether Hutchings acted in self defence, and if the jury

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believed that he struck Goodgion in *defence of himself, then they should find him not guilty." This request was also refused, the

judge saying he thought he had charged the jury enough.

The jury found John Q. Roark not guilty, and Hutchings and Baswell guilty on the second count, and the appeal comes to this court upon the following grounds:

I. Because his honor erred in failing and refusing to charge the jury that unless they found collusion between the defendants to commit an assault upon the prosecutor, the defendants could not be held jointly responsible for the separate assaults alleged to have been committed by the defendants individually at different times, and the solicitor must elect for which assault he will try them.

II. Because his honor erred in failing and refusing to compel the solicitor to elect for which assault the defendants should be tried, and allowing the case to go to the jury upon three separate assaults that had been sworn to.

III. Because his honor erred in failing and refusing to charge the jury that they could consider the plea of self-defence made by the defendant, Hutchings, and if they believed that he struck the prosecutor in self-defence, then they should find him not guilty.

IV. Because his honor erred in refusing to grant a new trial.

It is not at all clear as to what was the ground upon which Baswell was convicted of an assault and battery committed by Hutchings. Three defendants were charged with the same offence. The evidence disclosed two offences, one by Hutchings at the gate, and the other by Baswell in the mill. The jury acquitted Roark, one of the three defendants, but convicted both Hutchings and Baswell of the assault at the gate. As the jury seemed to negative the charge of collusion by acquitting Roark, who actually carried the prosecutor out of the house, it is not perceived upon what ground Baswell was convicted, unless it was on account of the separate assault made by him in the mill.

An indictment may contain two or more counts, but as we understand it a party cannot be convicted on the same indictment of more offences than one. Hence, when the evidence discloses two separate offences, on

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the same day, they should not be combined in such way as to secure one conviction; but in that case the practice is to require the prosecuting officer to elect upon which he rests the case of the State. Now, if the purpose was to charge Baswell upon the subsequent assault in the mill as a distinct and substantive offence, it was error in the judge to refuse to require the solicitor to elect on which assault he rested. *State v. Sims*, 3 Stro., 138; *State v. Nelson*, 14 Rich., 172 [94 Am. Dec. 130].

But if, as contended, the subsequent assault of Baswell was not charged as a dis-

tinct offence, then proof of it could only have been offered as evidence bearing upon the first assault; and it seems to us that there was no such necessary connection between the two assaults as that the commission of the latter by Baswell afforded evidence of his complicity in the former. That of Baswell was some time after that of Hutchings, and, as we understand, upon a new and independent cause of quarrel, the old struggle to keep the prosecutor out of the house having terminated. Baswell was a mere employé. It did not appear that he ever knew that orders had been given to keep the prosecutor out of the mill. When the lad, Smith, gave the information that Roark and Good-gion were fighting in the cloth room, he, with the other employés, ran to see what was going on. He does not seem either by word or deed to have taken any part in the assault and battery, of which he has been convicted. If, as alleged, he committed an assault on the prosecutor in the mill, he is answerable for that; but we are unable to see in that alone such evidence of collusion with Hutchings as to make him responsible for the much more serious offence committed by another at the gate.

Besides, as the only blow given was inflicted on the prosecutor while he was advancing with a stick, it seems to us that Hutchings, who inflicted the blow, was entitled to have the jury charged upon the law of self-defence. It is true that the request so to charge was not made in writing before the argument; but it was made before the jury retired, and we think was substantially within rule XI. of the Circuit Court as amended, which reads as follows: "Before the argument commences the counsel on each side shall submit to the judge in writing such propositions of law as they propose to rely on, which shall constitute the requests to

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*charge; provided, however, that nothing herein contained shall prevent either counsel at the close of the argument from submitting such additional requests as may be suggested by the course of the argument." It is always desirable, and especially in the administration of the criminal law, that the whole case should be considered.

The judgment of this court is that the judgment of the Circuit Court be reversed, and the case remanded for a new trial.

24 S. C. 146

STATE v. GWINN.

(November Term, 1885.)

[1. *Criminal Law* ⚡741.]

In the trial of a party charged with crime, it is for the jury alone to determine what force and effect should be given to the evidence of tracks and threats.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1138, 1221, 1705, 1713, 1716, 1717, 1727, 1728; Dec. Dig. ⚡741.]

[2. *Arson* ⚡20.]

Under the statute (Gen. Stat., § 2480), which declares that "the malicious and wilful setting fire to or burning of any barn, stable, &c., shall be deemed arson," the indictment need not refer to the location of the stable alleged to have been burned, nor charge that it was within the curtilage of a dwelling house; and where matters of location and appurtenance are alleged in an indictment under this statute, they may be disregarded as surplusage.¹

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 42; Dec. Dig. ⚡20.]

Before Kershaw, J., Anderson, October, 1883.

The opinion fully states the case.

Mr. J. C. C. Featherston, for appellant.

Mr. G. G. Wells, for the solicitor, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. John Gwinn was convicted of arson at the October term of the court, 1883, for the County of Anderson, and sentenced to be imprisoned in the state penitentiary "for life." The indictment charged that "John Gwinn, on the eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-three, with

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force and arms at Anderson *court house, in the County of Anderson and State aforesaid, did unlawfully, wilfully, and maliciously set fire to and burn the stable and barn of Jasper N. Pool, within two hundred yards of, and appurtenant to, a dwelling house of Jasper N. Pool, wherein Martha Pool habitually slept, whereby such dwelling house was endangered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State aforesaid."

The defendant made motions for a new trial and in arrest of judgment, which being refused, he appealed at the time to this court, but the appeal was suspended to allow a motion for a new trial to be made below, upon the ground of subsequently discovered evidence. That motion having also failed, the case was heard here upon the original appeal, in which motions were made for a new trial and in arrest of judgment on the following grounds:

I. "Because his honor erred in refusing a new trial when the evidence showed that the 'dwelling house,' of which the barn and stable were alleged to be appurtenant and within two hundred yards, was not the dwelling house of Jasper N. Pool, but was occupied by another—one Martha Pool.

II. "Because the evidence failed to show by what right Martha Pool occupied said house, whether as tenant of Jasper N. Pool, or otherwise.

III. "Because there was no evidence that

¹See next case post, page 150, *State v. Moore* (3).—REPORTER.

the barn and stable were 'appurtenant' to either the house occupied by Martha Pool or the dwelling house of Jasper N. Pool, the latter being at the distance of half a mile.

IV. "Because the evidence showed that there was a public highway running between the barn and stables and the house occupied by Martha Pool.

V. "Because there was no proof of the corpus delicti, nor of any fact showing that the burning was the result of criminal agency.

VI. "Because, as matter of law, tracks without any peculiarity, and threats, are not corroborative.

VII. "Because it is respectfully submitted that his honor erred in not arresting the

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judgment, when it appeared, (1) that *the indictment was fatally defective at common law, in that it does not allege the burnt building to have been within 'the curtilage,' (2) That it was fatally defective under the statute, in that it failed to show on its face how Martha Pool occupied the house wherein she slept, whether as proprietor, tenant, watchman, clerk, laborer, or simply as one lodged there with a view to the protection of the property, (3) That it was fatally defective under the statute, in that it did not allege that the dwelling house of Martha Pool was endangered, (4) That it was fatally defective in that it alleged the dwelling house to have been the property of Jasper N. Pool, and yet alleged it in such manner as to justify the inference that he did not dwell therein."

The fifth and sixth exceptions complain merely as to alleged insufficiency of proof, which we cannot consider. It was for the jury alone to determine what force and effect should be given to the evidence of threats, tracks, &c. All the other exceptions relate to the form of the indictment, and what proof was necessary to sustain it.

We do not understand that this was an indictment for arson at the common law. Both its terms, "contrary to the form of the statute in such case made and provided," and the punishment imposed, show that it was under the statute. But assuming this, it is claimed for the appellant, that it was under section 2483 of the General Statutes, which declares that "with respect to the crime of burglary and arson, and to all criminal offences, which are constituted or aggravated by being committed in a dwelling house, any house, out-house, apartment, &c., * * in which there sleeps a proprietor, tenant, watchman, clerk, laborer, or person who lodges there with a view to the protection of property, shall be deemed a dwelling house; and of such dwelling house, or any other dwelling house, all houses, out-houses, buildings, sheds, and erections, which are within two hundred yards of it and are appurtenant to it, or to the same establish-

ment, of which it is an appurtenance, shall be deemed parcels," &c.

In the view that the indictment was under this section, it was contended that it was fatally defective in several particulars, viz., that it did not distinctly allege that the house in which Martha Pool slept was either her

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"dwelling house," or that of Jasper N. *Pool; nor show on its face how Martha Pool occupied it, whether as proprietor, tenant, watchman, clerk, laborer, or simply as one lodged there with a view to the protection of the property; and that proof showing that the house was the property of Jasper N., but occupied by Martha, was not sufficient to make it the "dwelling house" of either, in the sense of the statute. As we understand it, this section was not intended to originate any new offence, but simply to change the proof necessary and thereby to enlarge the field of certain well known offences, already in existence, by declaring, as to them, what shall be deemed a "dwelling house" and an appurtenance or parcel thereof. It is not necessary here to consider this section.

The indictment in this case may be considered as framed under section 2480 of the General Statutes, which provides that "the wilful and malicious setting fire to or burning any court house or other public building, whether owned by the State or a corporation, or a building owned by an individual or individuals, and kept or let for public meetings or exhibitions, barns, stable, coachhouse, gin-house, storehouse, ware-house, grist or saw mill, railroad depot, coach or cotton-factory, or other house used for manufacturing purposes, of whatever name or kind, or setting fire to or burning any house habitually used for public religious worship, shall be deemed arson, whether the setting fire to or burning be in the day or night time; and the person setting fire to or burning any such house as aforesaid, and the aiders, abettors, and accessories before the fact, shall," &c. This provision certainly created a new statutory offence; in regard to which it is only necessary that the indictment should charge one of the description of houses named was set fire to and burned, without any reference whatever to its location as being within two hundred yards or the curtilage of a "dwelling house."

All the statements of this indictment in reference to Martha Pool and the house in which she habitually slept, may be disregarded as surplusage, and that would leave in it the simple charge that "John Gwinn, on the eleventh day of September, in the year of our Lord one thousand eight hundred and eighty-three, with force and arms at Anderson court house, in the County of Anderson and State aforesaid, did unlawfully, wilfully,

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and maliciously set fire to and burn the stable and barn of Jasper N. Pool, contrary to

the form of the statute in such case made and provided, and against the peace and dignity of the State aforesaid," which is as full as the terms of the statute require. "The general rule is, that mere surplusage will not vitiate, as when an indictment for an offence at common law concludes contra formam statuti." State v. Wimberly, 3 McCord, 193, citing 1 Cowp., 683; 5 Durn. & East., 162.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

24 S. C. 150

STATE v. MOORE.

(November Term, 1885.)

[1. *Indictment and Information* ⚭23.]

An indictment was headed with the name of the State and county, and alleged the county in which, and the court house at which, the court was holden, and then alleged that "the jurors of and for the county of — aforesaid, on their oaths present." &c. *Held*, that all this was a part of the caption, which may be amended at any time; so that, even if it were proper to insert the name of the county where it was omitted, the defect would not be fatal. But it is not a defect, as in substance and proper intendment the word is there.

[Ed. Note.—Cited in State v. Assmann, 46 S. C. 559, 24 S. E. 673.

For other cases, see *Indictment and Information*, Cent. Dig. § 102; Dec. Dig. ⚭23.]

[2. *Indictment and Information* ⚭86.]

The omission to state the court house or other place at which the crime was committed, the county being named, was not a fatal defect—the place in this case not being a matter of essential description of the crime.

[Ed. Note.—Cited in State v. Coldough, 31 S. C. 161, 9 S. E. 811; State v. Burbage, 51 S. C. 289, 28 S. E. 937.

For other cases, see *Indictment and Information*, Cent. Dig. § 232; Dec. Dig. ⚭86.]

[3. *Arson* ⚭20.]

The indictment charged that the defendant, on a day stated and in the county named, "with force and arms, did wilfully and maliciously set fire to and burn the gin house of F., contrary." &c. *Held*, that the indictment charged all that was necessary to make out the crime of burning a gin house under the statute. Gen. Stat., § 2480.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 42; Dec. Dig. ⚭20.]

[4. *Arson* ⚭31.]

Under indictment for burning a gin house, evidence of defendant's pecuniary condition is irrelevant and incompetent.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 68; Dec. Dig. ⚭31.]

[5. *Arson* ⚭41; *Criminal Law* ⚭720.]

In stating to the jury that it was possible for the prosecutor to have identified cotton and a basket, and in permitting the solicitor

to give his version of the facts to the jury, the Circuit Judge committed no error.

[Ed. Note.—For other cases, see *Arson*, Cent. Dig. § 77; Dec. Dig. ⚭41; *Criminal Law*, Cent. Dig. § 1671; Dec. Dig. ⚭720.]

[This case is also cited in State v. Assmann, 46 S. C. 560, 24 S. E. 673, without specific application.]

Before Cothran, J., Abbeville, September, 1885.

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*The facts are sufficiently stated in the opinion of this court. The grounds in arrest of judgment are stated in the opinion; the grounds for a new trial were as follows:

1. Because it was error in the presiding judge to refuse to allow the defendant to offer evidence of his pecuniary circumstances, the direct tendency of such proof being to show that he had no motive for the commission of larceny, and the theory of the State being that he first stole the goods of the prosecutor and then burnt the gin house to conceal the theft.

2. Because it was error in the presiding judge to allow the solicitor to argue to the jury, against the earnest protest of the defendant, that the defendant had, for some time before the night of the burning, been stealing the cotton of the prosecutor out of his gin house, although there was no evidence on that point, and although the defendant was being tried for arson only.

3. Because it was error in the presiding judge to allow the solicitor to persist, in spite of the earnest protest of the defendant, in stating to the jury that the witness, Lipscomb, said that when he was at defendant's house about the last of October, 1884, defendant told him that he had no more cotton left, when in point of fact the solicitor utterly misconceived the witness, Lipscomb's testimony, his statement being that defendant told him if he had come one day later, he would have been through, without saying through what.

4. Because it was error in the presiding judge to charge the jury that it was possible for the prosecutor to identify cotton in the possession of the defendant.

5. Because it was error in the presiding judge to charge the jury that it was possible for the prosecutor to identify a basket in the possession of the defendant, and that if they believed that the prosecutor had identified the basket, they might infer from that and the other facts claimed to be proved that the defendant burnt the gin house.

6. Because the evidence was totally insufficient to base a verdict of guilty upon, and it was error in the presiding judge to charge the jury that they might convict the defendant upon the evidence offered by the State.

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*7. Because the said verdict and judgment are contrary to the law and the evidence.

¹See State v. Gwinn (2), ante, page 146.—REPORTER.

Mr. E. G. Graydon, for appellant.

Messrs. M. L. Bonham, jr., and W. C. McGowan, contra.

March 8, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant was tried for arson at the September extra term of the Court of General Sessions for Abbeville County. He was found guilty, with a recommendation to mercy, and was sentenced to the penitentiary for the term of ten years. Before sentence, his counsel moved in arrest of judgment on account of alleged defects in the indictment, and also for a new trial, both of which motions were overruled. These motions are renewed here by way of appeal.

The indictment was as follows:

"The State of South Carolina.—Abbeville County.

"At a Court of General Sessions, begun and holden in and for the County of Abbeville, in the State of South Carolina, at Abbeville court house, in the county and State aforesaid, on Monday, the second day of February in the year of our Lord one thousand eight hundred and eighty-five, the jurors of and for the County of — aforesaid, in the State of South Carolina aforesaid, that is to say, upon their oaths, present that John Moore, on the fourteenth day of November, in the year of our Lord one thousand eight hundred eighty-four, with force and arms, in the County of Abbeville and State aforesaid, did wilfully and maliciously set fire to and burn the gin house of Francis Arnold, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State aforesaid."

On the motion in arrest of judgment below, it was urged that the indictment was fatally defective, because: 1st. That no county was mentioned in the indictment as the county of the jurors, the word "Abbeville" being left out, as above. 2d. That it was not alleged that the offence was committed at Abbeville court house. 3d. That it was not alleged that the offence was committed "feloniously," the word "felonious" having been omitted. 4th. That it was not alleged that the gin house was within two hundred yards of the dwelling-house. 5th. It was not al-

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leged to be "appurtenant" to the dwelling. 6th. That it was not alleged to be within the curtilage. 7th. No allegation that it was an out-house of the prosecutor. And 8th. That it was not alleged to be a parcel of the dwelling, "the proof offered having shown that the said gin house was within two hundred yards of, and appurtenant to, the said dwelling-house."

An indictment consists of three prominent features, (1) the caption, (2) the charge, and (3) the conclusion. The caption is the head-

ing to the indictment, and is not strictly a part of it. *State v. Williams*, 2 McCord, 301; *Vandyke v. Dare*, 1 Bail., 65. Only in that sense the expression above, that it is one of its features, is used. It has been defined to be that part of the record in a criminal case which comprehends the judicial history of the cause to the time of the finding of the indictment. *Bish. Cr. Proc.*, ch. XI., § 147. It is an entry record, showing when and where the court is held, &c.

There has been some contrariety of opinion as to where the caption ends and the indictment begins, and especially whether the words, "The jurors, &c., on their oaths, present," constitute a part of the caption or a part of the indictment. In England and in many of the States following the English practice, these words are termed the "commencement" of the indictment, and not considered to be a part of the caption. But in our State it has been distinctly held that they are part of the caption; that it is mere introductory matter, and constitutes no portion of the indictment. In the case of *State v. Creight* (1 Brev., 169 [2 Am. Dec. 656]), Trezevant, J., said the caption ends with the words, "upon their oaths, present," and Grimke, J., said (p. 170), "It was resolved, in an earlier unreported case (*State v. James Johnston*), that the part of the indictment here in question was a part of the caption."

Now, the caption being no part of the indictment (*State v. Williams*, supra), and the omitted word here, "Abbeville," being a part of the caption (*State v. Creight*, supra), it follows that the law in reference to defects in the caption, and not the rule in reference to the charging part or the conclusion, should govern where objection is made on account of alleged defects. And it must be remembered that the rules in such cases are quite different. In reference to the charging part,

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the law is extremely strict, requiring the closest observance to established forms and precedents, and demanding a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy. Manner, time, and place must be alleged, and even particular words and phrases sometimes, though they may seem technical, must be used.

This strictness is, however, not required in reference to the caption, the distinction in the two cases being that the charging part is really the matter which the accused is called upon to meet and answer, while the caption is a mere history or record of the case, up to the finding of the indictment, containing the name of the court, county, and State, and where and by whom the indictment has been found. It is important for the accused to be informed fully as to the crime with which he is charged, so that he can prepare for his defence; so that he can be shielded against a second trial for the same offence; and it is important, too, to the court that the crime

charged should be set out with great particularity, so that, in looking at the record, it may decide whether the facts charged constitute an offence within its jurisdiction, whether a conviction will warrant punishment, and what the punishment shall be. These reasons, however, do not apply to the caption, and, accordingly, as we have said, the rule as to the caption is much more liberal than as to the charging part of the indictment. It was held in the case of *State v. Creight*, *supra*, that the caption may be made up or amended at any time, &c. The opinion in that case was based upon the case of *State v. Johnston*, *supra*, in which a motion was made in arrest of judgment on several grounds, one of which was that the caption did not mention either the day or the year when the court was held, at which the bill was found. The court unanimously overruled the motion.

In the case of *State v. Williams*, *supra*, a similar motion was made on the ground that it was not set out in the caption, that it was a "special court." The court said: "The caption must set forth with sufficient certainty the court in which, the jurors by whom, and also the time and place at which, the indictment was found, so that it might appear on the face of the indictment that the court had jurisdiction of the offence, that the

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jurors were *sworn, and that the court was holden at the proper time." But in regard to the omission complained of, it said further: "There is no doubt, however, about the right to amend the caption of an indictment at any time, and leave is therefore granted to amend." And in *Vandyke v. Dare*, *supra*, the court held and said: "The caption is no part of the indictment, &c.; setting out the style of the court, the time at which, the names of the jurors, &c., may be amended at any time by the journals of the court"—further saying: "It has become so much a matter of course, that it is usually left in blank until some occasion occurs which renders its perfection necessary, and then leave is obtained for filling it up as a matter of course." These cases have been referred to to show that even if the word "Abbeville," which is omitted here, ought to have been inserted, yet that the defect is not fatal; it may be inserted afterwards.

But is the omission of this word a legal defect? We think not; because, though the word itself does not appear, yet in substance and proper intendment it is there. As we have seen, the caption of an indictment in this State does not end until it reaches the words, "upon their oaths do present." Down to that point, all the preceding part constitutes the caption. When the County of Abbeville, then, is used in the preceding part, and when immediately following comes "the jurors of and for the County of——aforesaid," is not that in substance saying the County of Abbeville? 1 *Saund.*, 308, note 1,

cited in *State v. Lamon*, 3 *Hawk.* [10 N. C.], 178. And would it not be a subtle distinction indeed to hold otherwise? See the case of *State v. Coleman* (8 S. C., 243), a case of murder, and where the defect complained of was in the body of the indictment, the charging part, and yet it was not held fatal. See *Reyes v. State*, 20 *Ala.*, 33.

The next objection is that the offence was not alleged to have been committed at "Abbeville Court House." The purpose in alleging the place is to show that the court has jurisdiction; or, at least, this is one of its purposes. True, the usual form is, as demanded by this exception, and according to strict and usual form it is admitted that the words "Abbeville Court House" should have been inserted. But the question is, is its omission fatal where the proper county is alleged? Is

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it imperatively *necessary that both a town and a county shall be mentioned? Where the place is not a matter of essential description of the crime, but is alleged as a matter of jurisdiction only in the court, the reason of the rule, it seems, would be satisfied with us by an allegation of the county simply, as our courts have jurisdiction over the respective counties in which they sit.

In the early times of the common law jurors were considered as witnesses, and no others were summoned or expected to be heard as witnesses except the jurors. They were sworn to speak the truth, and they were expected to speak from their own knowledge and not from the testimony of others. Hence the practice of summoning jurors from the immediate vicinage. And hence, too, so as to enable the court to issue a proper venire for proper jurors, it was necessary for the record to disclose the place where the offence occurred, to wit, a particular locality in the county. After the jurors ceased to be witnesses, and therefore there was no longer any necessity for the assignment of a particular locality, so far as summoning the jurors was concerned, still the practice of naming a town or ville was kept up, and in this way the present form of indictments with us, in which the court house of the county is usually named as the place of the offence, has been adopted.

The old practice, however, in England was altered by certain statutes, and Mr. Bishop says that the "effect of these statutes seems pretty plainly to have been in England to change the common law rule, and leave it unimportant for the pleader to allege any place of the commission of the offence other than the county." He further says: "In the United States the matter stands substantially as it did in England after the enactment of statute 6 Geo. IV., ch. 50, § 13. There is believed to be no State in the Union wherein the jurors are summoned *de vicinato*, but in all the States they come *de corpore comitatus*, from the body of the county, not from the immediate neighborhood in which the offence

was committed. And the general rule in our States, therefore, is that there is no need for the indictment to allege the particular township or other like locality within the county where the offence was committed. It may simply allege it to have been committed within the county which it mentions, without

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more *words." Bish. Cr. Proc., § 93. And at section 97 he says: "Some of the particular instances in which it has been held not essential to mention more than the county in the indictment are murder, affray, &c."—citing *Studstill v. State*, 7 Ga., 2; *Dillon v. State*, 9 Ind., 408; and *State v. Lamson*, 3 Hawk. [10 N. C.], 175. See our case of *State v. Thayer*, 4 Strobl., 286. It seems to be conceded in most of the States that in misdemeanors the mention of a town is not necessary, but in some of the States, in indictments for capital felonies, it appears to be necessary, or, at least, the practice has always been adhered to, as stated in *Com. v. Springfield*, 7 Mass., 9. We are of opinion, however, that although this practice is usual, yet its omission, the defect complained of here, was not fatal. See case of *State v. Fant*, 2 Brev., 487.

The other grounds assigned for the motion in arrest of judgment may be considered together, and we say generally that the offence with which the accused was charged, and of which he has been convicted, was a statutory offence (Gen. Stat., § 2480), making the wilful and malicious setting fire to or burning any house, &c., * * * specifying certain houses, among them gin house, &c., a crime. Whether said house be within the curtilage, appurtenant, or a part of the dwelling or otherwise, still it is the crime made by the act, if wilfully and maliciously done. Such being the fact, we think when the indictment charges the burning or setting fire to as wilful and malicious, specifying the house, as here, and the county, that the offence has been fully, fairly, plainly, and substantially set forth, and also as formally as the act requires.

As to the motion for a new trial, we find nothing in the grounds relied on to warrant a reversal of the Circuit Judge's order on that subject. The testimony offered in regard to the pecuniary condition of the accused was irrelevant and incompetent, and therefore properly excluded. The fact that the Circuit Judge said to the jury that it was possible for the prosecutor to identify cotton and a basket, &c., was no error of law, if error at all. Nor was it error of law to permit the solicitor to give his version of the facts to the jury, even if he stated the testimony incorrectly in the opinion of the other side.

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*It is the judgment of this court that the judgment of the Circuit Court be affirmed.

24 S. C. 158

TOWN COUNCIL OF BEAUFORT v. OHLANDT.

(November Term, 1885.)

[1. *Jury* ⇨ 11.]

The charter of the town of Beaufort provides that "the intendant of said town is hereby vested with all the power and jurisdiction given to trial justices of this State, and may hold court for the trial of violations of town ordinances, and may punish by fine or imprisonment in his discretion, or both." *Held*, that a person charged before the intendant with a violation of an ordinance of the town, was entitled to a trial by jury, as in a trial justice's court, and the same right of appeal to the Court of General Sessions.

[Ed. Note.—Cited in *Ex parte Brown*, 42 S. C. 184, 188, 20 S. E. 56; *City Council of Greenville v. Eichelberger*, 44 S. C. 355, 22 S. E. 345; *State v. Larkins*, 44 S. C. 363, 22 S. E. 409; *City Council of Anderson v. Fowler*, 48 S. C. 12, 13, 25 S. E. 900.

For other cases, see *Jury*, Cent. Dig. § 19; Dec. Dig. ⇨ 11.]

2. *State ex rel. Burton v. Williams*, 11 S. C., 288, affirmed.

Before Pressley, J., Beaufort, September, 1885.

The defendant, John Ohlandt, being on trial before the intendant of the town of Beaufort, for a violation of an ordinance of said town regulating the sale of liquors, demanded a trial by jury, which was refused. Upon his conviction and sentence, he appealed to the Court of General Sessions, upon the ground that the intendant erred in refusing him a trial by jury. The Circuit Judge reversed the judgment and remanded the case for a trial by jury, if the same should be demanded. The order of the judge is stated in the opinion.

Messrs. Elliott & Howe, for appellant.

Mr. W. J. Whipper, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Respondent was tried and convicted in the intendant's court for violating certain ordinances of the town of Beaufort and sentenced to pay a fine of twenty-five dollars. He appealed to the Court of Sessions on two grounds: 1st. Because the intendant erred in refusing his demand for a trial by jury. 2nd. Because the

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judgment of the intendant was *contrary to law and evidence. The Circuit Judge held, on the authority of *State ex rel. Burton v. Williams* (11 S. C., 288), that respondent was entitled to a trial by jury, and remanded the case to the intendant's court for a trial by jury if demanded. From this judgment the town council appeals upon two grounds: 1st. Because the Court of Sessions has no jurisdiction to hear an appeal from a sentence imposed by the intendant of the town of Beaufort. 2nd. Because respondent was not en-

titled to a trial by jury in the court of the intendant of the town of Beaufort.

We regard both of the questions raised by this appeal as concluded by the decision of this court in the case relied on by the Circuit Judge; but as we have been called upon to review that decision, we will add a few words in vindication of the doctrines there laid down.

A brief review of the legislation of this State in reference to the charter of the town of Beaufort may not be out of place as an introduction to the consideration of the questions involved. By the original charter of the town of Beaufort, granted in 1803 (8 Stat., 218), the government of the town was vested in an intendant and six wardens, with power to make all such by-laws, rules, and regulations as may to them seem necessary for the security, welfare, peace, and good order of the town, to impose fines for offences against such by-laws, not exceeding eighty dollars for any one offence, which fines, when they exceed thirty dollars, shall be recovered in the "District Court of Beaufort," and when they are less than the sum of thirty dollars, "before the intendant and wardens, or any four of them." That act also provided that "the said wardens, or any four of them, shall meet * * * to hear and determine all small and mean causes, agreeably to the directions of the act of the general assembly, and all other matters of complaint arising within the said town."

The act of 1816 (8 Stat., 275) continued in force the foregoing act for the term of fourteen years, and provided for the establishment of a court of record "for the hearing and determining all cases of a civil nature arising within the limits of the said town of Beaufort, * * * possessing concurrent jurisdiction with the Court of Common

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Pleas," to the amount of fifty dollars, "exclusive of costs, and with jurisdiction for the trial of all offences against the by-laws of said town, which court was to be held by a recorder, appointed by the town council, and "all issues in the said court shall be tried by a jury according to the regulations and forms prescribed by law in cases of trial by jury." And the right of appeal in all cases to the Circuit Court was provided for.

No other material changes in the charter of said town appear to have been made until the act of 1872 (15 Stat., 136) was passed, which, amongst other things, provided that the intendant and wardens, constituting the town council of the town of Beaufort, "shall have power and authority, under their corporate seal, to ordain and establish all such rules and by-laws and ordinances * * * for preserving peace, health, order, and good government" within the limits of said town as they may deem expedient and proper; "and the said council may affix fines for of-

fences against such by-laws and ordinances, * * * but no fine shall exceed thirty dollars, and when fines shall exceed twenty dollars, the same to be collected as fines and penalties in trial justices' courts." By the act of 1874 (15 Stat., 647) the charter of the town of Beaufort was further amended by declaring: "That the intendant, or acting intendant, of said town is hereby vested with all the power and jurisdiction given to trial justices of this State, and may hold court for the trial of violations of town ordinances, and may punish by fine or imprisonment in his discretion, or both."

Under this last act appellant claims that the intendant is invested with two separate and distinct powers. 1st. Those of a trial justice. 2d. With the power to hold court for the trial of violations of town ordinances, and to punish offenders for such violations "by fine or imprisonment, in his discretion, or both." The act contains no limitation as to the amount of the fine or the length of the imprisonment which may be imposed, except the discretion of the intendant; and hence, if the view contended for by the appellant should prevail, the very extraordinary result would follow that a single individual had been invested with power to impose fines unlimited in amount and imprisonment for an unlimited period. It is true that the

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ordinance under which *respondent was tried does provide "a penalty of not less than ten nor more than one hundred dollars, or imprisonment for not less than ten nor more than thirty days, or both, in the discretion of the intendant, for a violation of any section of said ordinance," but the act of 1874, under which jurisdiction is claimed, does not limit the power of the intendant, in the fine or imprisonment imposed, to the provisions of the ordinance.

Indeed, our attention has not been called to any act, or to any provision in the charter of the town of Beaufort, which authorizes the town council to impose imprisonment for any term whatever as a penalty for the violation of any of its ordinances. On the contrary, the last preceding act (1872) above cited, expressly provides that "no fine shall exceed thirty dollars;" and furthermore declares, probably in view of the decision in *Zylstra v. Charleston* (1 Bay, 382), that "when fines shall exceed twenty dollars, the same to be collected as fines and penalties in trial justices' courts," where parties could, if they so desired, obtain the benefits of a trial by jury. Now, as it is quite clear that a municipal corporation has no powers except such as are conferred by its charter, and as it does not appear that any power to imprison for a violation of any of its ordinances has been conferred upon the town council, or even to impose a fine beyond a prescribed limit, it would seem to follow that the powers conferred upon the intendant of

the town of Beaufort by the act of 1874 could only be exercised as a trial justice, with his jurisdiction so enlarged as to enable him to try all offenders against the ordinances of the town, and to impose either fines or imprisonments, or both, within the limits prescribed to trial justices.

This is the necessary construction of the act in order to make it harmonize with well settled principles and preserve the right of trial by jury and the right of appeal, so carefully guarded by the provisions of the constitution. Section 19 of article I. of the Constitution provides that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment or intervention of a grand jury, saving to the defendant the right of appeal."

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*Besides this general provision securing the right of appeal from all inferior courts, it seems that in every instance where such a court is specially provided for, the framers of the constitution again provided in express terms for the right of appeal. See art. IV., §§ 19 and 24, in reference to county commissioners and justices of the peace. So in section 11 of article I. of the Constitution, it is expressly declared that: "The right of trial by jury shall remain inviolate." Exactly what is the scope and effect of this declaration it is not necessary now to determine, as this and the other constitutional provisions above referred to are only mentioned for the purpose of showing that the framers of the constitution seem to have carefully guarded the right of trial by jury and the right of appeal, and therefore, before a court can allow either of these rights to be infringed or denied, it must be satisfied that the legislature has, by some constitutional act, clearly denied or limited these rights.

Now, if the act of 1874 should be regarded as conferring upon the intendant of the town of Beaufort all the powers of a trial justice, and, in addition thereto, constituting the intendant an independent municipal court for the trial of all offenders against the ordinances of said town, then the act fails to define or limit the jurisdiction of such municipal court as it is necessary to do; for it is quite clear that a municipal court can only enforce such ordinances as are passed in accordance with law, and, as we have seen, there does not appear to be any act conferring the authority on the town council of Beaufort to impose as a penalty for the violation of any one of its ordinances anything more than a fine of thirty dollars, and yet the act under consideration purports to give, to what is claimed to be a municipal court, the power to impose fine or imprison-

ment at its discretion, or both. But if the act of 1874 be construed, as we think it should be, to confer upon the intendant all the powers and jurisdiction of a trial justice, with the additional power of trying all violations of the ordinances of the town of Beaufort, then no such difficulty can arise; for if, as trial justice, he tries offenders against the ordinances of the town, he may, as such, impose fine or imprisonment to the extent of the jurisdiction of a trial justice. It seems to us, therefore, that there was no error on the part of the Circuit Judge in en-

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tertain*ing the appeal from the judgment of the intendant's court, and no error in holding that the respondent would be entitled to a trial by jury if demanded.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

24 S. C. 163

TOWN OF LEXINGTON v. WISE.

SAME v. BANKS.

(November Term, 1885.)

[1. *Municipal Corporations* ⇨636.]

The charter of the town of Lexington provides, that the intendant and wardens, or a majority of them, shall be vested with all the powers of a trial justice in this State in all cases of violation of any ordinance of the said town. *Held*, that the town council of Lexington, in the trial of offenders against the town ordinances, can only exercise the powers conferred by law upon trial justices, and are subject to the same limitations.

[Ed. Note.—Cited in *State v. Larkins*, 44 S. C. 363, 22 S. E. 409.

For other cases, see *Municipal Corporations*, Cent. Dig. § 1402; Dec. Dig. ⇨636.]

[2. *Municipal Corporations* ⇨641.]

Therefore, the accused in such trial has the right to trial by jury, if demanded, and that the testimony be taken down in writing and subscribed by the witnesses, and upon conviction, the right of appeal to the Circuit Court.

[Ed. Note.—Cited in *City Council of Greenville v. Eichelberger*, 44 S. C. 355, 22 S. E. 343; *City Council of Anderson v. Fowler*, 48 S. C. 12, 13, 25 S. E. 900; *Town of Batesburg v. Mitchell*, 58 S. C. 564, 571, 37 S. E. 36.

For other cases, see *Municipal Corporations*, Cent. Dig. § 1411; Dec. Dig. ⇨641.]

[3. *Municipal Corporations* ⇨636.]

The legislature having made this provision for the trial of persons accused of violations of the ordinances of the town, instead of creating a strictly municipal or police court for the trial of such offenders, the courts cannot declare such provision to be against public policy.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1402; Dec. Dig. ⇨636.]

Before Hudson, J., Lexington, September, 1885.

This was an appeal from the following judgment:

The questions raised on these appeals are: 1st. Whether the Circuit Court has appel-

late jurisdiction. 2d. Whether at the trial below the defendant was entitled to trial by jury if demanded. Upon the authority of the case of *State ex rel. Burton v. Williams*, 11 S. C., 289, I decide both questions in the affirmative, and therefore order and adjudge, that the sentence of the inferior court be set aside and a new trial awarded to the defendants in each of the above stated cases. The testimony should, upon the new trial, be taken in writing, and subscribed by witnesses, as the law requires.

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*Mr. George T. Graham, for appellant.

Messrs. Meetze & Muller and J. Brooks Wingard, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, involving the same principles, were heard and will be considered together. The defendants were tried by the town council of Lexington for a violation of certain ordinances of said town. Upon their trial they each demanded a trial by jury, and that the testimony of the witnesses be taken down in writing and subscribed by them. Both of these demands were refused, and the defendants were convicted and sentenced, the one to pay a fine of five dollars, or be confined in the guard house for eight days, and the other to pay a fine of ten dollars, or be confined in the guard house for twenty days. They each paid their fines under protest, their bonds to abide the determination of their cases in the Circuit Court having been tendered and refused, the town council holding that there was no appeal from their judgment to the Circuit Court. The Circuit Judge, upon the authority of the case of *State ex rel. Burton v. Williams* (11 S. C., 288), held that the defendants had the right of appeal, and that they were entitled to a trial by jury if demanded; and that the testimony of the witnesses should be taken down in writing and subscribed by them as the law requires.

The town of Lexington appeals substantially upon the following grounds: 1st. That the Circuit Judge erred in entertaining the appeal. 2d. That he erred in holding that the defendants were entitled to a trial by jury. 3d. In holding that the testimony of the witnesses should be taken down in writing and subscribed by them.

It is quite clear that a municipal corporation, as well as its officers or agencies, has no powers except such as are conferred by the charter creating such corporation. The town of Lexington was incorporated by the act of 1881 (17 Stat., 662), and the seventh section of that act declares: "That the intendant and wardens, or a majority of them, duly elected and qualified, shall, during their term of office, be vested with all the powers

of a trial justice or justice of the peace in

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this State, in all cases of violation of any ordinance or ordinances of the said town." From this it is manifest that when the town council of Lexington undertake to try an offender against any of their ordinances, they can only exercise such powers as are conferred by law upon a trial justice, subject, of course, to such limitations and restrictions as are imposed upon that officer. It is not, and cannot be, denied that where a person is brought before a trial justice for trial, that he is entitled to a jury if demanded, and that the testimony of the witnesses must be taken down in writing and subscribed by them, and that upon conviction there is a right of appeal to the Circuit Court. This being so, it necessarily follows that a person brought before the town council, who are only invested with the same powers as a trial justice, is entitled to the same privileges.

It is argued that it is against public policy to allow the right of trial by jury and the right of appeal to persons charged with a violation of the ordinances of a town, as it is important to the peace and good order of the town that such offenders should be dealt with summarily. That, however, is a consideration which would be more properly addressed to another department of the government, whose province we have no right or desire to invade. Our sole duty is to construe the law as we find it written. If the legislature has seen proper, instead of creating a strictly municipal or police court, with well defined powers and jurisdiction, to confer upon the town council of Lexington, for the purpose of enforcing its ordinances, the same powers as have been conferred upon a trial justice, we are bound so to declare the law when a proper case is made before us, calling for such declaration.

The judgment of this court is that the judgment of the Circuit Court, in each of the cases above stated, be affirmed.

24 S. C. 165

SKINNER v. HODGE.

(November Term, 1885.)

[1. *Pleading* ⇐ 250.]

An action having been instituted by the heirs of a mortgagor for the recovery of the mortgaged land, the Circuit Judge erred in withdrawing the case from the jury, and directing

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the complaint to be amended so as to make the case an action to redeem the mortgaged premises, as by such amendment the claim of the plaintiffs was changed, and a new and different cause and kind of action substituted.

[Ed. Note.—Cited in *Gregory v. Ducker*, 31 S. C. 146, 9 S. E. 780; *Cuthbert & Co. v. Brown*,

49 S. C. 518, 27 S. E. 485; Booth v. Langley Mfg. Co., 51 S. C. 419, 29 S. E. 204; Proctor v. Southern Ry., 64 S. C. 494, 42 S. E. 427.

For other cases, see Pleading, Cent. Dig. § 730½; Dec. Dig. ⚡250.]

2. Such order being erroneous, all subsequent proceedings, orders, and decrees under the amended complaint must fall with the erroneous order.

Before Pressley, J., Clarendon, October, 1880.

The appeal in this case was from the several orders and decrees stated in the opinion, but the decision passes upon Judge Pressley's order only, which was as follows:

This is a case of trespass to try title. Plaintiffs sue as heirs at law of James D. Skinner. He had mortgaged the land in his life-time, and defendant bought it at a sale by the commissioner in equity, under a decree of foreclosure of said mortgage, but James D. Skinner had not been served with process in that case. Defendant desired to go into proof that he was estopped in that matter by his knowledge of, and presence at, said sale, making no objection to the same. I did not permit said testimony, but withdrew the case from the jury, because, in my opinion, the defendant being, at the least, entitled to all the rights of the mortgagee, and being in possession of the mortgaged property, the right of plaintiffs, if any therein, could not be tried in the form of trespass to try title, but only by an action to redeem.

It is therefore ordered, that plaintiffs, on payment of the costs of amendment, have leave within thirty days from the filing of this order to amend their complaint as they may be advised, so as to conform their action to that of a complaint to redeem the mortgaged property. If said complaint be not so amended, then defendant has leave to enter judgment of non-suit.

After the filing of this order and a subsequent decree of Judge Thomson, in March, 1881, the defendants gave the following notice: "Please take notice, that upon the final determination of said case in said court, the defendant will appeal to the Supreme Court of said State from the order of Judge Pressley, filed, on December 16, 1880, allowing the plaintiffs to amend their complaint from trespass to try title to an action to redeem; as

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also *from Judge Thomson's order, filed March 11, 1881, overruling the defence of equitable estoppel."

After the final decree of Judge Fraser, in July, 1885, the defendants gave notice of appeal, and filed exceptions, of which the first was as follows: "I, Defendant Hodge excepts to the first order of his honor, Judge Pressley, on the ground that it was ultra vires, and because it is not a lawful order. And defendant Hodge submits that no costs having been paid thereunder, no amendments could have

been made, and all proceedings since are illegal, null, and void."

Messrs. Moise & Huggins, for appellants.
Mr. Jos. F. Rhame, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, respondents, brought action, as heirs of James D. Skinner, to recover the possession of certain real estate. Skinner had mortgaged the land in his life-time, and the defendant, Hodge, bought it at a sale by the commissioner in equity, under a decree of foreclosure of said mortgage. In this proceeding, James D. Skinner had not been served with process, but he was present at the sale, and did not object thereto. At the hearing before his honor, Judge Pressley, the fact that Skinner had not been served with process was developed, and the defendant proposed to go into proof that he was estopped because of his knowledge of, and presence at, the sale, making no objection. His honor declined to permit this testimony, and withdrew the case from the jury, because, as he states, "in his opinion the defendant at the least being entitled to all the rights of the mortgagee, and being in possession of the mortgaged property, the rights of the plaintiffs, if any, therein could not be tried in the form of trespass to try title, but only by an action to redeem." He thereupon ordered that plaintiffs, on payment of the costs of amendment, have leave within thirty days from the filing of the order to amend their complaint as they may be advised, so as to conform their action to that of a complaint to redeem the mortgaged property,

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and if said complaint be not *so amended, then the defendant has leave to enter judgment of non-suit.

From this order the defendant gave notice of appeal upon the final termination of the case. Afterwards the case came on for hearing before his honor, Judge Thomson, who states in his decree, that the case being called for trial, and the defendant's counsel being willing that it should be heard, upon the ground of equitable estoppel, without, however, waiving other grounds of defence, to which plaintiffs' counsel agreed, it was heard upon that question, to wit, Did the record of foreclosure, with the oral testimony submitted, exhibit a case of equitable estoppel? Upon this question, his honor decreed adversely to the defendant, adjudging "that the defence of equitable estoppel was inapplicable to the case, and that the same be overruled." From this decree the defendant gave notice of his intention to appeal, upon the final determination.

After this, the case came before his honor, Judge Hudson, who, referring to the order of his honor, Judge Pressley, and that in pursuance thereof the plaintiffs had amended the

complaint so as to convert the action into one to redeem, to which the defendant had answered, in which he had interposed several defences, viz., that the plaintiffs had not complied with the order of Judge Pressley as to the payment of the costs; that there was a defect of parties, in that the plaintiffs had failed to make the personal representatives of James D. Skinner and of his deceased wife, Sallie Skinner, parties, and also one John N. Brown, to whom the defendant, Hodge, had sold a part of the land; also the estoppel relied on; and holding that he had no power to review those matters which had been previously judicially determined by his predecessors, proceeded to consider such points as he regarded open and undetermined, and decreed, in substance, 1st, that the plaintiffs had the right to bring an action to redeem; 2d, that the representatives of James D. Skinner and of Sallie, his deceased wife, were not necessary parties, the said Sallie having died testate, bequeathing her interest to the plaintiffs, and no administration having ever been taken upon the estate of James D. Skinner; 3d, that the clerk of the court, as successor to the commissioner in equity, and John N. Brown, who had purchased a part

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of the *land from Hodge, should be made parties; and, 4th, that to entitle the plaintiffs to redeem, they should not only reimburse Hodge and Brown the money paid for the land, but also for all taxes and other expenditures in maintaining and improving the premises, and, in addition, that they should pay to the mortgagees the entire balance due on the mortgage debt after the sale of the land, with the costs of the proceedings—the plaintiffs having the right, however, to offset against the aforesaid items of payment such rents and profits as Hodge and Brown may have realized by their possession of the land, or the sum total of the value of the use and occupation thereof, if they have not realized rents and profits.

He further held that the complaint was not fatally defective on account of the fact that plaintiffs had not offered in their complaint to pay the mortgage debt and the other expenses enumerated, having alleged that Hodge had realized enough rents and profits to pay the mortgage debt and said expenses, which, if upon an accounting proved not to be the case, the plaintiffs should make good the deficiency; and, further, that redemption would not be decreed until plaintiffs should do all that the law required of them, whether they had offered to do so in their complaint or not; finally decreeing that the complaint could not be dismissed for the defects complained of by the defendant Hodge, and that it should be retained, with leave to the plaintiffs within thirty days to take the necessary steps to bring in as parties John N. Brown and the clerk of the court as defendants, on failure of which the complaint to be dismissed with costs.

After this, the case came up again before his honor, Judge Pressley, who, by consent of attorneys on all sides, ordered a reference, directing the referee to state the accounts between the several parties in manner and form following; "1st. That he take an account of the rents and profits which have accrued to the defendant, John J. Hodge, respectively for the use, occupation, and enjoyment of the premises described in the complaint and every part thereof, and the amount realized by the said John J. Hodge from the sale of said premises to the defendant Brown. 2nd. That an account be taken of the amount due on the said bond and mortgage, and of any sums expended on the property, or for taxes and improvements by

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the defendants, and of the *share of the proceeds of said bond and mortgage, to which the heirs of the said James D. Skinner are entitled, if any. 3rd. That the referee ascertain what costs or counsel fees the defendants have become liable for or paid in the defence of this action, with leave to report any special matter, and upon the coming in and confirmation of this report, the action may be brought on for final determination."

In due time the referee made his report, which came before his honor, Judge Witherspoon, with numerous exceptions from the defendants, upon the hearing of which the judge found it necessary to recommit the case to the referee, with instructions as to certain matters therein. From this decree the defendants gave notice of an appeal, upon the ground that his honor erred, in matter of fact, "in stating that the referee had allowed defendants interest upon the purchase money, which he had not done; and in matter of law, in holding that rents and profits drew interest, which, it is respectfully submitted, they do not draw, being in lieu of interest themselves, and are not liquidated demands on which interest would run." The defendant, Brown, also gave notice of an intention to appeal, upon the ground, "that his honor overruled the exceptions taken to the referee taking account of the rents and profits realized by Brown, when his co-defendant, Hodge, had been charged with the amount of purchase money received of Brown, so that if Brown has to account for rents and profits, and Hodge for the purchase money paid by Brown, there will enure to the plaintiffs double returns from same land, to wit, the purchase money and interest thereon, and the rents and profits. The referee not having credited John N. Brown with the amount of money paid by him to Hodge, and interest thereon, there can be no basis for an accounting by Brown for rents and profits on such land, and no order for such has been made in the cause."

The referee made a second report under the order of Judge Witherspoon, which came

up with exceptions before his honor, Judge Fraser, who, after stating the history of the case up to that time, and the questions which in his judgment had been adjudicated in the many orders and decrees already pronounced in the case, gave a final decree, overruling

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the most important exception *of the defendant, in which he objected to the finding of the referee fixing the rental value of the premises at \$100 per annum, this being fixed as the rent of the dwelling-house on the plantation separate from the rents and profits of said plantation, and decreeing that the deed from the commissioner in equity to the defendant Hodge, and of defendant Hodge to Brown, were void, except for the purpose of protecting their rights under the decree; that the plaintiffs had the right to redeem on payment to the clerk of the court of the sum of \$401.01, with interest, and in case the plaintiffs should not make such payment, then that the land should be sold by the sheriff, the proceeds, after the payment of the expenses of sale, to be turned over to the clerk of the court, \$401.01 of which was to be held by him, as if paid in by the plaintiffs, and to be paid out as follows, to wit, \$303 as costs, \$60 as a fee to the defendants' attorneys, and the balance to the defendant Brown; all over the sum of \$401.01, of the proceeds of said sale to be paid to the plaintiffs and the guardians of the minors. The plaintiffs to pay their own costs and those of the clerk of the court, together with the costs of Hodge and Brown, already provided for. From this decree the defendants gave notice of intention to appeal, with exceptions.

The case is a complicated one, and its history is long and tedious. The main question involved, however, in our opinion, arises upon the first order pronounced in the case by his honor, Judge Pressley. This meets us at the threshold, and must be first disposed of. We do not mean to say that the other questions raised to the several subsequent orders are not important, but from the view which we take of the case, they cannot arise in its consideration here. In our opinion, the order of his honor, Judge Pressley, changing the case from an action at law to recover possession of the land, to an action in equity to redeem was erroneous, and, therefore, that all subsequent proceedings have been unwarranted, rendering it unnecessary to consider the questions involved in said proceedings, as they cannot be said to properly arise in the case.

The practice under the code is quite liberal as to amendments, in furtherance of justice, and this court is in full accord with this spirit of the code. But the code itself places

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a restriction to said *practice, which, it seems to us, has been disregarded in the order in question. Section 194 of the Code

provides: "That the court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out any name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the facts proved." This section is the authority for the courts in reference to amendments, and while it is quite extensive, yet it is not unlimited. It does not allow amendments which, in their effect, change substantially the claim or defence.

Now, has not the amendment in question substantially changed the claim of the plaintiffs? The original claim was to recover certain real estate in the possession of the defendant, presented in an action at law. The amendment has, in effect, dismissed this action, or rather has expunged this claim from the plaintiffs' complaint, and allowed him to write therein a new and a different cause of action, and subject to a new and a different jurisdiction. It may be that the action, as amended, was the proper one for the plaintiff, and the one which, under the facts, he should have instituted in the beginning. But having commenced his action at law, we think it was without authority to engraft upon this action a new and a different cause, like that below, and allowing it to proceed in the place and stead of the action which the defendants had been summoned to answer, and have tried. We know of no precedent for such an amendment. The order must be reversed.

Such being the judgment of the court, as already stated, we do not regard the other orders and decrees as before us, and we pronounce no opinion as to the questions arising thereon. These subsequent orders and decrees must, however, fall with the original order, not that they contain error (they may, or may not, be right), but because the case was not in condition for the adjudication found in said orders and decrees.

It is the judgment of this court, that the order of his honor, Judge Pressley, authorizing the amendment referred to above, be

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*reversed, and that all subsequent proceedings be set aside, and that the case be remanded.

24 S. C. 173

Ex parte MAURICE.

(November Term, 1885.)

[1. Reference ⇨ 18.]

An old cause having been restored to the docket on petition, it was error to refer the cause to a referee, one of the original par-

ties being dead, and other necessary parties not before the court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. § 34; Dec. Dig. ⚭18.]

[2. *Reference* ⚭56.]

An order of reference is a proceeding in the cause, upon which all parties in interest are entitled to be heard.

[Ed. Note.—Cited in *Sullivan v. Latimer*, 32 S. C. 281, 285, 10 S. E. 1071; *Quick v. Campbell*, 44 S. C. 390, 22 S. E. 479.

For other cases, see Reference, Cent. Dig. § 84; Dec. Dig. ⚭56.]

[3. *Pleading* ⚭278.]

New issues in a cause may be raised by amendment or supplemental complaint, as the case may be, but not by a petition.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. ⚭278.]

[This case is also cited in *Boulard v. Carpin*, 27 S. C. 240, 3 S. E. 219, as to facts.]

Before Kershaw, J., Williamsburg, October, 1884.

This was a petition by Ellen C. Maurice and others, in re George P. Nelson et al. v. James M. Nelson et al. The appeal was from the following order of reference:

A motion had been noticed for the present term, and duly served on Thomas M. Gilland, counsel for G. P. Nelson; John A. Kelley, attorney for J. H. Keels; M. J. Hirsch and J. Barrett Cohen, attorneys for John T. Nelson, seeking to obtain the order of the court, on behalf of the above named petitioners, for a reference of the cause of the purport of that hereinafter made. At the hearing the motion was opposed most earnestly upon various grounds, and after a very protracted discussion, involving questions of practice, the history of the cause, and the merits of the case, the decision was reserved for consideration by the court.

The only point made in the argument which has impressed me, after consideration, as, perhaps, furnishing a reason why the motion should not be granted, is that which urges that the proper parties are not all before the court. In view of the protracted character of this litigation, the complications which have already arisen, and are likely hereafter to arise, by reason of the death of parties and other contingencies, it appears to me most important that some progress should be made in the cause, and that is understood to be the object of the motion

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now made. The fiduciary character of the relations of some of the parties, and the danger of irreparable loss, perhaps, to innocent parties, beneficiaries of the trusts set up in their behalf, are also most cogent reasons why there should be no longer delay than that which is unavoidable. The order proposed makes provision for the calling in of new parties, if found necessary, and there are persons before the court who are interested on both sides, perhaps, of all the issues to be considered by the referee. The learn-

ed and able counsel who make the motion are evidently of the opinion that the order sought will speed the cause, and it will certainly not prejudice any party not before the court at this time, or not brought before it by the referee under the terms of the said order.

It is therefore, on motion of Messrs. Johnson & Johnson, and H. J. Haynsworth, attorneys for petitioners, and J. B. Howe and George M. Trenholm, attorneys for Ellen M. Nelson and others, ordered, that Joseph F. Rhame be appointed referee in the above stated cause; that the said G. P. Nelson and J. H. Keels do account before the said referee for all their acts and doings as trustees under the deed of Samuel Fluitt, referred to in the petition herein; that the said referee take the testimony on all the issues raised by the pleadings in the cause, including the petition and answers thereto, and report his conclusions on all issues of law and fact to this court, with leave to report any special matter; and the referee have full power to cause all persons to be made parties to the cause, whose presence may be necessary to a complete adjudication of all the questions involved therein.

From this order G. P. Nelson, J. H. Keels, and others appealed to this court upon the grounds stated in the opinion.

Messrs. Richard Dozier, T. M. Gilland, J. A. Kelley, and M. J. Hirsch, for appellants.

Messrs. H. J. Haynsworth and Johnson & Johnson, contra.

February 13, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. One Samuel *175

Fluitt, late of *the County of Williamsburg and State aforesaid, in 1852, executed a certain deed, a copy of which is found in the "Case," by which he gave considerable property, both real and personal, to his grandson, William R. Nelson, in trust, however, for his daughter, Martha E. Nelson, and for the support and maintenance of her children, "for and during her natural life," with limitations over to her children and grandchildren, if any. William R. Nelson, the trustee named in the deed, died, and his brother, George P. Nelson, a son of Martha E., was appointed in his stead. After this, the said George P. and his mother, Martha, filed a bill in the then Court of Equity against James M. Nelson, the adult children of Martha, and the children of William R., deceased, praying a sale of all the real estate conveyed in the deed, except a certain tract known as "Ox Swamp," of which they prayed partition; and an order was obtained from Judge J. T. Green to that effect, under which certain of the lands were sold by George P. Nelson, the trustee. This order provided for the pur-

chase of said lands by the children of Martha, if they desired to so purchase, who seemed to have been regarded as remaindermen in fee.

Sometime after this, to wit, in September, 1871, George P. Nelson filed an ex parte petition in the cause for leave to sell a portion of Ox Swamp, which was granted; and in October thereafter another order was obtained to sell other portions of Ox Swamp. And in 1878 he filed another petition, alleging that Martha E. Nelson, the cestui que trust, had died during the month of April of that year, that she had retained in her possession the bulk of the property mentioned in the deed which now should be sold, and he prayed for the sale of such property as remained unsold at the death of the said Martha. Upon this petition an order was obtained from his honor, Judge Fraser, at chambers, authorizing the sale upon certain terms. Pursuant to the last order, G. P. Nelson proceeded to sell said property on saleday in January, 1879. At this sale one John T. Nelson, a minor son of the said G. P. Nelson, bid off the dwelling house tract and plantation, and perhaps other lands, at inadequate prices, as alleged. Certain proceedings were then taken by some of the parties in interest, under which G. P. Nelson was restrained temporarily from executing

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titles to his son of the lands bid off by *him and also he was required to turn over all books, mortgages, moneys, and papers to the clerk of the court as substituted trustee. Various other proceedings, not necessary to be mentioned now, were taken, and in the meantime the original bill in equity had been dropped from the docket.

Under these circumstances, the petition below was filed, in which the petitioners claim that the grandchildren of Martha E., many of whom have never been before the court, are really the remaindermen in fee of the property instead of the children of the said Martha, who, they allege, are only life-tenants; that an accounting should be had of both the present and the former trustee; that a certain order to show cause should be enforced against G. P. Nelson, and that the sale of the plantation and adjoining property by G. P. Nelson to his minor son should be cancelled and declared fraudulent and void. Wherefore they prayed that all of the grandchildren of Martha E. be brought in as parties, and that the original bill be redocketed; that G. P. Nelson, late trustee, be required to file without further delay a complete account of his receipts, disbursements, accounts, and doings as trustee, &c.; that J. H. Keels, clerk, do account fully and completely for his receipts and disbursements to date, and that both trustees do also file accounts with each separate distributee; and further, that the sale made by G. P. Nelson to John T. Nelson be set aside, and that all

other sales made by him be scrutinized, and where improper, they be set aside, &c.

To this petition, G. P. Nelson, John T. Nelson, and J. H. Keels filed separate answers. After which, upon notice that a motion would be made before his honor, Judge Wallace, for leave to docket the original bill in equity, with the petition below, an order, of which the following is a copy, was obtained from his honor, to wit: "It appears that several years ago a bill was filed by G. P. Nelson and others against James M. Nelson, for the purpose of settling a trust estate in which the parties were interested. The purposes and objects of the bill need not be set out here, as it is a record of the court. It seems that all persons who had an interest in the subject-matter of the bill were not made parties, nor has there ever been a final settlement of the litigation, or a final decree in the case;

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the case, however, has been *dropped from the docket. This petition sets out the various matters in connection with the original subject of the bill, and the petitioners ask that the case be restored to the docket, as the matters covered by the original bill have not been settled. To grant this motion is a matter of course. The bill being restored to the docket, then an opportunity is offered to the parties to raise all such issues as they may desire, and are proper by amendment or otherwise, as they may be advised. It is, therefore, ordered, that the case of George P. Nelson and Martha E. Nelson against James M. Nelson be restored to the proper calendar of this court." From this order there was no appeal.

In October following, the petitioners gave notice to the attorneys of the defendants that a motion would be made in open court for the appointment of a referee, and commanding and requiring G. P. Nelson and J. H. Keels to account before said referee for all their acts as trustees under the deed of Samuel Fluit, referred to in the petition, and to take the testimony on all issues raised by the pleadings in the cause, including the petition and answers, * * * with leave to report any special matter, and with full power to call on all parties that may be necessary to a complete adjudication of all the questions raised in said petition. This motion was heard by his honor, Judge Kershaw, who, after hearing protracted discussion for and against, granted the order moved, appointing Joseph F. Rhame referee, and requiring the said G. P. Nelson and J. H. Keels to account as trustees under the deed of Samuel Fluit, with power on the part of the referee to take the testimony on all issues raised by the pleadings in the cause, including the petition and answers thereto, and to report his conclusions of law and fact, with any special matter; and, further, to cause all persons to be made parties to the cause whose presence

may be necessary to a complete determination of all the questions involved.

From this order the defendants have appealed. The appeal raises the following questions: 1st. Was it not error to grant an order of reference in face of the fact, that all parties necessary in the case were not before the court, one of the plaintiffs to the original bill having been dead for years, and other parties mentioned in the petition as in-

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terested not having been called in, and *no amendment having been made. 2d. Was it not error to disregard the order of Judge Wallace, which was unappealed from? 3d. Was not the whole proceeding improperly brought, as contrary to the rules of law and practice in such cases?

It appears upon the proceedings below, that one of the two plaintiffs (to wit, Martha E. Nelson), in the original bill, had been dead for several years before the filing of the petition herein. It also appears in said petition that some of the grandchildren of the said Martha had never been made parties to said bill, or to any of the proceedings since. Such being the fact, we do not see how the case could be properly referred to a referee. In the absence of these parties, it was not ripe for reference. An order of reference is a proceeding in the cause, upon which all parties in interest are entitled to be heard, and it is, therefore, premature to grant such an order before all the parties necessary to a proper adjudication of the cause are before the court. We are not fully advised as to the precise interests of Martha E. Nelson, deceased, but she was a cestui que trust under the deed, and was a necessary, as well as an actual, party to the original bill, and her representatives should have been brought in, as prescribed by the code, in case of the death of a party, so as to insure the further progress of the cause. It is admitted, too, that certain of the grandchildren of Martha E. are beneficiaries under the deed, many of whom, it is stated in the petition, have not been made parties. This, we think, was necessary before the case could be referred.

The more serious objection, however, to the order appealed from is that it incorporates and refers to the referee various matters, which have occurred since the filing of the original bill, in advance of, and without, any amendment to said bill. It not only refers the original bill, with the issues raised therein, but it also refers the petition and the answers thereto, with the issues therein, with leave to the referee to report his conclusions of law and fact on all the issues raised. The code provides for raising new issues in a cause either by amendment or by supplemental complaint (*McCaslan v. Latimer*, 17 S. C., 123), as the facts may warrant, but we know of no authority by which this can be done by a petition, like this below.

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*The case seems to have been long delayed, and no doubt it is important that it should be brought to a close, and as the order in question was passed to the end that progress should be made, so that a final adjudication should be had at an early day, we would be glad to affirm it; but not finding any legal authority for such an order in the rules prescribing the practice in such cases, it must be reversed.

It is the judgment of this court, that the order of the Circuit Court be reversed, and that the case be remanded, so that the parties may take such orders for the perfecting of their pleading as they may be advised.

24 S. C. 179

SALINAS v. PEARSALL

(November Term, 1885.)

[1. *Trusts* ⇨102.]

Where a trustee of J. and her children purchased land with the proceeds, in part at least, of trust property, and took deed to himself as trustee, he holds the land so purchased under the terms and limitations of the original trust deed.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 153; Dec. Dig. ⇨102.]

[2. *Trusts* ⇨203.]

And this trustee having sold a part of this land to the defendant, and taken in part payment a bond and mortgage payable to himself as trustee for J., he could not assign these papers to secure advances to be made to J. and her husband.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 273-276; Dec. Dig. ⇨203.]

[3. *Trusts* ⇨207.]

Power to the trustee to sell for the purpose of reinvestment, when requested by J., did not authorize such assignment at J.'s request; for, while ordinarily a purchaser is not required to see to the application of the purchase money, he is not protected where he knows of the breach of trust, or the improper application is for his own benefit.

[Ed. Note.—Cited in *Rabb v. Flenniken*, 29 S. C. 285, 7 S. E. 597; *Allen v. Ruddell*, 51 S. C. 374, 29 S. E. 198; *Manning v. Screven*, 56 S. C. 78, 86, 33 S. E. 22.

For other cases, see *Trusts*, Cent. Dig. § 294; Dec. Dig. ⇨207.]

[4. *Trusts* ⇨207.]

In action of foreclosure instituted by the assignee, the mortgagor may defeat the action by showing that there has not been a legal assignment.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 294; Dec. Dig. ⇨207.]

5. Complaint dismissed without prejudice to any proper claim in equity against the income of the trust property.

[This case is also cited in *Rabb v. Flenniken*, 29 S. C. 284, 7 S. E. 597, as to facts.]

Before Kershaw, J., Darlington, March, 1885.

This was an action by Caroline B. Salinas, as executrix, and Richard M. Butler, as ex-

ecutor, of A. J. Salinas, deceased, against J. H. Pearsall, for the foreclosure of a mort-

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gage given by defen*dant to Edward F. Bryan, as trustee, and assigned by said trustee to A. J. Salinas. The action was commenced February 2, 1884. The defendant denied the validity of the assignment.

In 1870 one Charles E. Jarrott conveyed a tract of land in Marion County, called the "Cooper tract," and some personal property to Edwin F. Bryan, of Savannah, Ga., in trust to stand seized and possessed of this property "to the sole and separate use and behoof of my said wife, Emma E. Jarrott, for and during the term of her natural life, and to pay over to her on her separate receipts in writing all the incomes, rents, profits, and accretions of the said property, real and personal, and the interests on choses in action which he may receive, or be possessed of, and from and after the death of my said wife, then to the use of such of the children of our marriage, if more than one, share and share alike, the child or children of any who may then be dead to be entitled to the share or shares thereof to which the parent, or parents, would have been entitled if living; the said estate to be absolute to the said children or their representatives; and also to have and to hold the said property and estate heretofore described, for the uses and purposes above set forth, and for the following uses and trusts, to wit: That upon the written request of my said wife, Emma E. Jarrott, he, the said Bryan, may sell and convey any portion of the said estate and property described above, and to reinvest the proceeds of said sale in such property as he may deem advisable, with the like written consent of my said wife, the said reinvestments or proceeds of sales of any of said property and estate to be subject to the same trusts, limitations, and uses as are herein declared and provided in respect to the property and estate hereinabove conveyed, described, and set forth."

In February, 1873, Edwin F. Bryan purchased at a judicial sale a tract of land in Darlington County, part of the Cusack tract, containing 420 acres, and took deed in the name of "E. F. Bryan, trustee," without further indication of the trust. In June, 1873, he conveyed 57 acres of this land to the defendant, and the defendant executed his bond and mortgage to secure a balance of the purchase money. The bond was payable to "Edwin F. Bryan, of Savannah, Ga., trustee for his sister, Mrs. Emma E. Jarrott"; and the mortgage recited the bond to "Edwin F.

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Bryan, *of Savannah, Ga., trustee for Mrs. Emma E. Jarrott," and conveyed the property to "Edwin F. Bryan, trustee."

In March, 1874, at the written request of Mrs. Jarrott, in a letter to Bryan, "as trustee," he assigned this bond and mortgage to

A. J. Salinas, to the amount of \$700, to secure "advances to be made by A. J. Salinas, cotton factor of Charleston, S. C., to C. E. Jarrott and Emma E. Jarrott"; and in March, 1875, upon the request by letter of Charles E. Jarrott, "Edwin F. Bryan, trustee," assigned this bond to said Salinas. These advances, Bryan testified, were for the purpose of enabling said Jarrotts to pursue jointly their planting interests.

On August 10, 1883, Edwin F. Bryan executed a declaration of trust, in which, after reciting his purchase of the 420 acres known as part of the Cusack tract, and his payment therefor "out of trust funds derived from a portion of the proceeds of the sale of the Cooper tract in Marion County," and the rents and profits of the said land, and money received from the insurance company for houses destroyed on the said Cusack place, and a sale of a portion of the said Cusack place, he declared that he held the land so purchased at the judicial sale for "following uses and trusts"—stating the same in the same words as are found above in the extract from the original trust deed.

Salinas having died, his executors instituted this action to foreclose the Pearsall mortgage. It was admitted that children of Chas. E. and Emma J. Jarrott were living. After stating the facts, the Circuit decree proceeded as follows:

Under these circumstances, I am forced to the conclusion that the plaintiffs cannot recover in this action. The bond and mortgage were unquestionably subject to the same trusts as the property originally conveyed, and the assignee, if he had notice of the trusts, or of facts sufficient to put him on the inquiry, could take no beneficial interest by the assignment. The legal interest in the bond and mortgage, no doubt, would pass, but it remained subject to the trusts. The cestui que trust is not before the court, and the trustee and the remaindermen, if there be any, are not represented or made parties. The object of this action is to alienate and dispose of a portion of the trust property.

It appears to me that a bare statement of

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these facts will be *sufficient to dispose of the case if the plaintiff's testator had notice of the trust. Of that there can be no doubt. The bond shows on its face that it was given to Edwin F. Bryan, "trustee, for his sister, Mrs. Emma E. Jarrott." The purchaser of such a bond was bound to inquire into the terms of the trust, and if he did not, the trust remains, and he must take subject to its terms, be they what they may. *Simons v. Bank*, 5 Rich. Eq., 272; *Webb v. Graniteville Man. Co.*, 11 S. C., 407 [32 Am. Rep. 479]; *Magwood v. Bank*, 5 S. C., 390. The assignment was a breach of trust, known to Salinas, and, therefore, he cannot profit by it. If he acquired the legal title, it was by a wrong, which, though participated in by the cestui

que trust, will not be sanctioned or assisted by this court.

It is not improbable that the plaintiffs have an equitable demand against the Jarrotts arising out of this transaction which might be enforced against the income of the trust property, upon proper proceedings, with all the proper parties before the court, but they cannot have the relief here demanded.

It is ordered and adjudged, that the complaint herein be dismissed, and that the plaintiffs pay the costs of this action, to be adjusted by the clerk.

From this decree the plaintiffs appealed.

Mr. Geo. W. Dargan, for appellants, contended that until the declaration of trust in 1883, there was no written statement of the source whence Bryan derived the money to pay for the Cusack place; that the rents and profits then declared to have been a part of the purchase money, were Mrs. Jarrott's own, under the terms of the original trust deed, and as there is nothing to show that the Cusack place was any part of the trust property, a sale of a portion thereof, and the insurance money, were not subject to the trust. The reinvestment of the proceeds of sale of the Cooper tract would not subject the purchase to the trust, unless the reinvestment was made upon the written request of Mrs. Jarrott—of which there is no evidence. Salinas had no notice, and could have acquired none, that the tract in Darlington was subject to the same trusts that had been impressed upon the land in Marion. On the contrary, the

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deed to Bryan for the Cusack tract, and the bond and mortgage only disclosed a trustee and one adult cestui que trust, and the assignment was by one for the use and with the consent of the other. *Barrett v. Cochran*, 11 S. C., 35. But if trust property, the defendant cannot defeat this action. *Mayer v. Mordecai*, 1 S. C., 398. Mrs. Jarrott cannot complain; she is entitled to the interest, and for that, at least, foreclosure should be decreed. *Matthews v. Heyward*, 2 S. C., 239. The declaration of trust was executed after the assignments. *Haynsworth v. Bischoff*, 6 S. C., 166.

Messrs. Boyd, Nettles & Brunson, contra.

February 16, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. [Omitting the statement of facts.] The plaintiffs have appealed upon several exceptions. These exceptions, however, raise but three questions. 1st. That his honor erred in holding the bond and mortgage to be trust property. 2d. In holding that the plaintiffs' testator became assignee with knowledge of the trust, or at least of facts sufficient to put him upon inquiry, which if properly conducted, would have resulted in the discovery of the trust. 3d. That he erred in holding that the defendant could defeat the action on these grounds.

1. Did Bryan hold these papers as trustee of Mrs. Jarrott, and under the limitations of the original trust deed? There can be no doubt that, as between himself and the cestui que trusts, he did so hold them. They were the result of a sale of a tract of land which he had purchased as the trustee of these parties, and paid for in part, at least, by the proceeds of the sale of a portion of the original trust property. This land was conveyed to him as trustee. True, it is not stated in the deed who were the cestui que trusts, but there can be no doubt on this subject. If the contest here was between him and the cestui que trusts, could any court hesitate to enforce the trust under the facts as stated? Besides this, upon the face both of the bond and mortgage it appears that they were each executed to him as trustee of Mrs. Jarrott.

11. Now, the important question arises, Did Salinas have knowledge of this fact, or knowledge of facts sufficient to put him upon such inquiry as would have led to a discovery

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of the trust impressed upon these papers? If so, he could not hold them discharged of the trust, unless they were properly assigned under the power of the original deed—of which hereafter. His honor, the Circuit Judge, found as matter of fact, that Salinas did have the knowledge above. Is that finding contrary to the manifest weight of the testimony? If not, this court, under the authority of many decisions, must let it stand. We do not see such manifest weight of testimony against this finding of the Circuit Judge as would warrant us in overruling it. On the contrary, there is evidence to support it. The very papers assigned to him advertised him of the fact on their face, that they were connected with a trust, and that Bryan held them, not as his own property, but as a trustee for Mrs. Jarrott. This, it seems to us, was enough in itself to make him hesitate, at least to make him inquire into the nature and character of this trust. It does not appear that he had done this, nor that had he looked into the records he would have failed to ascertain the facts in reference thereto. We think that Mr. Salinas must have known that he was dealing with a trustee, and with reference to trust property.

It may be urged, however, that he thought this trustee had the right to sell and assign, when done with the consent of the cestui que trust, and he knew this consent had been given. True, the trustee had power to sell the trust estate or any portion thereof, with the written consent of Mrs. Jarrott, for reinvestment. Was the assignment here for reinvestment? Certainly not. It was to pay a debt contracted by Mrs. Jarrott and her husband for supplies, and its effect was not to keep the trust estate alive, but to destroy it, and this must have been apparent to Salinas. A purchaser is not ordinarily required to see to the application of the purchase money

where the vendor has power to sell, but where he knows, or ought to know, that a breach of trust is being committed, he cannot shield himself. *Simons v. Bank*, 5 Rich. Eq., 272; *Webb v. Graniteville Manf. Co.*, 11 S. C. 407; *Mayer v. Mordecai*, 1 S. C., 398. Especially where the breach of trust and the improper application of the funds is for his benefit.

III. Lastly, can the defendant interpose the objections above, and thereby defeat the action? Has there been a legal assignment? If not, the plaintiffs must fail to recover.

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That there has *not, is the defence, and we think the defence has been sustained. We say this, however, without prejudice to any equitable claim which the plaintiffs may have, arising out of the transaction, against the income of the trust property, upon proper proceedings, with all parties before the court, as suggested by the Circuit Judge.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 185

STATE v. BELTON.

(November Term, 1885.)

[1. *Witnesses* ¶45.]

A boy of twelve years who could repeat the Lord's prayer, and had heard that the bad man caught those who lied, cursed &c., but had never heard of a God, or the devil, or of heaven or hell, or of the Bible, and had never heard, and had no idea, what became of the good or of the bad after death, is not a competent witness. *Mr. Justice McGowan*, dissenting.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 106; Dec. Dig. ¶45.]

[2. *Homicide* ¶203.]

Declarations made by the deceased a few hours before his death, charging the prisoner with the infliction of the mortal wound, are admissible in evidence, his crying out at the time, "O Lord, I cannot stay here much longer," indicating that he had lost all hope of recovery, and looked for an immediate dissolution.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. ¶203.]

[3. *Homicide* ¶214.]

A dying declaration of the deceased, that the accused had passed him on the afternoon of the homicide on the road, was admissible in evidence.

[Ed. Note.—Cited in *State v. Petsch*, 43 S. C. 148, 20 S. E. 992.

For other cases, see *Homicide*, Cent. Dig. § 450; Dec. Dig. ¶214.]

[4. *Homicide* ¶167.]

A threat of the accused against "the Deans," without excepting any of the name, was admissible in evidence against him, the deceased being of that name and family, notwithstanding the proof showed the prisoner's quarrel had been wholly with other members of the family.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 335; Dec. Dig. ¶167.]

[This case is also cited in *State v. Stuckey*, 56 S. C. 588, 35 S. E. 263, without specific application.]

Before Hudson, J., Kershaw, September, 1885.

The opinion sufficiently states the case.

Mr. W. D. Trantham, for appellant, cited *Best Evid.*, 62, 228; 1 *Strob.*, 160; 1 *Green. Evid.*, 368-9; 1 *Sm. Lead. Cas.*, 196; 9 *Smedes & M.*, 120; 55 *Cal.*, 72; 24 *Id.*, 24; 9 *Car. & P.*, 418; 11 *Cox Cr. Cas.*, 250; 3

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Car. & P., 631; 2 *Parker Cr. Rep.*, 236; *Whart. Hom.*, 750; *Whart. Cr. Evid.*, 264, 278; 2 *Jones*, 360; 65 *Mo.*, 325.

Mr. J. D. Kennedy, contra.

February 16, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, David Belton, was convicted of the murder of Aaron Dean at the September term, 1885, of the Court of General Sessions for Kershaw County, his honor, Judge Hudson, presiding. From the judgment, he has appealed upon four exceptions, raising questions as to the competency and admissibility of certain testimony introduced by the prosecution. The first is as to the competency of a witness, Jim Miller. This witness was a boy about twelve years of age. He seems to have been a boy of, at least, ordinary intelligence, and although he had learned from his mother, since dead, the Lord's prayer, when he was five years old, and, according to his statement, had repeated it every day since, yet he said he had never heard of a God or the devil, or of heaven or hell, or of the Bible, and that "he had never heard, and had no idea, what became of the good or of the bad after death." He said, however, that he had heard it said that the bad man caught those who lied, cursed, &c., and upon being examined, he repeated the Lord's prayer. The presiding judge, in his report of the case as to this matter, states as follows: "As for the colored youth, he manifested an unusual sense of the efficacy of prayer, and the future torments by the bad man awaiting those who speak falsely, though his answers as to a God, heaven, &c., were singular. The court gave him instructions as to the meaning and obligation of an oath, and then permitted him to be sworn." His admission is assigned as error in the first exception.

The declarations of the deceased, made a short time before his death, as to who fired the fatal shot, and stating that the defendant had passed them on the road some three miles from the place where he was shot, were admitted as dying declarations. This is excepted to in the second and third exceptions (1st), because the evidence did not show that the deceased had given up all hope of life, and (2d), as to the statement of

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his having been passed by *the accused on

the road, that this could not be allowed under the law of dying declarations.

The fourth exception alleges error, in that one Everett Kirkland was permitted to testify that he had heard the defendant say "that if those Deans did not stay off his lands and let him alone, he would put a load of shot into some of them; that he had carried them before a trial justice, had posted his land, &c.," the appellant claiming this to be error, because that while it was true that the father and brother of the deceased had been in difficulties with the accused on account of trespass upon his land, yet that the deceased was in no way involved, he being a young man, absent from the place most of the time, and on friendly terms with the accused.

Now, let us recur to the first exception. A leading case upon the question of law raised therein in England is the case of *Onichund v. Barker*, reported in 1 Wille's, 538, and more fully in 1 Atk., 21, and found in 1 Smith Lead. Cas. 195. In this case, upon a full and most interesting discussion of the whole question of the competency of a witness as affected by his religious creed, it was made to rest upon the question of his belief in the existence of a God, and rewards and punishments by him, either in this world or in the future state, "the court stating that one who believes a future state, and that he shall be punished in the next world as well as in this if he does not swear the truth, should be entitled to the greater credit, as he is plainly under the strongest obligation." In most of the States of the Union, it has been held that the competency of a witness is not affected by a disbelief in a future state, and that his testimony should be admitted if he believes in the existence of a God and in divine punishment of crime. See *Hunscom v. Hunscom*, 15 Mass., 184; *Brock v. Milligan*, 10 Ohio, 121; *Bloeker v. Burness*, 2 Ala., 354; *United States v. Kennedy*, 3 McLean, 175 [Fed. Cas. No. 15,524]; *Bennett v. State*, 1 Swan. [Tenn.], 411. In our own State, the case of *Jones v. Harris*, 1 Strob., 160, lays down very much the same doctrine, holding that a belief in God and his providence is sufficient to establish the competency of a witness, objected to on account of defective religious beliefs.

Now, let the competency of the witness,

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Jas. Miller, be tested *by the rule of *Jones v. Harris*, supra, which is the law of South Carolina on this subject. Did he believe in a God and his providence? He stated to the court that he had never heard of a God, or of a heaven, or of a hell, or of a devil. How, then, could he have a belief in the existence and providence of a Great Being, of whom, up to the time that he was offered as a witness, he had never heard even? Such a belief, under such circumstances, seems impossible. In the absence of such belief,

he was incompetent under the authorities cited. The fact that he had learned the Lord's prayer, had repeated it daily for years, repeated it in court, and stated that he had heard it said that the bad man caught those who lied and cursed, &c., did not furnish, as it seems to us, sufficient proof of a belief on his part of the existence and providence of a Being of whom, up to that moment, he had never heard.

Next, as to the dying declarations. And, first, as to so much thereof as relates to the actual shooting of the deceased by the accused. The rule on the subject of dying declarations is so succinctly and clearly laid down by Mr. Greenleaf, that it is not necessary to do more than to quote from him. In section 138 he says: "It is the impression of almost immediate dissolution, and not the rapid succession of death in point of fact, that renders the testimony admissible. Therefore, where it appears that the deceased, at the time of the declaration, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an hour afterwards, the declaration is inadmissible. On the other hand, a belief that he will not recover is not in itself sufficient, unless there be also the prospect of almost immediate dissolution."

Did the deceased have any, the least, expectation or hope of recovery at the time he made the declaration objected to? He had stated to his father, about 8 o'clock in the morning of the day on which he died, that he could not stand it much longer, send for the doctor quick, his exact language being: "Father, I can't stand it much longer; send for the doctor quick." If the declaration objected to had been made at this time, there would be much force in the argument of appellant's counsel, that he had not lost hope; else, why send for the doctor? But

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the declaration was not made then; it was made some two hours later, and after the doctor had arrived and probed the wounds and gone out. It was then about 10 a. m. that he was heard by Pace and Watts at separate moments to say, "O Lord, I can't stay here much longer," or "stand it much longer." These expressions, made without qualification or call for help from any source, seem to indicate an impression of hopeless impending death, with the prospect of immediate dissolution, which is in accordance with the rule laid down by Mr. Greenleaf above. The deceased died in the afternoon of the day during which these declarations were made. We think they were competent.

Next, as to the declaration of the deceased, that the accused had passed him upon the road. "When the death of the deceased is the subject of the charges, and the circumstances of the death are the subject of the

dying declarations," they are admissible, says Mr. Greenleaf, section 156. In the case of Terrell, reported in 12 Rich., 321, dying declarations extending to the previous conduct of the prisoner were held admissible. Under the authority of this case, we cannot say that the judge erred in admitting the testimony in question. They were made at the same time of the other declarations above, which we have held were competent as dying declarations; and although they do not relate to the facts occurring immediately at the shooting, yet they state a circumstance pointing with more or less force to the prisoner as the party who committed the deed. This was regarded as sufficient in the Terrell case to render them competent. In that case Judge O'Neill said: "The next inquiry is whether the circumstances stated by McCullam are properly in evidence. They are the circumstances which point out the prisoner who prepared the poison, and who made the party preparing the instrument of poisoning, the two Grahams and himself." The testimony falls within the rule. "When the death of the deceased is the subject of the charges, and the circumstances of the death are the subject of the dying declarations."

Lastly, as to the testimony of Kirkland, stating certain threats made by the accused against the Deans. The deceased was one of the family of the Deans. The accused did not limit his threats to any special member of that family, but said if those Deans did

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*not stay off his place and let him alone, he would put a load of shot into some of them, &c. The threats, in their terms, being general as to the Deans, and the deceased being one of the Deans, we cannot say it was error to admit them.

It is the judgment of this court, that the judgment below be reversed, on the ground of error in holding that the youth, James Miller, was a competent witness, and that the case be remanded for a new trial.

Mr. Justice McIVER concurred.

Mr. Justice McGOWAN. I incline to think that the colored lad, Jim Miller, was a competent witness under the ruling in *Jones v. Harris*. He was not educated in book, but he had at least ordinary intelligence, and was twelve years of age. Although he said he had never heard of "God," yet he could repeat the Lord's prayer, and had "a strong sense of the future torments by the bad man, awaiting them who speak falsely." Was not this really a belief in Providence and rewards and punishments? The tendency in these latter days is "to enlarge the circle of competency by directing objections to the credibility of witnesses."

24 S. C. 190

STATE v. MAYES.

(November Term, 1885.)

[1. *Criminal Law* ⚡219.]

After voluntary appearance and trial before a trial justice, the defendant cannot object that the warrant was not signed by the officer.

[Ed. Note.—Cited in *Williams v. Garvin*, 51 S. C. 400, 29 S. E. 1.

For other cases, see *Criminal Law*, Cent. Dig. § 454; Dec. Dig. ⚡219.]

[2. *Criminal Law* ⚡252.]

The affidavit which is the foundation of the whole proceeding in a trial justice's court (Gen. Stat., § 830), is insufficient where it fails to set forth plainly and substantially whether the offence charged was a trespass on real estate (which is beyond the jurisdiction of a trial justice, *Ibid.*, § 2501), or an entry upon the lands of another after notice forbidding the same. *Ibid.*, § 2507.

[Ed. Note.—Cited in *State v. Hallback*, 40 S. C. 299, 306, 18 S. E. 919; *City of Florence v. Berry*, 61 S. C. 237, 241, 39 S. E. 389; *State v. Holcomb*, 63 S. C. 24, 40 S. E. 1017.

For other cases, see *Criminal Law*, Cent. Dig. § 528; Dec. Dig. ⚡252.]

[3. *Jury* ⚡25.]

The demand for a jury in a trial justice's court, made by defendant after the State has closed its case, comes too late.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. § 163½; Dec. Dig. ⚡25.]

[4. *Witnesses* ⚡263.]

It was error in a trial justice to refuse to correct the testimony of the prosecuting witness on an essential point, when the witness testified that he had made a mistake.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 901; Dec. Dig. ⚡263.]

[5. *Criminal Law* ⚡396.]

It was error to refuse to permit witnesses

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for the defence to testify to *the state of feeling between the prosecutor and the landlord of the defendant, and then to receive such testimony from the State in reply.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 861, 862; Dec. Dig. ⚡396.]

[6. *Witnesses* ⚡388.]

Witness must be notified of time, place, and person, when it is intended to prove inconsistent statements by him, but it does not appear that this rule was violated in this case.

[Ed. Note.—Cited in *State v. Kelley*, 46 S. C. 65, 24 S. E. 60.

For other cases, see *Witnesses*, Cent. Dig. § 1242; Dec. Dig. ⚡388.]

[7. *Criminal Law* ⚡258.]

The failure of the trial justice to endorse upon the information his finding of guilty, was a mere irregularity, which cannot avail the defendant on appeal.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 555; Dec. Dig. ⚡258.]

[8. *Trespass* ⚡81.]

A party put into possession of land by the owner, but forbidden to enter by one claiming to be a lessee for two years under a verbal lease, cannot be convicted of misdemeanor in so entering, under section 2507 of the General Statutes, even if such parol lease might

be sustained in a court of equity under the principle of part performance.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 171; Dec. Dig. ⚡81.]

[This case is also cited in *State v. Green*, 35 S. C. 268, 14 S. E. 619, without specific application.]

Before Wallace, J., Spartanburg, June, 1885.

The opinion states the case.

Messrs. W. M. Foster and J. S. R. Thomson, for appellant.

Messrs. Duncan, Solicitor, Bobo & Carlisle, and S. T. McCravy, contra.

February 18, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This was a prosecution originally commenced in a trial justice's court, but exactly what was the offence charged is one of the questions in the case. Indeed, the whole proceeding in the trial justice's court seems to have been attended with a series of irregularities, omissions, and uncertainties, unusual even in that court. The affidavit upon which the whole proceeding was based bears date the 28th of March, 1885, and charges "that on or about the last of March, 1885, one Calvin Mays did commit a trespass after notice upon the real estate under the control of deponent," one A. E. McCravy. The warrant issued thereon requires the arrest of the defendant to answer to a charge that at a time not specified, the same being left blank, he "did commit a trespass after notice," and the warrant is not signed by the trial justice. There is no endorsement on the papers of any finding by the trial justice as to whether defendant was guilty or not guilty; the only endorsement

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being the sentence, *signed by the trial justice, that the defendant pay a fine of ten dollars, or go to jail for fifteen days.

At the trial, and after the examination of the first witness on the part of the State, and after the State had closed its case, the defendant, by his counsel, demanded a jury, which was refused. After the witness for the State, the prosecutor, McCravy, had testified that defendant had trespassed on land under his control after he had given him notice not to trespass, that witness was recalled, when he said that "he sent written notice to defendant by my son. Never saw son give notice to defendant," and counsel for defendant desired that the testimony of this witness be corrected accordingly, which the trial justice refused to do, because, as he says in his report, "I was satisfied I had taken it down correctly and refused to change it." The testimony tended to show that the prosecutor, McCravy, had rented some land from one Wm. Posey, with the understanding that he was to clear some of the land and to have the use of the land for

two years, 1884 and 1885, but there was no contract in writing—it was simply verbal. Some dispute having arisen between Posey and McCravy, the former gave the latter notice, in the fall of 1884, to leave the premises, and early in the year 1885 Posey put other tenants on the land, amongst whom was the defendant. McCravy, however, claimed the right to use the land for the year 1885 under his verbal contract, and, as he says, remained in possession, having cleared some of the land according to contract.

At the trial, two witnesses on the part of the defendant were not allowed to testify as to the state of feeling between Posey and McCravy, while a witness on the part of the State, in reply, seems to have been allowed to testify on that subject. Witnesses were also allowed to testify as to what Posey had said on other occasions in reference to his trouble with McCravy, although it does not appear that the proper foundation was laid when Posey was on the stand by calling his attention to the time and place, when and where, and the person to whom, such declarations were made.

The defendant appealed from the sentence to the Court of General Sessions, upon numerous grounds set out in the "Case." Judge Wallace, who heard the appeal, rendered judgment, dismissing the appeal and affirm-

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ing the sentence of the trial justice, *and from his judgment defendant appeals to this court upon twenty-two grounds, set out in the "Case." It would be impracticable and, in our judgment, altogether unnecessary to consider these numerous grounds in detail. We shall, therefore, confine our attention to those points which, in our judgment, really arise in the case.

The Circuit Judge, ignoring many of the grounds of appeal from the judgment of the trial justice, bases his decision upon the fact that he was satisfied that, under the contract between Posey and McCravy, the latter was entitled to hold the land for the two years of 1884 and 1885, which contract though void under the statute of frauds at the time it was made, yet McCravy having performed his part of the contract had the right to demand that Posey should perform his part, and as he was satisfied that Mays had entered upon the land after notice from McCravy not to do so, the finding of the trial justice was right. Assuming, however, that the Circuit Judge, though not noticing specifically many of the grounds of appeal upon which the case was heard before him, has, by his judgment, practically overruled them all, it becomes necessary for us to consider whether he has erred in so doing.

As to the failure of the trial justice to sign the warrant, we think there is nothing in that, under the circumstances of the case. It certainly was a grave omission on the

part of the trial justice, and if it had become necessary to have the defendant arrested, might have led to very serious consequences. But it appears from the report of the trial justice that the defendant voluntarily appeared and submitted himself to the jurisdiction of that court, without any objection to the warrant until after the trial.

The objection to the affidavit, which, according to section 830 of the General Statutes, seems to be the foundation of the whole proceeding, is of a more serious character. The case in the trial justice's court, as well as in the Court of Sessions, seems to have been treated as a prosecution under section 2507 of the General Statutes, which reads as follows: "Every entry on the enclosed or unenclosed land of another, after notice from the owner or tenant prohibiting the same, shall be deemed a misdemeanor." Now, the rule is well settled that in indictments under

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a statute the indictment must follow substantially the words of the statute. In other words, the defendant must be charged with having done the thing which the statute declares shall be an offence against the law. It is true that the same strictness is not required in prosecutions before a trial justice, as in indictments in the Court of Sessions; and all that is required in the trial justice's court is, that the information under oath shall plainly and substantially set forth the offence charged.

Now, under section 2501 of the General Statutes it is declared that "Whoever shall wilfully, unlawfully, and maliciously cut, mutilate, deface, or otherwise injure any tree, house, outhouse, fence, or fixture of another, or commit any other trespass upon real property in the possession of another, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined and imprisoned at the discretion of the judge before whom the case shall be tried." Now, to say the very least of it, the affidavit in this case leaves it uncertain as to which of these sections the defendant is charged with having violated. Indeed, it points more clearly to section 2501 than to section 2507, for the charge in the affidavit is that the defendant "did commit a trespass after notice upon the real estate under the control of deponent." There is no charge that he entered upon land of another after notice from the owner or tenant prohibiting the same, which would bring it under section 2507. If, therefore, as we have seen, the charge more properly brings the prosecution under section 2501, then the trial justice had no jurisdiction, for the punishment is fine and imprisonment at the discretion of the judge before whom the case is tried; whereas under section 2507 he would have jurisdiction, for there, by the act of 1883 (18 Stat., 432) amending this section, the fine cannot exceed one hundred dollars, and the imprisonment cannot exceed thirty

days, the limits of a trial justice's jurisdiction. We cannot say, therefore, that the offence for which the defendant has been tried and convicted was plainly and substantially set forth in the information.

As to the demand for a trial by jury, we think it came too late. The defendant was unquestionably entitled to a jury if he had demanded one before the trial commenced; but having failed to avail himself of this

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privilege at the proper time, there was no error in refusing his demand after the trial had commenced and after the State had closed its case.

We think, however, that there was error in refusing to correct the testimony of the prosecuting witness, when it appeared from his own testimony, after he was recalled, that he had made a mistake in so essential a matter as giving notice to the defendant not to trespass upon the land.

So, too, we think there was error in refusing to allow the witnesses for the defence to testify as to the state of feeling between Posey and McCravy and at the same time allowing a witness for the State to testify on that subject. It may have been wrong to allow testimony on this point from either side, but to refuse to allow it on one side and then to receive it from the other was certainly erroneous.

The rule as to contradicting or discrediting a witness by showing that he has made inconsistent statements—that the witness to be thus discredited must be notified of time, place, and person—is well settled; but whether this rule was violated in this case does not very clearly appear from the testimony as presented to us.

The failure of the trial justice to endorse upon the information his finding of guilty was a mere irregularity, which we do not think can avail the defendant. In his report, he states that he found the defendant guilty and imposed the sentence which is endorsed upon the papers.

It may be that the testimony in the case was sufficient to show such part performance of the verbal contract for a lease for two years as would entitle McCravy to demand from Posey, in a court of equity specific performance (though as to that there may be two opinions), but we scarcely think that was a question which could be tried in a criminal proceeding. Section 2507 of the General Statutes makes it a misdemeanor for one to enter upon land after notice from the owner or tenant prohibiting the same. Now, it is quite clear that McCravy was not the owner of the land, and whether he was the tenant or not depended upon an unadjudicated equity which he might or might not be able to establish before another tribunal having jurisdiction of such matters. Section 1812 of the General statutes declares explicitly

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that "No parol lease shall give a tenant a right of possession for a longer term than twelve months from the time of entering on the premises," &c. Now, whether in the face of this positive statute, originally enacted in 1817, a party could enforce the specific performance of a verbal agreement for a lease of a longer period than twelve months, upon the ground of part performance, is a question which it is not necessary now to determine; but certainly until the alleged tenant has established, in the proper forum, his rights as such, he cannot enforce a criminal statute designed only for the protection of owners or tenants of land. The right to specific performance of a contract for the sale of lands is not an absolute right, but one resting in the discretion of the court to which the application is addressed, and until such court has established the right, we do not see how it can be recognized before another tribunal, especially one invested with criminal jurisdiction only.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court with instructions to order a new trial in a trial justice's court.

24 S. C. 196

MYERS v. WHITEHEART.

MASSMAN BROS. & CO. v. SAME.

(November Term, 1885.)

[1. Attachment ⇨100.]

To entitle a party to an attachment upon the ground that defendant had done certain acts with a fraudulent intent, the affidavit must disclose the sources of information, or the facts upon which such a belief is founded.

[Ed. Note.—Cited in *Roddey v. Erwin*, 31 S. C. 46, 9 S. E. 729; *Wando Phosphate Co. v. Rosenberg*, 31 S. C. 307, 309, 9 S. E. 969; *Sharp v. Palmer*, 31 S. C. 448, 10 S. E. 98; *Guckenheimer v. Libbey*, 42 S. C. 168, 19 S. E. 996.

For other cases, see Attachment, Cent. Dig. § 255; Dec. Dig. ⇨100.]

[2. Attachment ⇨249.]

The grounds of attachment in this case being (1) a sale of goods, at less than cost, by the defendant, a failing merchant, then negotiating for a cash compromise with his creditors; (2) his offer to them to compromise and thereby enable him to avoid an assignment (which was afterwards made); (3) his direction to his clerk to take down all empties and put up full barrels; and (4) a disposition of part of his property to certain preferred creditors (which last was satisfactorily explained)—the attachment was properly discharged.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 861-876; Dec. Dig. ⇨249.]

[3. Attachment ⇨40.]

Acts, made by statute a ground of attachment, done by an agent without the knowledge of his principal, will not support the statutory

remedy of attachment against the property of the principal.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 98; Dec. Dig. ⇨40.]

[4. Attachment ⇨248.]

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*Upon the question whether an attachment was properly issued in the first instance, new facts or new grounds to sustain it cannot be brought before the judge by affidavits in behalf of plaintiffs.

[Ed. Note.—Cited in *Sharp v. Palmer*, 31 S. C. 451, 10 S. E. 98; *Davis v. Cardue*, 38 S. C. 484, 17 S. E. 247; *Addison v. Sujette*, 50 S. C. 202, 27 S. E. 631.

For other cases, see Attachment, Cent. Dig. § 858; Dec. Dig. ⇨248.]

Before Fraser, J., Sumter, February, 1885.

These were two cases of attachment against C. H. Whiteheart, Jr., commenced December 31, 1885, one by Herman M. Myers and the other by A. E. Massman Bros. & Co. Defendant moved to discharge the attachment in both cases, and upon these motions, his honor filed the following order on February 14, 1886:

These cases were before me on motions to discharge attachments against the defendant issued by the plaintiffs. The motions were made at chambers at Sumter, and were heard on the notice with the accompanying affidavits and all the papers in the cases—affidavits on the part of plaintiffs in support of their showing for the attachments, and on the part of the defendant in reply. Parties were fully heard by counsel.

If it had been made to appear in the affidavits before me that, as suggested in argument, the defendant was at the commencement of these actions a resident of Florence, in the county of Darlington, the actions could not have been properly brought in this county, and the actions and the attachments would fall together. The defendant certainly knows where his residence is, and he says nothing about it. It is by no means a necessary inference, from the fact that the Sumter store is a "branch store," that the defendant is not a resident of the county. The question as to residence, however, may be made, if necessary, in some other shape in the progress of these cases, if the defendant is advised to do so.

It has also been insisted on in the argument with some earnestness that an attachment against an insolvent debtor is void as preference under our act in reference to assignments by insolvent debtors. It is true that under the late bankrupt acts all attachments issued against an insolvent debtor were ipso facto dissolved by certain proceedings in bankruptcy, voluntary or involuntary, instituted within a limited time after the issuing of the attachments. But Congress has

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power to pass bankrupt laws and the *State has not. The provision above referred to was

incorporated in the bankrupt act, and there is no such provision in our acts in reference to assignments by insolvent debtors.

Where there is a general assignment for the benefit of creditors, certain dealings with the property of the debtor within ninety days of the assignment are void if the debtor "procures or suffers" them to be made "with a view to give a preference" to a creditor who has "reasonable cause to believe" the debtor is insolvent. But to hold that an attachment issued by a creditor on his own motion against an unwilling debtor, and otherwise valid, is void under the provisions of our assignment acts would require a stretch of the power of judicial legislation which fortunately is very rare in the United States.

The questions, however, still remain: Were the facts stated in the affidavits on which these attachments were issued sufficient? and are they true?

Taking the whole line of cases in our own books on the subject of attachments, and the recent case of *Ivy v. Caston* (21 S. C., 583), I take the rule to be this: The affidavit should state facts within the personal knowledge of the witness, and the facts so stated should be sufficient to show that the property has been, or is about to be, dealt with in the manner prohibited, and that this was accompanied with the fraudulent intent, at least prima facie. If it does not make such a case, the attachment should not issue, and if issued, should be discharged on motion. If the affidavit is sufficient on its face, the defendant may still be allowed to show by counter-affidavits that the statements are untrue, for, otherwise, the business of the country would be at the mercy of the reckless and unprincipled; and, perhaps, he may be allowed to introduce such new facts as may show that the inferences drawn from the affidavits are not the true ones. The plaintiff cannot introduce into the case any new facts or evidence of fraud; he must stand on his original case, and if that fails the attachment fails. This seems to be right in itself, as no man should be allowed to attach the property of another and hold it until he can get the evidence on which he can secure a lien.

In the cases before me I see nothing in a proposition to creditors asking them to accept 25 cents on the dollar, or an assign-

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ment, which is improper or threatening. Paying off portions of the stock of goods to creditors who are pressing is certainly no evidence of fraud, even if the defendant had said he would make no preferences. The prices at which the segars and tobacco were sold, as mentioned in the affidavits, are not so extravagantly low as to excite in my mind any suspicion of fraud, unless there is some hidden meaning in the direction given by the defendant to his clerk, Dozier, about

taking down empty barrels and putting up others. I see no harm in it. It now appears from all the affidavits that the defendant knew nothing of the alleged low sales of segars and tobacco, and that as to at least a part of the giving up of goods to certain creditors, he and his clerk were both imposed on, and were themselves the victims of a fraud.

I am not at liberty to consider any new facts which are stated on behalf of the plaintiffs to show a fraudulent intent, and, therefore, will not undertake to say how far the statements in reference to them are to be believed.

I therefore conclude that the affidavits on which the attachments were issued were insufficient, and that some of the more important facts therein stated are untrue in the sense that the acts done are the acts of the defendant, the clerk or managing agent being alone responsible for them.

It is therefore ordered, that the attachments in the above stated cases be, and hereby are, set aside and discharged, with ten dollars costs in each case, to be paid by the plaintiffs to the defendant. It is ordered, that the notices of motion, and all the affidavits used on the hearing before me, be filed with the clerk, and with the other papers in the cases.

From this order plaintiffs appealed.

Messrs. Moises & Lee, for plaintiffs.

Messrs. Evans & Evans, and Johnson & Johnson, contra.

February 18, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. On December 31, 1884, the plaintiffs in the cases above stated sued out warrants of attachment, under which the stock of goods in a branch store

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of the defendant at *Sumter was seized by the sheriff. The affidavits upon which these attachments were issued were made on the same day (December 31, 1884) by Simon Kahn as the managing agent of the plaintiff in the first named case, and by Alexander Morris as the managing agent of the plaintiffs in the case second above stated. These affidavits are very much the same in substance, and state, as the grounds for issuing the attachments, that the defendant has removed goods from his place of business and secreted the same for the purpose of defrauding his creditors; that "he has wasted and dissipated his stock of goods in a shocking manner; has sold his goods at any price offered and at less than first cost, to wit, that the defendant sold to Z. E. Walker, on the 30th instant, 2,000 segars for \$50, that cost him, without freight, \$70; that on or about the 30th instant the defendant sold to one Wheeler several boxes of tobacco at less than first cost, and without adding any charges for freight; that on the 29th instant the

defendant wrote from Florence to his managing agent at Sumter to take down all empties and tap all full barrels, and dispose of goods as rapidly as possible; that said managing agent, Dozier, stated that he intended letting goods go at any price, stating further, 'I want to take my pocket book full to Whiteheart tomorrow night;' that defendant had stated to said Simon Kahn, on the 30th instant, that he would not prefer any of his creditors, but that on the morning of the 31st instant the defendant shipped two barrels of whiskey to one of his creditors, Myers, Edel & Co., and that he had also shipped several barrels of whiskey to Robert Hough & Sons, another of his creditors, in violation of his promise not to prefer any creditor; that defendant is giving away whiskey and segars to his friends, and is thereby defrauding his creditors; and that defendant has admitted that he was insolvent and had written a circular letter to his creditors proposing to pay twenty-five cents on the dollar in full of their claims, which, if not accepted, he will be compelled to make an assignment for the benefit of his creditors."

The defendant made a motion before Judge Fraser, at chambers, to discharge the attachments based upon his own affidavit and that of J. T. Dozier, his clerk in the Sumter store. These affidavits substantially deny all the

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allegations of fraud in the affidavits upon which the attachments were issued, explaining that the shipment of whiskey to Myers, Edel & Co. was made through an imposition practised by the agent of that house on the clerk, Dozier, and that the whiskey sent to Robert Hough & Sons had been shipped back to them about two weeks before the attachments were issued, because there was no demand in the Sumter market for that quality of liquors. Defendant in his affidavit admits that he did sell goods "as rapidly and closely as possible, but only in the legitimate course of his business, and with a view of paying up his creditors, many of whom were becoming importunate." He also admits that he wrote to Dozier, his clerk at Sumter, "to take down empties and to put up fresh barrels, as the business was then going on, and he was awaiting the action of his creditors," in response to his circular letter proposing a compromise, which proposition some of them had indicated a willingness to accept. He also says that if such reckless sales, as those described in the affidavits upon which the attachments issued, were made, they were without his authority. Finally, he says that he made an assignment to the said Dozier for the benefit of his creditors on the 2d of January, 1885. Dozier, in his affidavit, denies making the reckless sales attributed to him, and says that the defendant never at any time authorized him to sell any goods for less than their true value, or for the purpose of defrauding his, the defendant's, creditors.

He also denies the statement that he said he intended to let goods go at any price, as he wanted to take a full pocket book to defendant.

The motion to discharge the attachments were heard upon these affidavits, together with all the papers in the cases, as well as affidavits submitted by the plaintiffs, "in support of their showing for the attachments," and affidavits on the part of the defendant in reply. The Circuit Judge held that he was not "at liberty to consider any new facts which are stated on behalf of the plaintiffs to show a fraudulent intent, and, therefore, will not undertake to say how far the statements in reference to them are to be believed. I therefore conclude that the affidavits on which the attachments were issued were insufficient, and that some of the more important facts therein stated are untrue, in the sense that the acts done are the acts of the

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defendant, the clerk or managing agent being alone responsible for them." He therefore ordered that the attachments be set aside and discharged.

From this order plaintiffs appeal upon the following grounds: Because of error in holding: I. That the affidavits upon which the attachments were obtained in said cases were insufficient. II. That the said defendant was not responsible for the acts of his managing agent. III. That he could not consider the new facts stated in the affidavits on behalf of the plaintiffs against the motion to discharge the attachments.

Upon the first ground, we think that the view taken by the Circuit Judge is fully sustained by the cases in this State. *Smith & Melton v. Walker*, 6 S. C., 169; *Brown v. Morris*, 10 Id., 469; *Claussen v. Fultz*, 13 Id., 478; and *Ivy v. Caston*, 21 Id., 583. The allegation, that a person has done a certain act with a fraudulent intent, must necessarily be based upon information or belief, and, therefore, in such a case the rule is well settled that the sources of information, or the facts upon which such belief are founded, must be stated. The particular facts stated as to the sales of segars and tobacco at less than cost, do not, in our judgment, warrant the conclusion that the defendant intended to defraud his creditors. We suppose it is not very uncommon for merchants, under certain circumstances, to sell goods for less than cost; and when it is remembered that the defendant was negotiating a compromise with his creditors, which he seems to have had reason to expect would be accepted, he might very well have sold goods at very low prices with the most honest intentions, so as to enable him to get the money to meet promptly his offer of compromise.

We agree with the Circuit Judge, that nothing to the discredit of the defendant could be inferred from his letter to his clerk at Sumter, directing him "to take down the

empties and put up the full barrels." This is just what he would probably do if the compromise was effected, as he had reason to expect would be the case. The delivery of the whiskey to Myers, Edel & Co., as well as the previous shipment to Robert Hough & Sons, is fully explained in entire consistency with the defendant's honest intentions. The fact that defendant had written a circular letter to his creditors, proposing to pay twenty-five cents on the dollar in

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*full of their claims, or to assign all his property for their benefit, certainly constituted no evidence of an intent to defraud his creditors, especially when it was followed by the fact that such an assignment was actually executed within two days—probably as soon as practicable—after the attachments were levied.

We do not think the second ground of appeal is well taken. While it is true that a principal is liable for the acts of his agent within the scope of his agency, yet this is not universally true. Ordinarily a principal is not liable criminally for the acts of his agent, although he may be liable for the fraud of his agent in the disposition of property intrusted to his care, to whom he has committed the custody of such property, as in *Reynolds v. Witte*, 13 S. C., 5 [36 Am. Rep. 678]. But this case differs materially from that. There certain negotiable coupon bonds were lodged with the plaintiff's agent as collateral security for the payment of borrowed money, and fraudulently disposed of by the agent, and the principal was held responsible upon the ground that he had impliedly agreed to safely keep the collaterals until the maturity of the notes given for the borrowed money, and if he failed to do so, whether through the negligence or fraud of the agent to whom he had intrusted their custody, he was responsible. Here, however, no element of contract enters into the transaction. The plaintiffs are seeking to enforce the payment of their debts by a severe statutory remedy, which can only be made available where the defendant has done certain things prohibited by the statute; and until it is shown that the defendant has himself done or authorized another to do, some one or more of the things prohibited by the statute, he does not render himself liable to so stringent a proceeding. It is not, in our judgment, a case for the application of the doctrines growing out of the relation of principal and agent. There is no testimony whatever tending to show that the reckless sales of goods in the Sumter store, attributed to the clerk, which, however, are denied by him, were authorized by or even known to the defendant, and we do not think he can be held responsible for them, even if the allegations in the original affidavits as to such reckless sales by the clerk be true, about which there is no little conflict in the testimony.

As to the third ground, we agree with the

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Circuit Judge, that *he was not at liberty to consider any new facts stated on behalf of the plaintiffs to show a fraudulent intent. The question before the judge was whether the attachments were properly issued in the first instance, and to determine that question he could only consider the grounds upon which the attachments were originally applied for, and not any new facts or new grounds for the first time stated at the hearing of the motion to discharge the attachments. The question to be decided was whether the showing, made at the time the attachments were issued, was sufficient. It is true that the code provides that if the application to discharge an attachment be based upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, but this manifestly means that the plaintiff may, by affidavits, contradict or rebut the statements made in the affidavits submitted by the defendant, and not that he may state new facts—make a new case. This would be manifestly unjust to the defendant, and contrary to the usual course of investigation in a court of justice.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 204

COOK v. COOK.

(November Term, 1885.)

[1. *Bills and Notes* ⇨432.]

An agreement to credit a note with the value of work done, is not payment but contract, and can be enforced only under complaint or counter-claim.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1259; Dec. Dig. ⇨432.]

[2. *Executors and Administrators* ⇨77.]

The grant of administration has relation back to the death of the intestate, and legalizes all acts, otherwise valid, done by the administrator before his appointment.

[Ed. Note.—Cited in *Martin v. Fowler*, 51 S. C. 175, 28 S. E. 312.

For other cases, see *Executors and Administrators*, Cent. Dig. § 326; Dec. Dig. ⇨77.]

[3. *Executors and Administrators* ⇨86.]

An agreement by an administrator to credit a note, held by her as such, with the value of work done upon lands belonging to the estate of the intestate, is not binding upon the estate, and cannot be interposed as a defence to an action by the administrator on the note.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 374; Dec. Dig. ⇨86.]

Before Hudson, J., Aiken, October, 1884.

This action was commenced February 27, 1884. The opinion states the case.

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*Mr. G. W. Croft, for appellant.
Messrs. Henderson Bros., contra.

February 18, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action brought by the plaintiff, as administratrix of her deceased husband, Solomon Cook, on a note, as follows: "One day after date I promise to pay C. A. Cook, or bearer, five hundred dollars, for value received. Witness my hand and seal this 4th day of January, 1882. (Signed) J. W. Cook, [L. S.]" It appeared that in September, 1863, the defendant gave a note (growing out of some land transaction) to his brother, Solomon Cook, for \$500, payable "at the expiration of the present war." Solomon Cook died intestate in 1865, and his widow, Clara A., managed the affairs of the estate, without legal authority, down to 1884, when she took out letters of administration. After the war, and before she received letters, there were several payments and renewals of the note, the last being January 4, 1882, when the note sued on was given to Clara A. Cook, individually. After receiving letters, she brought this action on the note as administratrix. The defendant refused payment, claimed set off, &c.

Different questions were made, as to whether the action would lie by the plaintiff as administratrix, and whether the original note was given with reference to Confederate money, or had been paid, &c. But the only question which comes to this court is in regard to alleged error on the part of the judge in excluding certain testimony. Evidence was offered to prove that the said Clara A. Cook, after the note sued on was given, and before she became administratrix, agreed with the defendant, J. W. Cook, that if he would erect or repair certain mills on a tract of land owned by the estate of Solomon Cook and his two brothers, John M. and the defendant, J. W. Cook, she would credit on the note the pro rata of the expenses due by the estate of Solomon Cook; and that, relying upon such agreement, the defendant performed the work. The judge excluded the testimony, holding that, in this suit, the estate could not be held bound for its pro rata of expenses incurred in building on the

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property held in common by a *co-tenant, and that an administrator could not make a contract to charge the estate with a new debt.

The plaintiff had a verdict for \$594.64, and the defendant appeals to this court upon the following exceptions: "I. That his honor erred in excluding the testimony of defendant, showing that he repaired two mills at the request of the plaintiff after the date of the note of January, 1882, upon the express agreement that he should be credited with the value of such repairs upon said note. II. That his honor charged the jury that they could not credit the note given to the plaintiff

by the defendant in January, 1882, with the value of the work done by the defendant in repairing two mills at the request of the plaintiff, although the work may have been done on the express agreement that the defendant should be credited with the value thereof on said note. His honor also charged the jury, that said work on the mills was improvement of real estate by one tenant in common, and that the plaintiff could not legally allow credit for the same on the note. The defendant submits that his honor erred in so charging, for that the plaintiff is now estopped from denying her contract to credit the note with the work. That the only issue raised by the evidence was one of payment and not one of tenant in common receiving compensation for improvements."

As we understand it, the judge did direct credit to be given for all money actually paid to Mrs. Cook before she became administratrix; but as to the alleged agreement to credit on the note the value of the work to be done on the mills, that was not actual payment, but matter of contract, which could only be enforced, if it was a legal and binding contract, upon proper allegations and proof on complaint or statement of counter claim. There was a counter claim put in as to other matters, payment of notes, &c., but none as to the alleged contract to credit the note with the value of work done on the mills.

We do not think that the plaintiff can escape compliance with her contract to credit the value of the work on the note, upon the ground that the contract was made by her individually before she became administratrix. Her subsequent administration had relation back to the death of the intestate, and legalized all her intermediate acts—that is, made them her acts as administratrix.

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*May v. May, 2 Hill Eq., 22; Witt v. Elmore, 2 Bail., 597. It was only by the force of this principle that her action as administratrix, on a note payable to herself, could be sustained; and it must apply against her as well as for her. The matter must be considered precisely as if she had been the administratrix when she made the alleged agreement as to a credit on the note.

But, conceding this, the difficulty still remains. It is certainly the general rule, that an administrator has no right to diminish the assets of the estate or to contract in reference to the lands which, upon the death, descended to the heirs at law, even where there is no complication as to the rights of tenants in common to charge for improvements. In the view that the testimony excluded would have proved the allegations made, it may be that the plaintiff failed to keep faith with the defendant, but she insists upon her legal rights, and we are bound to judge of them according to the rules of law. He must seek his redress in some other way. The alleged contract of Mrs. Cook was either purely personal or without con-

sideration, and did not bind the estate. See *McBeth v. Smith*, 2 Tread. Const. 676; *S. C. 3 Brev.*, 511; *Nebbe v. Price*, 2 Nott & McC., 328; *Harral v. Witherspoon*, 3 McCord, 486; *Perry v. Brown*, 1 Bail., 45; *Ross v. Sutton*, *Ibid.*, 127 [19 Am. Dec. 660]; [*Wilson v. Huggins*] 11 Rich., 410.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 207

SIMONDS v. HAITHCOCK.

(November Term, 1885.)

[1. *Homestead* ⇨200.]

The Circuit Judge committed no error in confirming a return of homestead appraisers, to which exceptions, supported by affidavits, were filed, alleging excessive valuation, but not mistake, fraud, or corruption.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 374; Dec. Dig. ⇨200.]

[2. *Homestead* ⇨52.]

The return of homestead appraisers should have the same force and effect as the return of commissioners in dower, as to which latter the principle was declared in *Irvine v. Brooks*, 19 S. C. 101.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 70-72; Dec. Dig. ⇨52.]

[3. *Homestead* ⇨183.]

The statute (Gen. Stat., § 1996) regulating the assignment of a homestead to a debtor where his lands exceed \$1,000 in value and cannot be divided, is not unconstitutional.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 360; Dec. Dig. ⇨183.]

[This case is also cited in *Simonds v. Haithcock*, 26 S. C. 596, 2 S. E. 616, as to facts.]

Before Kershaw, J., Richland, July, 1885.

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*This was a claim of homestead by the defendant in the case of *John W. Simonds* against *James Haithcock*. The claim was made in January, 1884, and such proceedings were thereupon had as are stated in the opinion of this court.

The defendant and claimant supported his exceptions by affidavits of three persons that they were well acquainted with the land assigned, and that it was worth no more than \$2 an acre; by affidavits of the claimant and the trial justice who qualified the appraisers, that they had not gone upon the land; and by affidavits of the claimant and a surveyor, that the land could be divided without injury. The respondent submitted no affidavits.

Mr. John Banskett, for appellant.

Messrs. Lyles & Haynsworth, contra.

February 18, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff levied an execution on lands of the defendant, Haithcock, who claimed homestead. Appraisers were appointed to lay off the home-

stead, and they returned that the value of all the lands was \$987.50. To this return the plaintiff, Simonds, excepted, and Judge Wallace set aside the return and appointed new commissioners, to wit: Abram Huguenin, John T. Taylor, and J. A. Buckheister. Before an appraisal could be had, Huguenin died, and James H. Adams was appointed in his place.

These commissioners, on May 29, 1885, made return, describing the lands of defendant as the Brown tract, 217 acres, part of the Harris tract, 82 acres, and also one-fourth interest in another tract containing 458 acres, and stating "that in our opinion said premises are worth \$1,125, and cannot be divided without injury," &c. To this return the defendant, Haithcock, filed exceptions: 1. Because the commissioners failed to lay off homestead in lands. 2. That the commissioners over-estimated the value of the lands, and erred in their conclusion that the lands could not be divided without injury. Affidavits were submitted as to the value of the land and the practicability of dividing it without injury, &c. After hearing the affidavits and argument for and against the

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*return, Judge Kershaw overruled the exceptions, and confirmed the return of the appraisers.

From this order the appeal comes to this court upon the following exceptions: "I. Because his honor erred in confirming and holding good the report of the commissioners in the matter of the homestead, the report showing that they had failed and refused to set off the homestead in land. II. Because, the commissioners having failed to set off the homestead, his honor held that the commissioners had not erred in their conclusion that said lands could not be divided without injury to the remainder. III. Because his honor held good and confirmed the report of the commissioners, when it is respectfully submitted, that the section of the General Statutes of South Carolina under which they acted, viz., section 1996, chapter LXXI., General Statutes, is unconstitutional and void."

The first and second exceptions complain that the Circuit Judge committed error by concurring in the judgment of the appraisers as to the value of the lands, and that they could not be divided without injury to the remainder. Section 1996 of the General Statutes, in reference to the assignment of homestead, declares that "Whenever, in the assignment of a homestead, as provided in section 1994 of this chapter, the appraisers shall find that the premises exceed the value of one thousand (\$1,000) dollars, and that the same cannot be divided without injury to the remainder, they shall make and sign under oath an appraisal thereof, and deliver the same to the sheriff, who shall, within ten days thereafter, deliver a copy thereof

to the head of the family claiming the homestead, &c., with a notice attached, that unless the person so claiming the homestead shall pay to the sheriff the surplus of the appraised value over and above one thousand dollars, within sixty days thereafter, such premises shall be sold," &c. The appraisers made their return in exact conformity with this law. There is no allegation of "mistake, fraud, or corruption," but only of an alleged error of judgment on the part of the appraisers. The parties had the right, which they exercised, to resist the confirmation of the return; but when the judge approved it, we cannot say that he committed error in so doing.

The appointment of appraisers to set off

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homestead is somewhat analogous to the appointment of commissioners to lay off dower, and it would seem that the force and effect given to the return in one case should be given to it in the other. In reference to a return in dower, this court has held in *Irvine v. Brooks* (19 S. C. 101): "When commissioners are appointed by the court to lay off dower, they become part of the machinery provided by law for that purpose. They are selected and their judgment invoked on account of their supposed fitness. They take a solemn oath to discharge the duty, and when they have exercised their best judgment fairly, honestly, and impartially, and embodied that judgment in a return in proper form, we think that return is something more than a mere estimate of a certain number of persons, which may be overthrown by the opinion of the same number of other persons examined as witnesses. It is a record. The commissioners are, in one sense, the agents of the parties, who are not allowed, as matter of right, to assail the return if it has been fairly made, and is the judgment of the commissioners, unaffected by fraud or error of law or fact. If the law were otherwise, controversies as to value, resting only in opinion, would never end. *Buckler v. Farrow*, Rich. Eq. Cas., 180; *Stewart v. Blease*, 5 S. C. 433."

But it is said that the aforesaid provision of the law under which the appraisers acted, authorizing the lands of a debtor to be sold and a sum of money set aside as homestead instead of land, is unconstitutional and void. It is undoubtedly true that the constitution, in its homestead provision, does contemplate a home—a shelter—lands. This appears not only from the use of the word "homestead," but also from the terms of the provision itself: "The general assembly shall enact such laws as will exempt from attachment and sale * * * a homestead in lands, whether held in fee or any lesser estate," &c. It will be observed, however, that the constitution does not undertake to prescribe the details of procedure by which the

homestead may be set off; but, on the contrary, simply establishes the right and fixes its limit, and then declares that "it shall be the duty of the general assembly to enforce the provisions of this section by suitable legislation." Art. 2, § 32, as amended.

In the discharge of the duty thus imposed,

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the general assembly enacted the law in question for the avowed purpose of meeting an exceptional case, where the lands are worth more than a thousand dollars, and cannot be divided without injury to the remainder. Are we obliged to say that this act is not "suitable legislation" to enforce the provision made as to homestead in the most general terms? Can it be truly said to be inconsistent with the constitution? In the exceptional case stated, the debtor has the option to pay "the surplus of the appraised value over and above one thousand dollars," and retain the use and possession of his own land, to the extent allowed. But if he fails or refuses to pay said "surplus," the land is to be sold, and one thousand dollars of the proceeds of sale invested in other lands for his homestead. Substantially, this amounts merely to an exchange of lands, and seems to us to be in the interest of the claimant. No particular land is indicated for homestead, and we cannot say that this provision of the law violates either the letter or spirit of the constitution.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 211

Ex parte TURNER.

(November Term, 1885.)

[1. *Wills* ⇨137.]

All wills of personal property must be executed in writing (Gen. Stat., § 1854), except that nuncupative wills of a certain character and under certain conditions may be made as prescribed in section 1876.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 348; Dec. Dig. ⇨137.]

[2. *Wills* ⇨141.]

Where a person just before his death, in his last illness, in the house in which he resided and died, called upon three bystanders to witness that it was his last will and wish on earth that his wife should have his whole estate after his death and the payment of his debts, and that T. should take charge of and manage his business, and see that his wife got it all—and these three witnesses reduced these words to writing, and duly proved them before the probate judge as the will of deceased, within five months of his death, the same was properly admitted to probate as a nuncupative will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 353; Dec. Dig. ⇨141.]

[3. *Appeal and Error* ⇨1022.]

Findings of fact by a probate judge, approved by the Circuit Judge, affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015–4018; Dec. Dig. ⇨1022.]

[4. *Appeal and Error* ⇨1082.]

Where testimony was objected to in the Probate Court, but on appeal no error was assigned for its admission, and the Circuit Judge made no ruling upon the subject, this court will not consider the objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1135, 4284; Dec. Dig. ⇨1082.]

[5. *Statutes* ⇨225½.]

[Cited in *City Council of Charleston v. Weller*, 34 S. C. 362, 13 S. E. 628, to the point that a later statute in a general law will be read as an exception to a former statute so as to harmonize the whole.]

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 305; Dec. Dig. ⇨225½.]

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*Before Witherspoon, J., Edgefield, March, 1885.

To the statement of the case made in the opinion of this court, it will be proper to add only, that the testator died on December 21, 1883, and that the words in which he declared his last will were reduced to writing and sworn to by the three witnesses before the probate judge on May 14, 1884, and that they therein set forth the facts essential, under the statute, to the validity of a nuncupative will.

Mr. Arthur S. Tompkins, for appellant.
Messrs. Sheppard Bros., contra.

February 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. J. N. Bouchelle, late of the County of Edgefield in this State, died in December, 1883. He left surviving a widow and several collateral kindred. On the night before his death (as it is alleged), after stating to the petitioner "that he did not believe he would live until next morning, so that he could get his will fixed," he said to the petitioner, to Mrs. Griffith, and Mrs. Graddiek, all of whom were at his bedside: "I want you all to witness that it is my last will and wish on earth that my wife, Addie, shall have all my property of every nature and description after my death, and after my debts are paid. And you, Mr. Turner, to take charge of and manage my business, and see that she gets it all."

After the death of Mr. Bouchelle, the petitioner filed the petition below, stating the above facts, and also that said will of deceased was made in his last illness, in the house in which he resided, and had been reduced to writing within the time and according to the form prescribed by the law, and was attached to the petition as a part thereof. Wherefore he prayed that the same be admitted to probate under the law in such cases, and that he be appointed and authorized to carry out the same. Dr. L. B. Bouchelle, a brother of the deceased, is the only

party who seems to have answered the petition. He denied the material allegations in the petition, and prayed that it be dismissed.

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He *seems, also, to have demurred on the ground that the petition did not state facts sufficient to constitute a cause of action. The probate judge, after testimony, admitted the will to probate as a nuncupative will.

From this judgment Dr. Bouchelle appealed to the Circuit Court. The case then came to trial before his honor, Judge Witherspoon, when by consent of parties the issue of fact, "will or no will," was submitted to a jury. His honor was requested to charge: "1st. That all wills and testaments of real and personal property shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor and of each other by three or more credible witnesses, or else they shall be utterly void and of none effect (Gen. Stat., § 1854); except in case of soldiers and mariners in active service, and that they may dispose of their movables, wages, and personal estate as he or they might have done at common law. Gen. Stat., § 1880. 2d. That the will proposed to be established cannot be established unless the same had been in writing and signed by the testator or some one by him authorized so to do, and attested by three witnesses." His honor declined to charge these requests. To the charge made there was no exception. The jury found for the will. His honor approved the finding, and affirmed the judgment of the Probate Court.

Dr. Bouchelle has appealed to this court, raising three questions: I. That the Circuit Judge erred in holding that a nuncupative will of the kind here was a good and valid will under the laws of this State. II. That he erred in affirming the judgment of the jury; and that the evidence was sufficient to establish the same. And, III. That he erred in holding that W. T. Turner and F. P. Griffith were competent witnesses.

Under the first exception, the appellant submits that there is no such thing in this State as a nuncupative will. It will be conceded that at common law, in early times in England, a will of chattels was good without writing. Such wills were allowed then, in part because of the inability of the people to write, or make wills in any other way but

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verbally. As, however, letters *and learning became more generally cultivated, and reading and writing more widely diffused, unwritten or nuncupative wills were confined to extreme cases, to wit, in cases of necessity. And at length, on account of the great frauds and abuses to which they were subject, and especially because of frightful perjury in a noted case, the statute of frauds (29 Charles

II.) was enacted, regulating such wills, and declaring the mode and circumstances which would legalize them. 4 Kent, 517.

In 1712 the provisions of this act as to nuncupative wills were, in substance and almost in the precise words, enacted and made of force here. 2 Stat., 528. In 1789, by act of assembly, it was enacted that no nuncupative will should be good, where the estate bequeathed shall exceed the value of ten pounds sterling, that is not proved by the oaths of three witnesses at least. 5 Stat., 107. These acts recognized the existence of nuncupative wills at common law, and to prevent frauds and perjuries simply prescribed the conditions upon which they could be made, and the mode of having them put in form and established. Thus the law stood in this State until 1824, when it was enacted, "That from and after the first day of May (then ensuing), all wills or testaments of personal property shall be executed in writing and signed, * * or else they shall be utterly void and of no effect." 6 Stat., 238. What effect this act had on the acts of 1712 and 1789, it is not necessary now to determine, because we find the act of 1789 incorporated in the General Statutes, both of 1872 and 1882. See, in last General Statutes, §§ 1876, 77, 78, and 79. The act of 1824, *supra*, is also incorporated. See § 1854.

These sections, when read separately, seem to conflict, but they are found in the same general act, which, upon this subject, must be construed as a whole. They should be made to harmonize if possible. We think this can be done by construing section 1876 *et seq.* as an exception or proviso to section 1854, to wit: That all wills of personal property shall be executed in writing * * (§ 1854), except that nuncupative wills of a certain character and under certain conditions may be made, as prescribed in section 1876. This view determines the question first raised.

The second raises a question of fact as to the force and effect of the testimony. We

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see no error here, even if this case could be regarded as a case in chancery, and, therefore, bringing the facts under our cognizance. There was certainly testimony direct and positive upon the point submitted to the jury, sufficient to sustain the verdict, and to support its confirmation by the Circuit Judge.

As to the competency of Turner and F. P. Griffith as witnesses. While it does appear that they were objected to before the Probate Court, yet in the appeal from that court to the Circuit Court there is no error assigned in this respect to the ruling of the probate judge. Nor was there any motion made before the Circuit Court to strike this testimony out. In fact, it does not seem that the Circuit Judge made any ruling thereon. Such being the fact, no error can properly

be assigned to him on account of its admission.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 215

STARK v. WATSON.

(November Term, 1885.)

[1. *Dower* ⇨79.]

A widow suing for dower is not required to make out a complete chain of title in her husband; if she prove possession during coverture, it is sufficient until the defendant disproves title.

[Ed. Note.—Cited in *Ex parte Steen*, 59 S. C. 223, 37 S. E. 829.

For other cases, see *Dower*, Cent. Dig. § 306; Dec. Dig. ⇨79.]

[2. *Appeal and Error* ⇨204.]

Evidence received without objection cannot be made a ground of appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1259; Dec. Dig. ⇨204.]

[3. *Appeal and Error* ⇨1001.]

The Circuit Judge having found that the widow had made out a *prima facie* case entitling her to dower, and that it had not been rebutted by the defendant's evidence, both these findings of fact were approved by this court, the manifest weight of the evidence not being against them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3922, 3928, 3934; Dec. Dig. ⇨1001.]

[4. *Appeal and Error* ⇨1003.]

Findings of fact by the Probate Court are not absolutely conclusive upon the Circuit Court on appeal, but may be reversed where clear ground is afforded for that purpose. *Black v. White*, 13 S. C., 38.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3962; Dec. Dig. ⇨1008.]

[This case is also cited in *Stark v. Hopson*, 30 S. C. 375, 9 S. E. 345, without specific application.]

Before Fraser and Wallace, JJ., Richland, July, 1883, and November, 1884.

Mrs. Eliza Stark filed her petition in the Court of Probate for Richland County, claiming dower in certain lands called Reedy Point place, held by the defendant, Dennis Watson, which she alleged her husband had been seized and possessed of during their

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*coverture, to wit, about the year 1835; and that her husband had died in the year 1882. The petition was filed February 27, 1883. The defendant put in a general denial.

After the testimony for petitioner was closed, the probate judge dismissed her petition, and the petitioner appealed to the Circuit Court. Judge Fraser heard the appeal, and filed the following decree:

This case came before me on appeal from the judgment of the Probate Court dismissing the petition, and was heard at July term, 1883, on the pleadings, judgment, and evidence in that court and exceptions there-

to. I will consider the several exceptions of the petitioner, though in the view I take of the case it may not be necessary to refer to some of them.

Exceptions 2, 3, and 4. At the time of the alleged declarations (which were ruled out) made by Theo. Stark and H. P. Green to the witness, James Davis, he held the Reedy Point place as a joint tenant with Greek Avery and C. J. Houston, under a deed from Frazee, sheriff, and was engaged in running the lines, and besides being seized per my et per tout, "and having entire possession as well of every part as of the whole," the witness Davis seems to have been acting for the others, his testimony being in these words, "after we bought, we looked into the titles." It seems to me that any statement made to Davis at this time by Theo. Stark or H. P. Green, or, indeed, any other person, and his reply or his conduct in reference to such communications, is admissible as evidence, for what it may be worth, as to the possession of Theo. Stark, or the extent of his claim under it, in any proceeding in which either of the joint tenants or their privies is interested.

Exception 5. The fact that Mrs. Stark "never heard of any one's objecting to her husband's possession" is a mere negative statement and of no value, and it matters very little whether ruled out or not.

Exceptions 7, 8, and 9. I cannot assent to the proposition of law asserted in these exceptions, that because certain testimony has been ruled out as incompetent (and it is alleged erroneously), the defendant is estopped to deny the fact it was offered to

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prove. *If the ruling on the testimony was wrong, it can be corrected in the proper way, and no estoppel follows its rejection.

Exception 10. This exception is so general that I am not able to apply it to any particular testimony "offered and ruled out," the only way to raise a question of the admissibility of evidence for the judgment of an appellate court.

Exception 6. The petitioner relies (1) on the possession of Theo. Stark, her husband, during the coverture; (2) on a title in the defendant derived from her husband.

(1) As to the possession of Stark at the time of the marriage. Theo. Stark was living with his sisters, and, as I construe petitioner's testimony, this state of things continued only a few months, when he became the head of the family, and she went to housekeeping, and got provisions generally and butter and eggs from Reedy Point, and nursed and made clothes for the negroes she recognized as working there. Paul Pickens testifies that Theo. Stark bought his father Noble and himself as slaves; that Noble was a driver at Reedy Point, and a Mr. May the overseer; this was during the coverture. It is true that when one relies on possession,

it should be a possessionem pedis, or then with color of title. In general, the "land should be cultivated," or, perhaps, it would be sufficient if it should be used for pasture. *Porter v. Kennedy*, 1 McMull., 357. The character of the provisions used is just such as to show that the land was cultivated and used for pasture also, and, as was the habit in those days, the pasture was on unenclosed land. The pecuniary embarrassment of Theo. Stark is sufficient to account for the dispersion of his slaves, without supposing, as we are asked to do, that they always were the property of the Stark family, and only were divided off after his failure. There is not sufficient evidence to support this theory. I think the evidence of possession in Theo. Stark is sufficient prima facie to support the claim of dower.

(2) The only difficulty in the chain of title of Theo. Stark to the defendant, who holds under C. J. Houston, is as to the deeds from B. F. Taylor, executor, to Theo. Stark, Theo. Stark to R. W. Gibbes, and R. W. Gibbes to Lucy P. Green. These deeds, it is alleged, have been lost. The records in Columbia having been burned during the war, the petitioner

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could not produce copies. The defendant, or those under whom he claims, had or ought to have had, the originals, and in their possession they have been lost. This loss occurred while these deeds were in the possession of James Davis, one of the joint tenants under whom the defendant claims. James Davis, however, cannot read writing, and only knows of the existence and contents of these deeds by their being read over to him; he recognized the reading as correct, and acted on the information conveyed to his mind. While the mere reading over of the deeds to any other witness might not have been sufficient to enable him to speak of its contents, I am inclined to the opinion that the reading of the deeds to James Davis and his recognition of them, as he certainly did, as parts of his chain of title, makes his testimony on that subject competent. The statement of this witness as to these deeds is more than mere hearsay, and was admitted without objection at the hearing below.

I think that the judge of probate should have required the defendant to have offered testimony in defence, if he had any, and not have made any ruling dismissing the petition at the close of petitioner's case and this exception is therefore sustained.

It is not proper for me to prescribe any course of proceeding to be hereafter taken in the Probate Court, and I shall not undertake to do so. The judgment of the Probate Court, dismissing the petition at the close of the petitioner's testimony, is therefore reversed, and the case remanded to that court for such further proceedings as may be proper in the case, and it is so ordered and adjudged.

Defendant excepted at the time to this decree, but did not then appeal.

The probate judge, on the second trial, on the evidence already taken for the petitioner, and testimony on behalf of the defendant, found "as a matter of fact that the petitioner is not entitled to dower in the lands of defendant." And he ordered that the petition be dismissed with costs.

On petitioner's appeal from this order, Judge Wallace passed the following decree:

This is an appeal from the Probate Court. Mrs. Stark had filed her petition in that

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court, claiming dower in certain land, *now held by Dennis Watson, as the widow of Theodore Stark. Upon the hearing in that court, the petition was dismissed at the close of petitioner's testimony, upon the ground that she had not shown seizin in the husband of the land in question during the time she was his wife. From this decree an appeal was taken to this court, which was heard by Judge Fraser. He made a decree reversing the judgment of the Probate Court, upon the ground that the petitioner had shown the possession to have been in the husband of petitioner under a claim of right during the existence of the marital relation between herself and her husband, and that this showing was prima facie sufficient to entitle the demandant to dower. The case was therefore remanded to the Probate Court for further proceedings.

Upon the second hearing before the Probate Court, it was agreed that the testimony taken at the first hearing there should be considered as part of the case. The defendant then offered testimony intended to show that Mrs. Stark had renounced dower in the land. This testimony was to the effect that after Stark's possession, during the existence of the marriage relation between himself and the demandant, the land had been several times sold and purchased, and deeds made and accepted by grantors and grantees, and in every case the titles had been examined by careful and competent lawyers. I do not think this testimony sufficient to establish the existence, loss, and contents of an instrument of renunciation of dower. Testimony was also introduced, intended to show that the land now held by Dennis Watson was not part of the land which had been in the possession of Theo. Stark. I think, upon this point, the preponderance of the evidence is in favor of demandant, and shows that the land in which dower is claimed is part of the tract once in possession of demandant's husband.

The case made by demandant at the first hearing before the Court of Probate, stands unaffected by the evidence of the defendant at the second hearing, and this case has been held by Judge Fraser sufficient, in the absence of countervailing testimony, to en-

title the demandant to dower. In this view I concur.

1. It is therefore ordered and adjudged, that petitioner is entitled to dower in the land described in the petition as held by

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*Dennis Watson, and to an account and decree for the rents and profits, and to her costs and disbursements. 2. It is further ordered, that the cause be remanded to the Probate Court for such further proceedings as may be necessary and proper to carry out this decree.

The exceptions taken by defendant to this decree are set forth in the opinion.

Mr. Allen J. Green, for appellant.

Messrs. Bacon & Moore, contra.

February 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The respondent filed the petition below, claiming dower in certain lands situate in Richland County, of which she alleged her husband, the late Theodore Stark, had been seized during coverture. The petition was heard by the Probate Court for said county, and upon the close of petitioner's testimony, the defendant moved to dismiss the petition on the ground that petitioner had not shown seizin in Theodore Stark, and, even if she had, that she had proved herself out of court. This motion was granted with costs. The petitioner appealed to the Circuit Court. The appeal was heard by his honor, Judge Fraser, who reversed the judgment of the Probate Court, and remanded the case for such further proceedings as might be proper. To this decree defendant excepted.

The case was then heard a second time before the Probate Court upon the testimony of the former case by the plaintiff and additional testimony introduced by the defendant. The probate judge again dismissed the petition, finding, "as matter of fact, that the petitioner is not entitled to dower in the land of Dennis Watson, the defendant." From this judgment an appeal was again taken by the petitioner to the Circuit Court, which was heard at the October term of the court by his honor, Judge Wallace, who sustained the claim of the petitioner for dower, and for rents and profits, remanding the case for such further proceedings as might be necessary.

Now the cause comes to this court upon exceptions by defendant from both decrees.

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*The exceptions to the decree of Judge Fraser assign error: I. Because his honor held certain declarations of Theo. Stark and H. P. Green to James Davis and his reply, as to Stark's possession, &c., admissible. II. Because his honor held that the evidence of possession in Theodore Stark was sufficient prima facie to support petitioner's claim. III. Because he held that deeds from Taylor,

executor, to Theodore Stark, from Theodore Stark to R. W. Gibbes, and from Gibbes to Lucy P. Green, had been in existence and had been lost, or alleged to have been lost. And IV. Because that he admitted the testimony of Davis as to the contents of these deeds, said testimony having been admitted below without objection, as stated by his honor.

The decree of Judge Wallace is excepted to on the following grounds: I. Because his honor held that Judge Fraser had reversed the judgment of the Probate Court on the ground that the petitioner had made out a prima facie case, whereas it is submitted that he reversed it because the probate judge should have required the defendant to go on with his testimony, at the close of the plaintiff's testimony, instead of dismissing the case at that stage. II. Because his honor erred in holding that the existence, loss, and contents of a renunciation of dower had not been proved. III. Because his honor erred in holding that the preponderance of testimony showed that the land in which the dower was claimed was a part of a tract once in the possession of demandant's husband. IV. Because his honor held that the case, as made by the defendant in the first trial before the Probate Court, stood unaffected by defendant's evidence in the second trial, and that Judge Fraser had held the evidence sufficient, in the absence of countervailing evidence, to entitle the demandant to dower. And V. Because his honor held that demandant was entitled to dower, &c., and that he reversed the decree of the Probate Court on a question of fact involving the credibility of witnesses.

The first exception to the decree of Judge Fraser raises a question of fact, to wit, whether the evidence of petitioner had shown such possession in her husband as to entitle her prima facie to dower. It is hardly necessary to refer to authority for the position, that a demandant in dower is not required to make out a complete chain of title in her husband, and that all that she is

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*expected or required to do is to show possession by her husband during the coverture, which will be sufficient unless it is overthrown by disproving title by the defendant. In other words, proof by the demandant of possession in her husband during coverture makes out her case in the first instance, and at the end, too, unless the defendant has shown the absence of title in such husband. This is elementary law. Judge Fraser said that he thought the evidence of possession was sufficient to make out a prima facie case. We concur in this opinion. Next exception relates to the declarations of Theodore Stark and H. P. Green to James Davis, &c. This is admitted in appellant's argument to be an abstract question, as the testimony objected to was never offered at the

hearing (we suppose the second hearing). It, therefore, need not be considered.

3d, 4th. As to the testimony of James Davis in reference to the existence, loss, and contents of certain deeds mentioned in this exception. It is sufficient to say, in reference to this exception, that the testimony in question was offered and received without objection by the defendant. This is stated by the judge, and we find no objection noted in the "Case." Such being the fact, the exception is not properly before us.

Next in order is the consideration of the exceptions to the decree of Judge Wallace. The first seems to us to be inconsistent with exception 1 herein to the decree of Judge Fraser. That exception assigned error to Judge Fraser, because he held that the evidence of possession in Theodore Stark was sufficient to support the claim of dower. And now Judge Wallace's decree is excepted to because he construed the decree of Judge Fraser in the same way. Judge Fraser evidently thought that the evidence of the petitioner was prima facie sufficient, and on that account he ruled that the probate judge was in error in dismissing the case without hearing from the defendant, and he, therefore, remanded it, to give the defendant an opportunity to make his defence. That defence has since been made, and, in the opinion of Judge Wallace, the case made by the demandant in the first hearing stands unaffected by the evidence of the defence. He, therefore, decreed, in accordance with the opinion of Judge Fraser as to the prima facie case made at the first hearing, that the

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*demandant was entitled to dower. Whether the demandant's prima facie case had been affected by the subsequent defence, was a question of fact, and we cannot say that the manifest weight of the evidence is against the finding of the Circuit Judge on that subject.

The questions raised in several of the other exceptions to this last decree seem to be questions of fact, such as, that his honor erred in holding that defendant's testimony was insufficient to establish the existence, loss, and contents of a renunciation of dower, and that the preponderance of the testimony was in favor of demandant, showing that the land in which dower is claimed was a part of the tract once in possession of demandant's husband. We cannot disturb these findings under the settled rule in such cases. The remaining exceptions are too general, failing, as they do, to raise any specific question.

In the argument of appellant, a distinction is pointed out and contended for between the powers of the Circuit Court on appeals from the Probate Court, and the powers of this court on appeals to it. Even admitting the distinction contended for, yet the rule laid down in *Black v. White* (13

S. C., 38) precludes the idea of the findings of the Probate Court being absolutely conclusive upon the Circuit Court upon appeal. The court said in that case: "The Circuit Court ought not to disturb the findings of the Probate Court on questions of fact of that nature [that is, where the witness had been before that court, &c.], unless clear ground is afforded for that purpose." Here the court below thought that clear ground had been afforded, and we are of the same opinion. The petitioner was not required to make out a complete chain of titles in her husband. As we said at the outset, she was only required to show possession during the coverture. This being done, her claim was perfect until the defendant disproved title. The probate judge, notwithstanding the evidence of possession, decreed against her, although no sufficient evidence had been offered by the defendant disproving title.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed. Let this judgment be certified to the Probate Court for Richland County.

24 S. C. *224

*STATE v. BROWN.

(November Term, 1885.)

[*Indictment and Information* ⚭87.]

An indictment that fails to state any specific day on which the alleged offence was committed is fatally defective.

[Ed. Note.—Cited in *State v. Richey*, 88 S. C. 239, 241, 70 S. E. 729.

For other cases, see *Indictment and Information*, Cent. Dig. § 244; Dec. Dig. ⚭87.]

Before Pressley, J., Charleston, June, 1885. The opinion sufficiently states the case.

Messrs. Lee & Bowen, for appellant.

Mr. Solicitor Jervey, contra.

February 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The only question raised by this appeal is as to the sufficiency of the indictment under which the defendant was convicted. The indictment was for burglary, and charged, "That Andrew Brown, on the day of March, in the year of our Lord one thousand eight hundred and eighty-five, at the hour of , in the night of the same day, with force and arms," &c.; and the precise question is whether the omission to state any specific day on which the offence was alleged to have been committed is fatal.

In Archbold's *Criminal Pleadings*, page 11 of the 1st edition, it is said: "Time and place must be added to every material fact in an indictment; that is, every material

fact stated in an indictment must be alleged to have been done on a particular day, and at a particular place." And again, at page 12, this writer says: "The time laid should be the day of the month and year upon which the act is supposed to have been committed. A day certain must be stated; and this at present is always the day of the month, although naming it as a feast day, or 'the octave of the Holy Trinity,' or the like, seems to be sufficient." So in 1 Chitty, *Criminal Law*, at page 217, it is said: "It is, in general, requisite to state that the defendant committed the offence for which he was indicted on a specific year and day." And in 1 Bishop, *Criminal Procedure*, sec-

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tion 239 of 1st edition, it is said: "Every indictment must allege a day and year on which the offence was committed."

In view of the doctrine thus explicitly laid down by these standard authorities on criminal pleading, we do not see how we can avoid the conclusion that the indictment under consideration is fatally defective in failing to state any specific day on which the offence charged was alleged to have been committed; especially when we find that this doctrine has been so recently recognized in this State in the case of *State v. Coleman* (8 S. C., at page 243), where it is said: "Time and place must accompany every material allegation in the indictment, though it is not necessary in all cases to prove the offence on the day laid if it is before bill found." In that case the indictment charged that the prisoner, on the 13th day of April, in the year of our Lord one thousand eight hundred and seventy-three, inflicted the wounds, &c., and then proceeded to allege that the said deceased, "from the said 13th day of April, in the year of our Lord 1873, until the 14th day of the same month of April in the year of our Lord last aforesaid, did languish," &c.; and the court said these latter words just quoted made manifest and put beyond doubt the day when it was alleged that the mortal blow was inflicted. But the court said: "Admitting that the letters *cigh* make no word significant of time, if there was nothing else in the indictment by which a time was found to be specified by proper expression, the exception should prevail."

The case of *State v. Washington* (13 S. C., 453), is relied on by the solicitor. But there, too, we find that the omission complained of was supplied by other parts of the indictment. Here, however, the day on which the offence is charged to have been committed is left entirely blank, and there is nothing in the indictment to supply the deficiency. The best that can be said of it is that it was some day in the month of March, 1885, but what particular day is not designated or even indicated in any way whatever.

In view of the authorities above cited and

quoted from we cannot hold that this indictment is sufficient, especially when we are told in 1 Chitty Cr. Law, 218, that it has been held that "an indictment for battery, setting forth that the defendant beat so

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*many of the king's subjects between two specified days, would be insufficient," for here this indictment charges in effect that the burglary was committed between the first and thirty-first of March.

The case of *State v. Dent* (1 Rich., 469), relied on by the solicitor, is not in point. That was an indictment for gaming, in which the time at which the offence was alleged to have been committed must necessarily have been stated, for the judge who delivered the opinion of the court says, in speaking of the indictment: "It is perfect on its face, and that is enough." Hence no question like the one now under consideration could have arisen in the case. The question there was as to the effect of the special finding of the jury, to wit: That the defendant was guilty, but that the unlawful playing took place more than six months before the commencement of the prosecution; and it was contended that as no day anterior to the six months was designated in the indictment the finding, therefore, was vague and uncertain. It was in reference to this position that the court used the language quoted and relied upon by the solicitor, to wit: "But the exact day of the offence need not be charged in the indictment. And when circumstances render the precise time of consequence, it must be pleaded in order that the solicitor may assign the exact time."

This, of course, means nothing more than that it is not essential that the exact time at which the offence was actually committed should be stated in the indictment, and does not at all affect the rule as laid down in the authorities above cited, that though it is necessary that some particular day must be laid in the indictment it is not necessary that it should be proved that the offence was committed on that particular day. This is not a case in which the wrong day is stated in the indictment, but the objection here is that no specific day is alleged, and hence the suggestion thrown out in *Dent's Case* that where the nature of the defence is such as to require that the correct time should be stated, in order that the defence may be made available, the solicitor may be required to "assign the exact time" (though exactly how this could be done after the bill has been found by the grand jury, it might be difficult to

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say), does not apply. We suppose what was really meant by the suggestion was that in such a case the solicitor should be required not to assign the correct day in the indictment, but to elect upon what day he will stand, in analogy to the practice where two separate and distinct assaults are tes-

tified to the solicitor is required to elect upon which he will stand; and in this view the suggestion becomes still more inapplicable, for here the question is as to the sufficiency of the indictment, and not as to the proper practice in the conduct of a prosecution.

Again, it is contended that, as *Chitty*, in the passage above quoted, only says that it is, in general, requisite to state in the indictment that the offence was committed on a specific day, the rule is not universal and should not be applied where the reason for it has ceased. But it will be observed that Mr. Chitty practically explains the use of the words "in general," not in the way contended for, but by going on to show two exceptions to the rule, under neither of which does this case fall.

Finally it is urged that the strictness formerly required in criminal pleading is not in accordance with modern views, and that "the general progress of civilization and enlightenment has worked many relaxations in the hide-bound maxims of the law, and in none more conspicuously than the exact technical phraseology of indictments." Without undertaking to inquire how far this may be true as a general proposition, it is sufficient for us to say that so far as the particular question involved in this case is concerned we have not been cited to any authority, and we are not aware of any, in which the old rule has been relaxed. On the contrary, we find, as shown above, that the rule has been recently recognized in our own State. It may be that many of the strict rules of criminal pleading should pass away with the reasons upon which they were founded (if, indeed, there ever was any good reason for them), but it is not our province to alter but simply to declare the law.

And when we find that the fundamental law of the land (Cons., art. 1, § 13.) explicitly declares that: "No person shall be held to answer for any crime or offence until the same is fully, fairly, plainly, substantially, and formally described to him," and when we know of no forms of indictment establish-

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ed by competent authority except those sanctioned by the wisdom of ages, we do not see how we can justify a departure from those forms. For it will be observed that the constitution not only requires that the offence charged shall be fully, fairly, plainly, and substantially, but formally described; and this must mean either one of two things—that the offence must be charged in the form required at the adoption of the constitution, or in some form prescribed by competent authority (most probably the latter), and therefore until some other form is so prescribed we are bound to adhere to those originally adopted.

The judgment of this court is, that the judgment of the Circuit Court be reversed,

and that the case be remanded to that court for such further proceedings as may be necessary and proper.

24 S. C. 228

WATSON v. WATSON.

(November Term, 1885.)

[1. *Deeds* ⇨24.]

An instrument of writing, in form a deed, from a husband to his wife, in words following, to wit: "Know all men by these presents that I, T. W., in consideration of the affection I bear my wife, E. C. W., at and before the sealing of these presents, have granted, bargained, and at my death, by these presents, do grant, bargain, and release unto the said E. C. W., all that tract or parcel of land known as my homestead * * * together with all the kitchen and household furniture and effects, with all and singular the rights, members, * * * to have and to hold, &c. All of the before mentioned property I give to my wife independent of her dower, and no enumeration or deduction is to be made against her in consideration thereof in the final distribution of my estate." Then follows a covenant of general warranty, and the conclusion with date, and last of all these words: "This paper not to be in full force until I desire to act." *Held*, that this instrument was not intended to operate as a will, but as a deed, and must be sustained as a covenant to stand seized to uses.

[Ed. Note.—Cited in *Sumner v. Harrison*, 51 S. C. 354, 362; 32 S. E. 572; *Bethea v. Allen*, 55 S. E. 904.

For other cases, see *Deeds*, Cent. Dig. § 45; Dec. Dig. ⇨24.]

[2. *Wills* ⇨88.]

It may not now be asserted as an inflexible rule that a conveyance of chattels cannot be made to take effect after the termination of a life estate; but the personality included in this deed not being here in contest, the court will not permit the mention of them to control the otherwise clear intention of the grantor, that the paper was not intended to operate in the nature of a will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 208, 217; Dec. Dig. ⇨88.]

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[3. *Deeds* ⇨95.]

*The last sentence is too vague and indefinite to control the clear intention disclosed in other parts of this deed.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 238, 241-254; Dec. Dig. ⇨95.]

[4. *Deeds* ⇨95.]

The intention of this deed must be ascertained from the instrument itself, and this was done by the Circuit Judge in this case.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 238, 241-254; Dec. Dig. ⇨95.]

Before Witherspoon, J., Edgefield, March, 1885.

This is an appeal from the following decree:

Plaintiffs contend that as defendant could take no interest in the land under the instrument until after the death of Tillman Watson, Sr., and as said intended disposition was revocable, the instrument must be construed as testamentary in its character. It is con-

tended that as a will the paper is invalid, as it has but two witnesses. The form of an instrument is important only so far as it is evidence of what was intended.

As to the form. The only evidence of a testamentary character furnished by the instrument is that the defendant's enjoyment of the land is postponed to the death of her husband. The force of this circumstance may be overcome, as in *Wheeler v. Durant* 6 Rich. Eq., 454, by the context and general form of the instrument. The instrument under consideration begins with the usual statutory words of a deed: "Know all men by these presents," and in all other respects has the form and requisites of a valid deed.

As to the intent. It is the duty of the courts, by reasonable construction, to give effect to the intention of the parties not inconsistent with law. The intent is to be ascertained from the whole instrument and the surrounding circumstances; the intention should be regarded as looking rather to the effect than the mode of producing it. See *Chancellor v. Windham* and *Law*, 1 Rich., 167 [42 Am. Dec. 411]. In the premises the grant is made in the past and present tense: "Have granted, bargained, and at my death, by these presents, do grant, bargain, and release unto the said Elizabeth C. Watson all that tract," &c. In *Wheeler v. Durant* 6 Rich. Eq., 454, it is held that "a paper is a deed and not a testament if the instrument is intended to have a present and not a future operation, if it is intended to pass the right in present to be a perfected and executed contract, and not revocable or ambulatory." It was stated in

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argument and not denied that *defendant, prior to her marriage, lived upon the premises in dispute. Tillman Watson, Sr., had no children to succeed him in the possession of this homestead. It would be both reasonable and natural that he should desire his wife to have this homestead, after his death, in preference to his next of kin, who have shared with his wife in the distribution of the rest of his large and valuable real and personal property.

It is, however, contended that the words in the instrument, just before the signature of Tillman Watson, Sr., "This paper to be in full force until I desire to act," render the grant revocable, and thereby destroy the effect of the instrument as a deed. It is difficult to understand these words. The last of the words quoted is indistinct, being interpreted by plaintiffs to be "act," and by the defendant to be "alt." Interpreted in either view, the words quoted and appearing at the conclusion of the instrument, just before the signature of Tillman Watson, Sr., are repugnant to each and all of the foregoing parts of the paper, and cannot therefore control the operation or effect of the instrument. If these ambiguous concluding words could be held to reserve the power of revocation, there

has been no effort on the part of Tillman Watson, Sr., during the six months that he lived after the execution of said instrument, to exercise such power of revocation.

It appears from the testimony that, after signing the instrument, Tillman Watson, Sr., folded the same and handed it to his wife, the defendant, saying something about the uses and purposes therein contained. I conclude, from the testimony, that the execution and delivery of the paper has been established. In delivering the opinion of the court, in the case of *Alexander v. Burnet* (5 Rich., 195), Judge Evans says: "I have seen no case when the instrument was in form a deed, accompanied by delivery, which has been construed into a will, although a life estate was reserved to the donor."

I must conclude that it was the intention of Tillman Watson, Sr., at the time of the execution and delivery of the instrument on July 13, 1874, to convey, in present, to his wife, the defendant, the land in dispute, reserving to himself the use thereof during his life. There are no express words of reserva-

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tion *of the use in the instrument under consideration. No such words are necessary when such intent can be discovered from the instrument and the surrounding circumstances. In *Chancellor v. Windham and Law*, supra, it is held "that a deed, whether in form a feoffment, a bargain and sale, or a lease and release, if the consideration of blood or marriage exists, may, to effect the intention of the parties, be construed to be a 'covenant' to stand seized to uses." The only consideration expressed in this instrument is the affection of a husband for his wife, which is sufficient consideration upon which to found a covenant to stand seized to uses. The case of *Chancellor v. Windham and Law*, supra, seems to me to be analogous to this case.

As matter of law, I conclude that the defendant, Elizabeth C. Watson, is entitled to the land described in plaintiffs' complaint, by virtue of the deed of Tillman Watson, Sr., executed and delivered July 13, 1874, construed as a covenant to stand seized to uses. It is therefore ordered and adjudged, that plaintiffs' complaint in the above entitled action be dismissed with costs.

From this decree the plaintiffs appealed upon several exceptions, which raised the points stated and considered by this court.

Messrs. B. L. Abney and E. A. Glover, for appellants.

Mr. M. C. Butler, contra, who also submitted argument of Mr. B. W. Bettis, deceased, on same side.

February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Tillman Watson, Sr., late of Edgefield County, died intestate February, 1874. He died childless,

but he left surviving him his widow, the defendant, and several collateral kindred, among whom are the plaintiffs. The widow administered and all of the real estate admitted to belong to the deceased has been partitioned among the parties entitled. The widow, however, is in the possession of the homestead, containing some four hundred

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acres, which she claims under a deed *executed by her husband in July, 1870, and which therefore was not embraced in the partition. The plaintiffs deny the validity of this deed as a conveyance of this property, and the action below was brought to recover one undivided half of the same. The defendant, in addition to relying on the deed, plead lapse of time and the statute of limitations. The action below was commenced in January, 1884.

The cause was heard by consent by his honor, Judge Witherspoon, upon testimony taken before the clerk of the court. His honor found as matter of fact that the deed in question had been executed and delivered, and as matter of law that it was a covenant to stand seized to uses. He therefore adjudged that the defendant was entitled to the land, whereupon he ordered the complaint to be dismissed with costs.

The appeal denies the execution and delivery of the deed; also, that it could be construed as a covenant to stand seized; and also, that defendant was entitled to hold the land under said deed. It also assigns error to the Circuit Judge in admitting certain testimony as to the acts, declarations, and intention of Tillman Watson concerning said deed. The following is a copy of the deed in question:

"State of South Carolina—Edgefield County.

"Know all men by these presents that I, Tillman Watson, Sr., of Edgefield County, in the State aforesaid, in consideration of the affection I bear my wife, Elizabeth C. Watson, at and before the sealing of these presents, have granted, bargained, and at my death by these presents do grant, bargain, and release unto the said Elizabeth C. Watson all that tract or parcel of land known as my homestead, containing four hundred acres, more or less, situate, lying, and being in the County of Edgefield and State aforesaid, near Ridge Spring depot, on the Charlotte, Columbia and Augusta Railroad, being bounded as follows, viz.: On the north, by lands of P. J. Quattlebaum; on the east and south, by lands of Burrell Boatwright; and on the west, by the Charlotte, Columbia and Augusta Railroad and land of Mrs. T. Watson; together with all the kitchen and household furniture and effects, with all and singular the rights, members, hereditaments, and appurtenances to the said premises belonging or in anywise incident or appertaining. To have and to hold all and singular the premises before mentioned unto the said Elizabeth

C. Watson, her heirs and assigns, forever.

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All of the before *mentioned property I give to my wife, Elizabeth C. Watson, independent of her dower, and no enumeration or deduction is to be made against her in consideration thereof in the final distribution of my estate; and I do bind myself, heirs, executors, and administrators to warrant and forever defend all and singular the said premises unto the said Elizabeth C. Watson, her heirs and assigns, against my heirs and all and every other person lawfully claiming or to claim the same or any part thereof.

"Witness my hand and seal this thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy, and in the ninety-fifth year of American Independence. This paper to be in full force until I desire to act.

"Tillman Watson, Sr. [L. S.]

"Signed, sealed, and delivered in the presence of

"P. J. Quattlebaum,

"R. P. Jones,

"State of South Carolina—Edgefield County.

"Personally appeared before me P. J. Quattlebaum, and made oath that he saw the within named Tillman Watson, Sr., sign, seal, and, as his act and deed, deliver the within deed, and that he, with R. P. Jones, witnessed the execution thereof.

"R. P. Quattlebaum.

"Sworn to before me this 9th day of August, 1873. Jackson Covar. N. P.

"Recorded on the 15th day of December, 1875. Jesse Jones, C. C. C. P."

The questions involved in this appeal were very fully and elaborately discussed before us on both sides, and especially was much light thrown upon the intricate subject of conveyances, both at common law and under the statute of uses, many authorities having been cited and ably commented upon. The case, however, involves an examination of only one of the classes of conveyances discussed, to wit: covenants to stand seized, which originally only created a trust enforceable in equity, but afterwards by the statute of uses conveyed the legal title, and, therefore, since that statute recognized at law. The Circuit Judge held the deed in question here a covenant to stand seized, and whether he erred in thus holding is the main question to be considered. What is a covenant to stand seized, and what are its prominent features and characteristics?

Mr. Kent describes it as well and perhaps better than can be found elsewhere. No apology is therefore necessary for quoting

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*from him, even at some length. He says: "By this conveyance a person seized of lands covenants that he will stand seized of them to the use of another. On executing the covenant the other party becomes seized of the

use of the land, according to the term of the use, and the statute of uses immediately operates and annexes the possession to the use. This conveyance has the same force and effect as a common deed of bargain and sale, but the great distinction between them is that the former can only be made use of among domestic relations, for it must be founded on the consideration of blood or marriage. No use can be founded for any purpose by this conveyance in favor of a person not within the influence of the domestic consideration; and it makes no difference whether the grantee, if he be a stranger to the consideration, is to take on his own account or as a mere trustee for some of the family connections. He is equally incompetent to take. The existence of another consideration in addition to that of blood or marriage will not impede the operation of the deed. Covenants to stand seized are a species of conveyance said no longer to be in use in England, as no use would vest in a stranger to whom the consideration of blood did not extend. They owe their efficacy to the statute of uses. * * * But if the covenant to stand seized be founded on the requisite consideration, it would be good as a grant, for there would be no dispute about the intention, and it is admitted that in a covenant to stand seized any words will do that sufficiently indicate the intention. It is a principle of law that if the form of the conveyance be an inadequate mode of giving effect to the intention, according to the letter of the instrument, it is to be construed under the assumption of another character so as to give it effect. * * * The qualification to this rule is, that the instrument must partake of the essential qualities of the deed assumed; and, therefore, no instrument can operate as a feoffment without livery, * * * nor as a grant, unless the subject lies in grant; nor as a covenant to stand seized without the consideration of blood or marriage; nor as a bargain and sale without a valuable consideration. If there be no lease to make a deed good as a release, and no livery to make it good as a feoffment, it may operate as a bargain and sale; or, if a release cannot operate because

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it attempts to convey a *freehold in futuro, it will be available as a covenant to stand seized provided there be the requisite consideration." 4 Kent, 493-5.

It appears from this that the principal characteristics of a covenant to stand seized are, first, the intention; secondly, it must be founded upon the consideration of blood or marriage, and it may create a freehold in futuro; and, further, though the form of the deed according to its letter may not be covenant to stand seized, yet if such be the intention it will be so construed provided the consideration be that of blood or marriage. See also our cases of Chancellor v. Windham

and Law, 1 Rich., 164 [42 Am. Dec. 411], and *Kinsler v. Clark*, 1 Rich., 170, especially on the point of creating a freehold in futuro by covenants to stand seized. Now let the deed in question be tested by the principles laid down in the authorities cited. The consideration is of the character required in a covenant to stand seized, and there can be no doubt that Mr. Watson intended to create an estate in fee in his wife to take effect in enjoyment at his death, reserving a life estate to himself, thus creating a freehold as to enjoyment in futuro, one of the leading features of a covenant to stand seized.

The case of *Chancellor v. Windham*, supra, was very similar to the case here. In that case one John Wilson, by words in present, had given, granted, and released unto his son, his heirs and assigns, the land described in the deed, at his death to have and to hold, &c. It was held to be a covenant to stand seized, though creating a freehold in futuro. And so, too, in the case of *Kinsler v. Clark*, supra, where a mother, in consideration of natural love and affection, &c., gave and granted to her two sons after the term of her natural life a tract of land, the same holding was had. In the former case Judge Wardlaw said the authorities cited "show that a deed, whether in form a feoffment, a bargain and sale, or a lease and release, if the consideration of blood or marriage exists, may, to effect the intention of the parties, be construed to be a covenant to stand seized; that give and grant are apt words for such covenant, and that it is the duty of courts by reasonable construction to give effect to the intention of parties not inconsistent with law. The deed in question is, therefore, a good covenant to stand seized to uses."

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*Here apt words are used, the intention is apparent, and the exact consideration required is present: why, therefore, should we not sustain the Circuit Judge in his holding this paper a covenant to stand seized? It is urged that this should not be done, first, because in this deed personal property is embraced (household and kitchen furniture), which could not be made the subject of a covenant to stand seized; and, second, that the grantor reserved a power of revocation by the last words of the deed, "This paper to be in full force until I desire to act;" and it is contended that these two facts differentiate this case from the cases relied on above. It is true that the statute of uses does not apply to personalty, and it is also true that at common law, while a conveyance of a chattel might be made to commence in futuro at a definite time fixed, yet it could not be made after a life estate, because a life estate was supposed to be of longer duration than any chattel. This ancient common law rule, however, has been much modified since, and it cannot be said now that it has been established as an inflexible rule to be applied

in all cases of personalty without regard to the circumstances. Be this as it may, however, we do not understand that the personalty here is really in contest. Whether it has been destroyed or whether it is in the possession of the defendant, does not appear.

The fact, though, that it appears in the deed as a portion of the property attempted to be conveyed, is made use of as an argument to show that the whole paper was ambulatory in its character, certainly so, as is contended, with reference to the personalty, because a future interest could not be created therein except by will, and inferentially so as to the land, because it is embraced in the same paper with the personalty. The land was far the most important and valuable portion of the conveyance. It was the homestead of these two old people, containing some 400 acres. If the small personalty found in the deed had not been embraced, we think there could be but little doubt as to the intention of the husband, and under the authorities cited above it would have been the duty of the court to declare the deed a covenant to stand seized, thereby creating a freehold in futuro in his widow. Such being the fact, is it not much more reasonable to suppose that the small personalty embraced was thrown in, either under the sup-

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*position that it would go with the land, or, perhaps, inadvertently, rather than to show that the deed was ambulatory, in the nature of a will, and was to have no effect except as a will? In these matters it must be observed that the intention must always control, and the intention must depend, not upon the effect of portions of the paper taken up in detached parts, but upon the whole paper, construed as a whole.

But, it is urged that the last line of the deed supra affords evidence that the deed was not regarded or intended by old Mr. Watson to be irrevocable. Without going into the question of powers reserved in such cases, it seems sufficient here to say that the line in question is too indefinite and vague to predicate any construction thereof. In the first place, it is not agreed as to the last word in the line, whether it is "act or "alt." This is the most important word in the line, and in the absence of a distinct understanding of what it is, it cannot be safely interpreted. All of the foregoing portions of the deed are reasonably clear and free from doubt, and directly opposed to the effect contended for from this line. To overthrow the clear portions of the deed by a portion which is not distinctly intelligible, seems unreasonable. Besides, the only intelligible portion of the line shows that Mr. Watson knew that he had made a deed, which was of force at the time, at least, and that it passed a right in present.

The exceptions involving matters of fact are overruled under the authority of many

familiar cases in our own reports. The case is a case at law, and the facts belong to the jury.

Next, it is urged "that his honor erred in not excluding all testimony as to Tillman Watson's acts, declarations, or intention concerning said deed, the deed itself being the highest evidence of intention." This is a very general exception, not sufficiently specific according to strict practice and rule, and if we have overlooked any testimony objected to, it is due to this fact. The testimony in the case seems to have been taken before the clerk under the provisions of the statute. During this examination, objections were made and noted, and it is stated by the appellant that these objections were urged at the trial. It does not appear, however, that the Circuit Judge made any ruling upon the subject. Nor does it clearly appear that he considered the testimony in question.

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*But in no event is the exception tenable. The principle contended for by the appellant, to be applied in the construction and interpretation of papers, is no doubt sound. They must speak for themselves, and through the words employed. Nothing can be added, taken away, or changed by oral testimony, but the paper as written must govern. Now, wherein did any testimony of Mrs. Quattlebaum or Abram Jones (the witnesses mentioned in appellant's argument) conflict with this rule? Neither testified as to any matter being left out that should be added to the deed, or that it should be altered in any respect. Nor did they disclose any act or declaration of Mr. Watson giving character to the deed, whether intended as a bargain and sale or a covenant to stand seized. These were the real questions in the case, and the Circuit Judge, doubtless, determined these upon the paper itself.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 238

WESTMORELAND v. MARTIN.

(November Term, 1885.)

[1. *Attorney and Client* ⇨133.]

An attorney's right to fees must, in every case, rest on contract made with the party himself who is charged, or with his representative. No legal claim for compensation can be founded upon services incidentally benefiting a party, other than the employer, as against that party, because of the incidental benefit.

[Ed. Note.—Cited in *Hubbard v. Camperdown Mills*, 25 S. C. 501, 1 S. E. 5; *Wilson v. Kelly*, 30 S. C. 489, 9 S. E. 523; *Ex parte Fort*, 36 S. C. 25, 15 S. E. 332; *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012; *Butler v. Butler*, 73 S. C. 403, 53 S. E. 646.

For other cases, see *Attorney and Client*, Cent. Dig. § 317; Dec. Dig. ⇨133.]

[2. *Partition* ⇨114.]

Where a plaintiff, claiming a half interest in land, brought action for partition, and the claim was resisted, but finally adjudicated in plaintiff's favor, and the land divided, each party getting half, the defendant cannot be charged with any part of the fee due to plaintiff's attorney.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 443; Dec. Dig. ⇨114.]

3. This case distinguished from *Nimmons v. Stewart*, 13 S. C., 416.

Before Wallace, J., Laurens, June, 1885.
The opinion states the case.

Mr. W. H. Martin, for appellant.
Mr. Geo. Westmoreland, contra.

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*February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs filed the complaint below for the partition of a certain tract of land situate in Laurens County, in which they claimed that the plaintiff, Permelia, and the defendant were tenants in common, each being entitled to one-half. The defendant denied this claim. The case was referred to the master to hear and report upon the issues of law and fact involved, who sustained plaintiffs' claim. Upon exceptions to the Circuit Court, the master's report was confirmed, from which there was no appeal. Thereupon, by order, a writ in partition issued, under which the land was divided between the parties, and on motion of plaintiffs' attorney it was then referred to the master, to report a suitable fee for said attorney to be paid by the parties to the suit. The master upon testimony reported \$250 as a reasonable fee. The partition was confirmed, and the fee reported was ordered to be paid, one-half each to be paid by plaintiffs and defendant, and in case that either failed, the interest of such failing party in the land to be sold for such payment. From this order the defendant has appealed, contesting the ruling of the judge as to the fee.

The appellant's counsel correctly states the general rule on this subject, to wit, that counsel fees must depend upon the contract of the parties. Under this rule attorneys must ordinarily look to their clients for compensation—to those who directly employed them. The courts, however, have sometimes decreed counsel fees to attorneys not employed by the party himself subjected to the fee, but by one whom the law regards as the representative of such party, and, consequently, authorized to contract for him. Thus, attorneys' fees must in every case rest on contract made by the party charged himself, or by his representative. We mean the right to fees, the amount, in the absence of a sum agreed upon, of course depending upon labor and services rendered. Thus it is, that the property of infants, lunatics, and

others, who must appear by representatives, may be charged for the fees of attorneys employed by such representatives. And thus it is, too, that the attorney employed by one of a class, interested in a common property, to recover, protect, and defend said prop-

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erty for the benefit of all, may be allowed a fee out of the common fund. But we know of no law which can subject one to a charge for services which have not been authorized by him, neither directly nor through his representative. No legal claim for compensation can be founded upon services incidentally benefiting a party, other than the employer, as against that party, and because of the incidental benefit. *Hend v. Railroad Co.*, 21 S. C., 162. In such case, there might be some moral equity underlying the claim, but this equity has never yet been brought within the jurisdiction of the courts. It has been left to the moral sense of the party benefited.

The respondent relies upon the case of *Nimmons v. Stewart*, 13 S. C., 446. Upon examination of that case, however, it will be found that the principle therein does not cover the question here. There, the plaintiff was suing for, and recovered as trustee, the sum of \$2,000 for her *cestui que trust*, and a fee of \$200 was allowed her attorney, which reduced the trust fund to \$1,800. The parties entitled in remainder to this fund objected and made the question. This court held that the allowance of the fee was proper, in accordance with the principles herein above referred to. *Nimmons* was acting in a representative capacity, suing for the benefit of her *cestuis que trust*, and the fund which she brought into court, by her litigation for the benefit of those whom she represented, was liable for the fee of her attorney. But in the case at bar, the plaintiff does not sustain any trust relation to the defendant. She is in no sense the representative of the defendant. In fact, she and the defendant have been antagonists, fighting at arm's length from the beginning of the litigation, each having her own attorney.

We think it was error to charge the defendant with any portion of the fee of the plaintiffs' attorney, and to that extent the judgment below is modified, by reversing so much thereof as charges the defendant with one-half of the fee allowed to plaintiffs' attorney.

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*GRAHAM v. JONES.

(November Term, 1885.)

[1. *Executors and Administrators* ¶144.]

Where a testator gave to his executors power to sell a tract of land and eight negroes for the purpose (as implied from the terms of another clause in the will) of paying his debts, but made no disposition of this property, one of

his executors could not acquire title to such tract of land by paying the debts with her own funds; she could only demand reimbursement for her expenditures, after accounting for her receipts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 579; Dec. Dig. ¶144.]

[2. *Executors and Administrators* ¶151.]

This executrix having mortgaged this land for her own purposes, the mortgagee took only an equitable assignment of the mortgagor's interest after such accounting had.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 614-620; Dec. Dig. ¶151.]

[3. *Mortgages* ¶566.]

And this mortgage having been given to secure a note upon which there was a surety, and afterwards there was another mortgage of other property given by this mortgagor to the same person to secure this note and a subsequent note of the mortgagor, and the latter property was first sold, the proceeds of sale should be applied pro rata to both notes.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1630; Dec. Dig. ¶566.]

Before Pressley, J., Union, October, 1884.

The complaint and answers, as they appear in the "Brief," were as follows:

1. The complaint first sets out a note, of which the following is a copy:

"On or before twenty-fifth of December, eighteen hundred and eighty-two (1882), we, or either of us, promise to pay W. T. Graham, or bearer, the sum of nine hundred and eleven 95-100 dollars, cash loaned. Witness our hands and seals. S. Jones, [L. S.]

"February 23, 1882. Joseph Hill, [L. S.]"

2. The complaint next sets out another note, of which the following is a copy:

"\$494.55. One day after date, we, or either of us, promise to pay Wm. T. Graham the sum of four hundred and ninety-four 55-100 dollars. Value received. Interest at the rate of ten per centum per annum.

"January 19, 1884. S. Jones, [Seal]"

3. The complaint sets out, also, an account against Sarah Jones for \$37.57.

4. On the \$494.55 note, Graham claims only \$294.55 and interest.

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*5. That no part of said debts have been paid, except \$595, on the 11th day of April, 1884.

6. The \$911.75 note was secured by a mortgage on a tract of land containing 102 acres, known as the "mill tract," said mortgage having been executed by said Jones on the 15th March, 1882.

7. That the defendant, Mary A. E. Gist, claims an interest in said land.

8. That at the time the mortgage above referred to was executed, plaintiff was informed by the defendant, Sarah Jones, and also by her co-defendant, Joseph Hill, the brother of the defendant, Sarah Jones, who signed the note first above set forth, jointly and severally with the defendant, Sarah Jones, that defendant, Sarah Jones, had a

title in severalty and in fee to the whole of above described tract of land: that the said defendants repeated this to the plaintiff until he believed it to be true.

9. That under that belief, and by virtue of a power to the plaintiff contained in the mortgage above described, plaintiff, on the 7th day of April, 1884, offered said land for sale at Union Court House, after due notice of time and place of sale; and at the sale thereof, still believing from the statements of the said defendants that the defendant, Sarah Jones, owned the whole of said tract in severalty and in fee, and without notice, either express or implied, from any source whatever, that her title to the same was imperfect, plaintiff bid off said land at and for the sum of seven hundred and five dollars, which plaintiff alleges is a full and fair price for the whole of said land in entirety and in fee.

10. That since said sale, plaintiff has discovered that he was deceived in believing that the defendant, Sarah Jones, had the entire title to said land: he is now informed that the defendant, Mary A. E. Gist, is a joint tenant or tenant in common with the defendant, Sarah Jones, and owns an undivided half interest in the same, and claims and asserts title thereto under and by virtue of the last will and testament of one Jesse Jones: a copy of which is annexed to this complaint as exhibit A.

11. Sarah Jones and Joseph Hill, although they deceived the plaintiff as to Sarah Jones's title to said land, and he was thereby led to foreclose it at a price far beyond its real value, insist that said purchase is valid, and that the plaintiff should comply

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with *his bid, and credit the note secured by said mortgage with the amount thereof, which plaintiff has refused to do.

The plaintiff prays that said sale be set aside; that said mortgage be foreclosed, and the interest of Sarah Jones in said land be sold under order of court and the proceeds applied to the payment of the costs and expenses of this action, and the amount due on said notes, account, and mortgage and interest thereon; that the defendants be adjudged to pay any deficiency, and for further proper relief.

Exhibit A.

In the name of God. Amen.

I, Jesse Jones, of Union District, South Carolina, being of sound mind and but feeble in health, and mindful of the uncertainty of my life, do make and ordain this to be my last will and testament, to wit:

First. I want all my just debts paid.

Item, I give and bequeath unto my beloved wife, Sarah Jones, my home tract of land, containing five hundred and sixty-five acres, during her natural life; at her death, my will is that it shall be my daughters', Mary

A. E. Jones and Laura L. Jones, and the heirs of their bodies.

Item, I give and bequeath to my beloved wife, Sarah Jones, the following negroes: Peter, Fannie, Elija, Squire, Clarke, Cornelia, Isaac, Thomas, Peter, Richard, Patience, Lizzie, Wesley.

I give and bequeath to my beloved wife the following negroes: Harriet and child, to and her heirs forever.

Item, I give and bequeath to my daughter Mary the negro girl Hannah, and to the heirs of her body.

Item, I bequeath to my daughter, Laura L. Jones, the negro girl Caroline, and the heirs of her body.

Item, My desire is, that the balance of negroes be sold—Henry, Steven, Louisa, Elija, John, Moses, Peggy, Antony—and also my remainder of land.

Item, My desire is, that all my stock be kept on the place, unless my executor may think proper to sell a portion of them, to do so.

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*Item, My desire is, that my daughters shall be educated from the crops on the place.

Item, After the death of my wife, my desire is that my negroes shall be equally divided between them—Mary and Laura.

Item, From item second, the property willed in that item is to go to my daughters, Mary A. E. Jones and Laura L. Jones, to them and the heirs of their bodies (after the death of my wife, Sarah Jones).

Item, If the property willed to be sold is not sufficient to pay the just debts, I will that Lyge and Wesley, if both be required, be sold for that purpose.

Item, I do appoint my beloved wife, Sarah Jones, Jos. Hill, Holly Hill, and Perry Fant my executrix and executors.

Item, I will that the increase of negroes go to daughters Mary and Laura.

Jesse Jones.

I have set my hand in the presence of

D. S. Lee,

T. P. Jones,

Samuel F. Fant.

September 30, 1856.

The answer of Dr. Hill alleges that under the will of Jesse Jones, the mill tract was ordered to be sold to pay debts, and that his co-defendant, Mrs. Jones, having paid the debts of her testator without a sale of the mill tract, he supposed the same became hers in severalty: that if he had not so believed, he would not have become surety upon the note. That so believing, he did, at the time of mortgage given, represent to the plaintiff that Mrs. Jones was the owner of the mill tract, and that she had derived her title from the will of her husband.

2. That the note set forth in the paragraph 1st of the complaint is entitled to a credit of four hundred and dollars from proceeds of sale of home tract mort-

gaged by the defendant, Mrs. Jones, to the plaintiff, and by said plaintiff sold on April 7, 1884.

3. That the defendant is released, because time was given.

4. Denies that \$705 is a full and fair price

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for the whole of the mill tract, and insists that the sale, so far as this defendant is concerned, should be held good and valid.

5. Denies all allegations of the complaint inconsistent with the truth of these defences.

The defendant, Mrs. Jones, in her answer, alleges:

1. That Jesse Jones, her husband, died in the year 1856, seized and possessed of the two parcels of land mentioned in his will. That she paid and discharged all his debts, and thereupon and thereafter believed that she became entitled to the mill tract in severalty and in fee.

2. That she did state to the plaintiff that the mill tract belonged to her, and she also stated to him, before the execution of the mortgage of said mill tract, the source of her title thereto, and, independently of any statement of herself or her co-defendants, the plaintiff well knew whence and in what manner her title was derived. That before the execution of the mortgage upon the homestead, she stated to the plaintiff that she only had a life estate therein, and she then supposed that to be her only interest therein.

The defendant, Mary A. E. Gist, by her attorneys, Munro & Munro, answering the complaint herein, alleges:

That her father, Jesse Jones, at the time of his death in 1856, was seized and possessed of the lands described in the mortgage deed set forth in the complaint, and upon his death said land descended to his heirs at law, to wit, his widow, the defendant Sarah, and his two daughters, Laura and this defendant.

That after the death of her said father, and before the commencement of this action, and about twenty-five years since, the said Laura died intestate, leaving as her heirs at law the defendant Sarah and this defendant.

That upon the death of said Jesse Jones, this defendant became seized of an undivided one-third part of said land, and ever since the death of said Laura, this defendant has been seized of an undivided moiety thereof.

That for more than eighteen years last past, the defendant Sarah has been in the

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exclusive receipt of the rents and profits of said land; has never accounted to this defendant for the same, and is largely indebted to this defendant therefor.

Further answering, this defendant denies that she is, or should be, held liable to the plaintiff for any deficiency or any moneys whatever, as prayed in the complaint.

Further answering, this defendant has not sufficient knowledge or information to form a

belief respecting the allegations of the complaint not herein specifically admitted, and, therefore, requires strict proof thereof.

Wherefore this defendant demands judgment that an account be taken of the rents and profits of said land, and that this defendant have judgment therefor, and for costs.

The mortgages are in the usual form, with power of sale. Upon default of payment of the first note, the mortgagee is empowered to sell the mill tract and apply the proceeds of sale to that note; and on default in the payment of the two notes secured by the second mortgage, the mortgagee is empowered to sell the home place and apply the proceeds to the payment of these two notes. On April 7, 1884, after due advertisement under said mortgages, the plaintiff sold both places—the home place for \$595 to Mrs. Mary A. E. Gist, who received a deed therefor; and the mill tract to the plaintiff for \$705, who took no deed.

The testimony was taken in open court before Judge Pressley, who afterwards filed the following decree, omitting some matters elsewhere stated:

Plaintiff also seeks judgment against Sarah Jones for \$37.57 due to him on open account, to which she makes no objections, but claims a large amount for damages by plaintiff in selling her land at an unreasonable time, after agreeing in the second mortgage for time to be given to her on said debts. It was then supposed that Mrs. Gist would sign the said mortgage with her mother. She refused to do that, and as it was then thought that she had an estate in remainder, in all the "home place" after the life estate of her mother, and as plaintiff regarded the life estate not sufficient security, his selling the same under the mortgage was no breach of his contract.

Joseph Hill claims that he is discharged as

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surety on the first note, because he alleges that plaintiff gave time to principal debtor without the assent of the surety. The testimony on that point shows that he was not present when the second mortgage was executed, but it also shows that he had been previously consulted in the matter, and gave his active aid to procure to it the signature of Mrs. Gist. His claim of discharge is, therefore, not sustained by the testimony.

The remaining question is, whether Sarah Jones was sole owner of the mill place. It belonged to her husband, Jesse Jones, who, on the 30th September, 1856, three days before his death, by will directed that it be sold for payment of his debts. He also set aside eight slaves to be sold for that purpose, and directed that if said slaves and lands were not sufficient to pay his debts, then two other slaves, bequeathed to his wife, should be sold to pay them. Sarah Jones, his widow, and Joseph Hill, her brother, qualified on said will as executrix and executor. They sold

one of the slaves for \$1,000, and the widow, without further sale, paid the rest of said debts. The amount of them is not satisfactorily proved. Her returns to the ordinary show more than \$3,300, but her daughter Laura died in or about the year 1859, and the widow made no returns after that. Jesse Jones was administrator of his father's estate, and had an interest in it, but was indebted to it so that there was a considerable balance against him paid by his widow and not included in the said \$3,300. She testifies that because she paid the debts which the "mill place" was to be sold to pay, she always considered that it thereby became her property, and as such she has ever since claimed and held it.

Defendant, Mrs. Gist, claims that a portion of said debts were paid by the crops on hand when her father died, and by the stock on the home place and the annual proceeds of the "mill place." But it is not satisfactorily proved that said proceeds of the mill place were ever sufficient to pay the taxes and repairs, and to keep down the interest on the debts paid for the estate. As to the crops on hand, they are expressly appropriated by the will to the education of testator's daughters, and the stock is directed to be kept on the place in the discretion of the executrix and the executor, and there is no proof that any of it was sold. Mary Gist was married in 1806, and is now 36 or 37

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years old. She testifies that she did not know until lately why her mother held the mill place; that she lately knew the whole of it was mortgaged to plaintiff, and made no objection, either before or at the sale under foreclosure. Her husband testifies that he knew long ago, does not remember how long, that Mrs. Jones claimed the mill place as her own, and so held it.

At the time Mrs. Jones mortgaged the "home place," she had not only a life estate therein, but also a share in remainder, by reason of the previous death of her daughter Laura. Plaintiff was ignorant of that fact, not only when he sold the home place under the mortgage, but also up to and after the time of filing his complaint in this case. The true interest of Mrs. Jones in the home place was of sufficient value to pay both debts due to plaintiff with interest, but there are no proper allegations in the complaint to authorize me to make any decree concerning that sale.

Though I cannot fix the amount of the debts of Jesse Jones paid by Mrs. Jones, yet I have no hesitation in finding, and do find, that after applying the \$1,000, proceeds of the sale of the slaves, there remains a balance due to her for debts of Jesse Jones, paid by her out of proceeds of her crops, exceeding considerably the sum of \$2,300, and that the mill place could not then, or since, have been sold for that sum. Jesse Jones

gave only \$1,700 for it a year or two before his death, and his will, made three days before his death, plainly indicates his doubt whether the mill place and the eight slaves would suffice to pay his debts.

I therefore adjudge and decree, that Mrs. Jones had a lien on the mill place for the money advanced by her to more than its value, and that her holding the same for so long a time has perfected her title. And further, that her right is vested in plaintiff to the extent of his note, with interest.

I further adjudge, that plaintiff have judgment and execution against Sarah Jones for the sum of \$37.57.

The question of usurious interest need not be decided, because it is raised only by Mrs. Gist, and she has no interest in the property mortgaged to secure plaintiff's debt.

The question of the final liability of Joseph Hill, for any balance which may remain unpaid on the notes to which he is surety, after exhausting the property mortgaged, must re-

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main undecided *until the end of the litigation, if any, concerning the sale of the home place. If there should be no such litigation, then the \$595 for which it sold must be applied pro rata to the second note and the balance which may remain unpaid on the first note after applying to it the proceeds of the mill place.

It is ordered and adjudged, that James Munro, clerk of the court, after due advertisement, do sell the mill place at public auction at Union Court House, on salesday in next February, for one-half cash, remainder payable in one year with interest from day of sale, secured by bond of the purchaser with mortgage of the land, the purchaser to have the right to pay all cash. The proceeds of said sale are to be applied to the payment of the costs of this case, the remainder to be paid to the plaintiff, not exceeding the sum of \$911.95, with interest from the 25th of December, 1882.

The plaintiff has leave, as he may be advised, to amend his complaint by adding such allegations as deemed necessary for the proper sale of the home place, and the defendants, Sarah Jones and Joseph Hill, or either of them, has leave to offer testimony as to the rents of the mill place for the year 1884, and to have the amount applied to the mortgage debt.

The exceptions to this decree are fully stated in the opinion of this court.

Mr. D. A. Townsend, for plaintiff.

Mr. William Munro, for Joseph Hill.

Messrs. David Johnson, jr., and R. W. Shand, for Mrs. Gist.

February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. It will be necessary, for a proper understanding of this case, that the complaint and answers

should be set out in full, and also the decree of the Circuit Judge, his honor, Judge Pressley. These papers, therefore, will be appended to this opinion, so that they may be incorporated by the reporter as a heading hereto. A short synopsis of the case, however, will be given here.

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*The plaintiff held two mortgages of the defendant, Sarah Jones. One covered a tract of land known as the "mill place," and was given to secure the payment of a sealed note for \$911.15, to which the defendant, Jos. Hill, was surety; the other to secure this first note and another for \$494.55 (reduced by a credit to \$294.55), bearing 10 per cent. interest. This covered a tract of land known as the "home place." This note was dated in January, 1884, the first in February, 1882. At the time of the mortgage of the mill place, it was represented to the plaintiff that Mrs. Jones was the sole owner thereof, and the plaintiff accepted the mortgage with that understanding. The mortgages contained a power of sale, and under this power the said lands were sold by the plaintiff, the defendant, Mrs. Gist, purchasing the home place at \$595, and the plaintiff the mill place at \$705.

After this sale, the plaintiff became satisfied that he had been misled as to the ownership of the mill place by Mrs. Jones, the mortgagor, and the action below was instituted for relief from his purchase, seeking to set aside the sale of the mill place to himself on account of misrepresentations by Mrs. Jones, and also a decree ordering a resale of said place, the proceeds to be applied to the notes, and a judgment for any deficiency against the defendants—Mrs. Jones and the surety, Jos. Hill, we suppose. The defendants answered separately. Hill claimed that he had been released from his suretyship, because time had been given his principal, and insisted that the sale of the mill tract should be declared good and valid, and that the plaintiff should be held to his purchase, admitting that he had represented to the plaintiff that Mrs. Jones had title to said place, which he believed to be true. Mrs. Jones admitted that she had made the representations mentioned as to the mill place, believing at the time that she had titles thereto, because she had paid certain debts of her deceased husband, by whose will this place was directed to be sold to pay his debts. Mrs. Gist claimed that she was the owner of one undivided half of the land embraced in the mortgage, as heir at law of her deceased father, Jesse Jones, and as heir at law of a deceased sister, Laura, who had died since the death of her father, and she prayed an

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accounting from her mother Sarah for *the rents and profits while she had been in possession, some eighteen years.

Judge Pressley, who heard the case, held,

first, that Hill could not be released from his suretyship, as the testimony negatived his ground for discharge. He held, second, that Mrs. Jones had paid debts of her husband more than the value of the land, sufficient to give her a lien on the mill place for reimbursement, said place having been directed in the will of her husband, Jesse Jones, to be sold to pay his debts, of which will she and her brother, the said Jos. Hill, were executors; and that her long possession, with this lien, had perfected her title, which had vested in the plaintiff to the extent of his note and interest. He further adjudged "that Mrs. Gist had no interest in the property mortgaged to pay plaintiff's debt," and, further he decreed "that the question of the final liability of Joseph Hill, for any balance which may remain unpaid on the notes to which he is surety, after exhausting the mortgaged property, must remain undecided until the end of the litigation, if any, concerning the sale of the home place. If there should be no such litigation, then the \$595, for which it sold, must be applied pro rata to the second note, and the balance which may remain unpaid on the first note, after applying to it the proceeds of the mill place"; finally ordering James Munro, clerk of the court, to sell the mill place on certain terms, the proceeds when collected to be applied to the costs of this case, the remainder to be paid to the plaintiff, not exceeding the sum of \$911.95, with interest from December 25, 1882, giving leave to the plaintiff to amend his complaint, by adding other allegations, as deemed necessary, for the proper sale of the home place, and also leave to the defendants, Sarah Jones and Joseph Hill, to offer testimony as to the rent of the mill place for the year 1884, and to have the amount applied to the mortgage debt.

From this decree, or at least from portions of it, each of the defendants, except Mrs. Jones, appealed upon separate exceptions. Mrs. Gist, because his honor held that the defendant, Mrs. Jones, had a lien on the mill place for the money advanced to more than its value, and that her holding had perfected her title; and, further, that her right had vested in the plaintiff to the ex-

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tent of *his note: and, further, because he held that she, Mrs. Gist, had no interest in the property mortgaged. Joseph Hill, because his honor held that the proceeds of the home place should be applied ratably to the two notes after applying the proceeds of the mill place to the note secured thereby, and also because he held that the plaintiff should be relieved from the purchase of the mill place when the complaint should have been dismissed. And the plaintiff appealed, because his honor should have decreed that the proceeds of the sale of the home place should have been applied first to the payment

of the second note and not applied pro rata to both notes.

The other portions of the decree stood unappealed, to wit: the refusal to discharge Joseph Hill from the note on which he was surety, his final liability thereon for any balance, and the sale of the mill place ordered, which, in effect, set aside the previous sale made by the defendant under the mortgage, except that Joseph Hill urged that the plaintiff should be held to his purchase.

We will take up Mrs. Gist's exceptions first. She claims that his honor erred in holding that Mrs. Jones had a lien on the mill place for moneys advanced for the estate, and that her long holding of the mill place had vested in her title therein, which had vested in the plaintiff to the extent of his note and interest, and also in holding that she, Mrs. Gist, had no interest in this property.

Upon an examination of the will of the testator, Jesse Jones, it will be found that he made no disposition of the proceeds of this tract of land nor of the eight negroes embraced in the same clause of the will with this land except impliedly, the implication arising from a subsequent clause in which he stated, "if the property willed to be sold is not sufficient to pay my just debts, I will that Lyge and Wesley, if both be required, be sold for that purpose." There is no residuary clause in the will. Nor does he dispose of his personal assets, if any, except the negroes. He first directed that all of his just debts be paid, and after giving his home place to his wife for life, then to his two daughters, and also disposing of certain of his negroes, he directed eight negroes and the remainder of his land (mill place), to be sold as above, with the two negroes, Lyge

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and Wesley, as above. He therefore *died intestate as to the eight negroes and the mill place, except that they should be sold, and impliedly that the proceeds thereof should be applied to his debts—nothing said as to the excess, if any.

The defendants, Sarah Jones and her brother, Joseph Hill, qualified as executor and executrix, and thereby they became invested with the power to sell the property mentioned. In the meantime the title to the mill place descended to the heirs at law, to wit, the widow and the two daughters; and one of the daughters having since died (Laura), leaving her mother, Sarah, and her sister, Mary, her heirs at law, her share descended to them, in whom the title has been ever since in equal moieties unless the title of Mrs. Gist has been divested and obtained by Mrs. Jones by her long possession. As to this we find no such onus in the case as would entitle Mrs. Jones to claim the land by possession. She took and held possession under the will of her husband for a certain purpose, and there does not seem to have

been any act of hers "until the execution of the mortgage" showing any claim against the will.

Now, the question arises, had she, by virtue of paying the debts of the estate from her own means, such a lien on the mill place, as held by the Circuit Judge, which she could transfer to the plaintiff to secure a private debt of her own? No doubt Mrs. Jones, upon final settlement of the estate of her husband, would be entitled to reimbursement for all sums she may have paid from her own funds, and no doubt she could transfer this right to another, but before obtaining such reimbursement she would be required to account for all of the assets of the estate which she had held as executrix. In other words, before she could claim reimbursement she should show that she had made payments over and above the assets for which she was legitimately accountable. But we know of no authority by which she could in advance of settlement lay claim to any specific property of the deceased and deal with it as her own; for instance, mortgaging it for her private debts, as was done here of the mill place. The executors under the will had power to sell the mill place, the proceeds to be accounted for to the estate and the distributees thereof. This was the extent of their power and their duty.

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*Have they made such sale? Not so, unless the mortgage to the plaintiff can be regarded as a sale, and therefore an execution of the power. The mortgage was not a sale; certainly not such as the will directed. It was not in execution of the power with which the will invested the executors. It was therefore void as a legal paper, and the sale by the plaintiff under it was equally void. The land then stands as if no such sale had been made with the title thereto in Mrs. Jones and the defendant, Mrs. Gist, and it has been subject to be sold under the will by the executors during all the time since the death of the testator. It has not been sold, and now the decree of his honor below has ordered a sale. From this portion of the decree there is no appeal, either from Mrs. Jones or Mrs. Gist, and we are not warranted therefore in disturbing it. Besides, doubtless, if there was an appeal this is the best course to be taken under all the circumstances.

But then comes the application of the proceeds which presents a difficult question. The decree directs that these shall be applied after the costs to the payment of the plaintiff's note for \$911.95. This was directed on the theory of the lien of the plaintiff through the mortgage. According to our view above the plaintiff has no lien, therefore he is not entitled in the first instance to the proceeds of the sale. On the contrary, we think that these proceeds must be the subject of administration by the executors or under the direction of the court, as the other assets of the

estate may be, Mrs. Gist being entitled as one of the distributees of her father's estate to one-half of such portion of said proceeds as may remain after payment of the debts of the estate, Mrs. Jones first accounting for the other personal assets previously disposed of (in so far as she may be accountable), before subjecting these proceeds to her reimbursement, and the plaintiff being entitled to set up his mortgage against the share of Mrs. Jones therein, should there be any remaining after Mrs. Gist has been paid not only her half of these proceeds but also such other portion as she may be entitled to from the balance of the personal estate, if any, after paying of debts and reimbursing Mrs. Jones for such amounts as she may have paid on the debts from her own funds. This is a complicated matter and it is not free from difficulties in any view

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which may be taken, but we think the course indicated above is the best that can be done in view of both the legal and equitable rights of the parties.

The Circuit Judge made no decree as to the sale of the home place. In fact, that matter was not embraced in the complaint, and no prayer therein in reference to said sale. He did, however, decree that, in the event there was no subsequent litigation about the home place, that the proceeds thereof should be applied pro rata upon both notes after applying to the first note for \$911.95, the proceeds of the mill place. There was no error in this, supposing that there were proceeds of the mill place now to be applied; but there being none as yet, the proceeds of the home place should be applied pro rata to both notes secured by it, in case there is no further litigation as to the home place. The Circuit Judge also left the final liability of Joseph Hill, as surety, open: as also whether the defendants should pay such deficiency of the notes as might remain after the application of the proceeds of the sales. As we have said, there has been no appeal from these matters. They are, therefore, not before us. The exceptions of the defendant, Joseph Hill, and of the plaintiff, Graham, are disposed of above.

It is the judgment of this court, that the judgment of the Circuit Court be modified as herein, and that the case be remanded for further proceedings as the parties may be advised.

24 S. C. 255

JOHNSON v. PELOT.

(November Term, 1885.)

[1. *Partition* ⇨73.]

In an action for partition, an order referring the case to the master "to state the account of the defendant for the receipts of rents and profits of said lot of land for a period commencing six years prior to the commencement of

this suit and extending up to the date of his report, together with all improvements thereon," was an order of inquiry only, and did not fix any liability upon defendant for the rent of houses on the premises.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 208; Dec. Dig. ⇨73.]

[2. *Partition* ⇨86.]

Where a co-tenant in the bona fide belief that she is sole owner, erects improvements upon a vacant lot, she is not liable for the rents received from such improvements, before demand made, nor for any ground rent of the otherwise profitless lot.

[Ed. Note.—Cited in *Cain v. Cain*, 53 S. C. 353, 31 S. E. 278, 69 Am. St. Rep. 863.

For other cases, see *Partition*, Cent. Dig. § 247½; Dec. Dig. ⇨86.]

[3. *Partition* ⇨85.]

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*The whole lot being divided between the plaintiff and defendant, allotting to plaintiff one-half in area and value, on which stood a house erected by defendant in good faith under a belief of exclusive ownership in herself, and allotting to defendant the other half on which stood a house, also erected by herself, and an old kitchen, the plaintiff is liable to account for the value of the house on his half, and the defendant for the half value of the kitchen.

[Ed. Note.—Cited in *Hall v. Boatwright*, 58 S. C. 548, 36 S. E. 1001, 79 Am. St. Rep. 864; *Vaughan v. Langford*, 81 S. C. 288, 62 S. E. 316, 128 Am. St. Rep. 912.

For other cases, see *Partition*, Cent. Dig. §§ 236-245; Dec. Dig. ⇨85.]

[4. *Costs* ⇨13.]

This being an equity case, costs were in the discretion of the Circuit Judge.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 21; Dec. Dig. ⇨13.]

[5. *Partition* ⇨85.]

A co-tenant, who in the bona fide belief of exclusive ownership, improves the common property, should be allowed the benefit of his improvements in the final division or sale of the property; and this right does not depend upon the mode of enforcing it, adopted in other cases.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 238; Dec. Dig. ⇨85.]

6. *Petition for rehearing* refused.

Before Kershaw, J., Richland, July, 1885.

This was an appeal from the following Circuit decree:

The report makes no recommendations, but simply stated the accounts, the master therein obeying the order of reference, and supplying the facts necessary to a decree by the court.

As to the exceptions, I think they are not well taken. The decree did not commit the valuation of the improvements to the commissioners, but distinctly referred it to the master. The valuation made by the commissioners was no more than an expression of opinion on their part by individuals, and in no way binding upon any one. The master proceeded properly to take the testimony of witnesses, and to decide upon such testimony.

The second exception is not well taken, because the decree directed the accounts to be

taken of "the receipt of rents and profits," and not for the use and occupation of the premises, the presiding judge no doubt holding that the defendant was not actually in possession of more than her share of the premises, and that she ought not to be charged for the use of a house erected at her own cost.

The exceptions must therefore be overruled, and the report confirmed.

It remains to consider and determine the rights of the parties in relation to the improvements, and the rents and profits. And first the question arises whether the decree

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has already determined that the defendant is chargeable with her receipts of rents and profits, and to be allowed for her improvements. The decree has determined nothing upon those questions, but very properly referred the subject to the master to state the accounts, in order that when the question came before the court for determination, a full and complete decision might be made. The partition of the land alone was committed to the commissioners, and these questions were reserved for consideration at a future period.

I will therefore proceed to determine these questions, and first as to the plaintiff's right to the rents and profits claimed. Defendant held the premises as her own, believing herself entitled to the same as her own and exclusive property, without any knowledge or notice of the plaintiff's rights therein, and under such circumstances as were well calculated to induce such belief, she was entirely innocent, and held bona fide. When the possession of the defendant commenced, there was no building upon the lot but the "old kitchen." All other improvements thereon were made by the defendant. All the rents received, except from the old kitchen, were due to those improvements.

A tenant in common is not chargeable for rents and profits derived from improvements made by himself, "when he had reason to believe, and did honestly believe, that he had fee simple title in severalty to the land so improved." "In such cases the tenant will be allowed compensation; and if practicable, in partition, the part of the land so improved will be assigned to the tenant who made the improvements, without charging him with the value of said improvements; that is to say, the partition will be made without reference to the improvements." This is the language of the court in the latest case on the subject; *Buck v. Martin*, 21 S. C., 592 [53 Am. Rep. 702]; citing *Williman v. Holmes*, 4 Rich. Eq., 476; *Scaife v. Thomson*, 15 S. C., 337; *Annely v. DeSaussure*, 17 Id., 391; *Johnson v. Harrelson*, 18 Id., 604. In the case cited, it was ordered that the commissioners should assign, if practicable, to the improving tenant the portion improved without charging her for the value of the im-

provements, or if the land be sold, that the amount added to the value of the land by the improvements be allowed her out of the proceeds of sale before an equal division of the

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same. In that case the co-tenants had concurred, some being minors, in permitting the improvements, but the court applied to the case the same principle applicable to the cases of tenants who bona fide believe themselves the sole owners of the land; that principle is stated as follows in 1 Story Eq. Jur., § 655: "When improvements have been erected by a co-tenant, which add value to the common estate, and erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of the benefit of such improvements, throwing their whole value into the common estate for partition, the disposition of the Court of Equity has always been to give the improving tenant the benefit of them, so far as consistent with the equity of the co-tenants."

If this manifest equity of an improving tenant is so strong as to entitle him to the whole value of his improvements, surely it will protect him from accountability for the rents and profits received by him, due wholly to such improvements. But we are not left to this analogy, but have authority on the very point in *Lewis v. Price* (3 Rich. Eq., 198), where it was said by the court, "Rent is not allowable for premises which the tenant has rendered capable of yielding rent, which they could not before; and that by parity of reasoning the tenant is not chargeable for so much of the rent of the premises as his improvements have contributed to produce."

It follows, from these authorities, that the defendant is accountable for neither the value of the improvements made by herself, nor for rents received by her, which were due to the improvements made by herself. The kitchen was on the premises when the tenant went into possession. She must account for the rent received on it, but such accounting ought not to extend further than to the receipts on that account, accruing since the demand of the plaintiff to be admitted to her share of the common estate. Until that time there was no ouster, and therefore no right to share in the rents received.

The commissioners appear to have considered the parcels of land divided to be of equal value without the improvements, which they value separately. They allotted to the defendant that portion upon which the kitchen

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was situated, and to the *plaintiff that portion upon which was the work-shop erected by the defendant. The former (the kitchen) is valued by the master at one hundred dollars, and the work-shop at two hundred dollars. The defendant must pay to the plaintiff the half of the value of the kitchen,

while she is entitled to the whole value of the work-shop. Setting off the one against the other, the plaintiff must pay one hundred and fifty dollars to the defendant for equality in respect of the improvements. But the defendant must account to the plaintiff for the one-half of the rent of the kitchen from the time of the commencement of this action, and will be allowed credit for so much of the taxes as she has paid since the same date, as is chargeable, to wit, one-half of the tax upon the land and the kitchen, without regard to the other improvements.

It is therefore ordered and adjudged, that it be referred to the master to adjust the accounts between the parties upon the principles and in the manner herein set forth and determined, and to report the same to this court; and that in all other respects the report of the master, hereinbefore made, be confirmed, and the exceptions thereto be overruled; that the return of the commissioners in partition, in so far as concerns the allotment made by them of their respective moieties of the said lot of land to the parties, be confirmed, and that they be vested respectively in the said parties in severalty, and that they be let into possession of the same accordingly; subject, however, to the result of the accounting herein provided for, and the payment of any assessment that may be made thereon by the court in pursuance thereof; that each party pay one-half of the costs of this action.

Messrs. Lyles & Haynsworth, for plaintiff.
Mr. S. W. Melton, contra.

February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The purpose of the action below was to partition certain real estate situate in the City of Columbia, and in possession of the defendant, in which plaintiff claimed a moiety. The

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plaintiff's title being disputed, this question was submitted to a jury, who found for the plaintiff one-half of the land. Thereupon the Circuit Judge, Hon. W. H. Wallace, after stating certain facts found by himself, ordered a writ in partition, awarding one-half in fee to the plaintiff and the remaining half in fee to the defendant. "At the same time he referred the case to the master to state the account of the defendant, Octavia Pelot, for the receipts of rents and profits of said lot of land for a period commencing six years prior to the commencement of this suit and extending up to the date of his report, together with all improvements thereon."

The commissioners in charge of the writ made their return in January, 1885, in which they stated that they had divided the land into two equal portions as to area, each fronting on Gervais street, and had allotted to the defendant the western half, and to the plaintiff the eastern. On the western half

was a dwelling, or store, which had been erected thereon by the defendant during her possession, and a kitchen which was there when she took possession. The dwelling, or store, they valued at \$300, the kitchen at \$100. On the eastern half was a store, or work-shop, erected by the defendant; this they valued at \$150.

The master made his report, valuing the dwelling at \$400, the kitchen at \$100, and the work-house, or store, at \$200. He also reported upon the rents and profits received by the defendant for six years, amounting to \$313—\$183.75 of which was derived from the kitchen, the balance from the other houses, principally the work-shop; upon which aggregate, after crediting taxes, \$166.50, a balance was left of \$146.50. The master made no recommendation, but simply reported the facts. He also reported the rental value of these houses. To this report the plaintiff excepted: 1. Because the master did not adopt the valuation fixed by the commissioners in partition, as the true value of the improvements. 2. Because the master did not find that the defendant had occupied the dwelling from December 15, 1877, and did not charge her with the rental value thereof.

The case then came up before his honor, Judge Kershaw, who overruled the exceptions and confirmed the report, and, holding that the case had been referred to the master for no other purpose but to collect the facts in reference to receipt of rents and

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*profits by the defendant and the value of the improvements, so that the rights of the parties might be properly adjudicated, proceeded to such adjudication, holding that the defendant was not accountable for either the value of the improvements made by herself or the rents received from such improvements, but that she was accountable for the rent received from the kitchen, such accounting, however, not to extend beyond the time of demand by the plaintiff to be admitted to her share of the common estate; and, adopting the value of the improvements as estimated by the master instead of the commissioners, he held that the defendant was responsible to the plaintiff for half of the kitchen, \$50, and that plaintiff was responsible for the whole value of the store or work-shop on her lot, it having been erected thereon by the defendant, to wit, \$200; resulting to the defendant from plaintiff \$150 out of the improvements, the defendant to account for one-half of the rents received from the kitchen from the commencement of the action, first deducting therefrom one-half taxes paid on said kitchen from same date. He ordered and adjudged, that it be referred to the master to adjust the accounts between the parties according to the principles set forth, and that in all other respects the report of the master under consideration be confirmed and the exceptions thereto be over-

ruled, each party to pay one-half of the costs.

Both parties appealed, the plaintiff alleging: I. That his honor should have held the decree of Judge Wallace as fixing the liability of defendant for rents and profits for a period of six years before the action, and that he should, therefore, have decreed such liability as to the kitchen. II. That he should have held defendant to accountability for the ground rent of that portion of the premises improved by the defendant. III. Because he erred in holding the plaintiff accountable for the value of the store or shop erected by the defendant upon that portion of the lot assigned to the plaintiff. IV. Because the costs had been fixed in the decree of Judge Wallace upon the defendant, and Judge Kershaw should have so held. The defendant's appeal raises but one question, to wit, that his honor erred in decreeing that the defendant should pay to the plaintiff the half value of the kitchen as ascertained by the master.

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*We think the construction put by Judge Kershaw upon the decree of Judge Wallace, in referring the case to the master, was correct. At the time that Judge Wallace ordered this reference, the case was not ripe for settling the rights of the parties. The facts were not before him; they had not been fully developed, especially as to the very matters involved, and upon which a final decree was to be made. Judge Wallace did not in his decree lay down any principle to which the report should conform; he simply required the master to ascertain certain facts, to wit, the receipts by the defendant of the rents and profits of the whole lot for six years, together with the improvements. It does not seem to be contended that this decree fixed accountability upon the defendant for the whole lot. Why not, if it fixed accountability as to the kitchen for the six years? The order of Judge Wallace, in our opinion, was no more than an intermediate order, searching for information, preparatory to a final decree, upon which information Judge Kershaw properly proceeded to adjudicate the rights of the parties, untrammelled.

As already stated, we do not understand that plaintiff contends that the decree of Judge Wallace fixed any liability on the defendant for rents and profits received from improvements erected by her on the lot, but she contends that the accountability of defendant as to the rent of the kitchen was fixed, and this for six years, and she now raises the question that whether this was fixed or not, yet that his honor erred in not requiring the defendant thus to account, and also in not requiring an accounting for the ground rent of so much of the lot upon which the new buildings stood, this much at least being, as alleged, common property, made use of by the defendant. It appears among the

findings of fact by the master that the defendant went into possession of the lot in question upon the death of her grandmother, Suckey McGru, "under the belief that she was the sole owner," and she no doubt so held it until the demand by action was made upon her, erecting improvements thereon without question. Under these circumstances, the law permits her to be exempt from liability for the rents and profits anterior to a demand by action. See the case of *Woodward v. Clarke*, 4 Strob. Eq., 170, and especially

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our recent case of *Scaife v. *Thomson*, 15 S. C., 368; *Freeman on Co-ten.*, § 258, and *Riddlehoover v. Kinard*, 1 Hill Eq., 381. We do not find that his honor, the Circuit Judge, erred in applying the principle of these cases to the facts here.

As to the ground rent of the precise locus upon which the improvements were erected, or of the unimproved portion, the master does not seem to have estimated this, nor did the Circuit Judge rule upon that point. There was no exception to the master's report involving this point, nor any claim made for it before the Circuit Judge; but even if this question was properly before us, we have been referred to no case, nor have we found any, where, in estimating rents and profits against a co-tenant for improvements, a distinction has been drawn between said improvements and the ground upon which they stood, the improving tenant being exempt for the one and held liable for the other. It is manifest here that the unimproved ground was worthless except for the improvements, and also that that portion on which the improvements were erected was made rentable only on account of the improvements, so that its rentable value, if any, was due to the improvements, and might well be classed as an improvement made by the tenant's own labor, and therefore exempt, as the houses have been exempt. *Lewis v. Price*, 3 Rich. Eq., 198.

The equity of the defendant in this case to be reimbursed for her improvements on the portion of the lot assigned to the plaintiff is supported by the following authorities: *Scaife v. Thomson*, supra; *Woodward v. Clarke*, 4 Strob. Eq. 167; *Rowland v. Bess*, 2 McCord Eq., 317. Judge Kershaw says that the commissioners seem to have considered the parcels of land allotted to each of the parties to be of equal value without the improvements. These improvements, then, were left open as a matter for adjudication in the final determination of the rights and equities of the parties, and we do not think that Judge Kershaw erred in requiring the plaintiff to account for the value of the store or shop erected on her lot at the expense of the defendant under the circumstances of the case.

There is no ground for defendant's exception claiming exemption from the half value of the old kitchen, as decreed by the judge.

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*The only thing remaining is the matter of costs. This is an equity case, and the costs are under the control of the judge, if he sees proper to decree on that question; otherwise costs follow the event of the suit, as in cases at law. Judge Wallace's order of reference was not such a final decree as would carry costs, in the absence of an order otherwise. It was competent, therefore, for Judge Kershaw to decree on this matter.

It is the judgment of this court that the judgment of the Circuit Court be affirmed.

In this case a petition was filed by the plaintiff asking a rehearing of so much of her appeal as was embraced in her third exception, upon the ground that a tenant in common, to whom has been assigned in severalty a portion of the land, cannot be required to pay for improvements put, without his consent, upon such portion by a co-tenant; citing and quoting from *Dellet v. Whitner*, Chev. Eq., 229; *Martin v. Evans*, 1 Strob. Eq., 355; *Thurston v. Dickinson*, 2 Rich. Eq., 317 [46 Am. Dec. 56]; *Lewis v. Price*, 3 Rich. Eq., 198; *Thompson v. Bostick*, McMull. Eq., 79; *Williman v. Holmes*, 4 Rich. Eq., 476; *Scaife v. Thomson*, 15 S. C. 337; *Annely v. De Saussure*, 17 Id., 391; *Buck v. Martin*, 21 Id., 599 [53 Am. Rep. 702].

May 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. As a general rule, and in ordinary cases, where co-tenants are well known and easy of access, and improvements are made by one without consultation with the others, they are made at the risk of the improving tenant, and will not, as matter of right, be allowed him in the partition of the premises. 1 Story Eq. Jur., § 655; *Thurston v. Dickinson*, 2 Rich. Eq., 317 [46 Am. Dec. 56]; *Dellet v. Whitner*, Chev. Eq., 223; *Hancock v. Day*, McMull. Eq., 69 [36 Am. Dec. 293]; *Thompson v. Bostick*, McMull. Eq., 79. Where, however, improvements are made by one co-tenant under the belief that he has in severalty a fee simple title to the premises, or where said improvements have been erected under circumstances which would make it a great and obvious hardship upon the improving tenant to deprive him entirely of their benefit, the

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disposition of the Court of Equity *has always been to give him the benefit thereof if practicable, and as far as consistent with the equity of the co-tenants, especially as against the claim of one who subsequently thereto establishes his right as co-tenant. 1 Story Eq., § 655.

Under this principle, the cases of *Williman v. Holmes*, 4 Rich. Eq., 476; *Scaife v. Thomson*, 15 S. C., 368; *Annely v. De Saussure*, 17 S. C., 391; *Johnson v. Harrelson*, 18 S. C.,

604; *Buck v. Martin*, 21 S. C., 592 [53 Am. Rep. 702], were decided, modifying the general rule above by allowing the improving tenant not the original cost of his improvements, but the increased value of the premises imparted in consequence of said improvements, this benefit being secured to him either by assigning the improved portion of the premises to him without charging the improvements, or by sale of the premises, the increased purchase money in consequence of the improvements being allowed him in the distribution of the proceeds of said sale. The equity, however, of the improving tenant to this added value does not depend upon the mode which was adopted in these cases to enforce it, but it rests upon the facts of each case, and is applicable to every case where the facts are of such a character as to demand it, and where, at the same time, it can be enforced without injustice to others, as where the improving tenant has reason to believe that he is the exclusive owner, or where it would be a great and obvious hardship to deprive him of it, and at the same time accompanied with the further fact that the allowance can be made consistently with the equity of the co-tenants. Story Eq., supra.

Now, in the case at bar the improvements were made while the improving tenant was in the exclusive possession of the premises, holding as sole owner, and before even any claim or notice of opposing title had been made upon her. There was no doubt, therefore, as to the equity of her claim to the value of the improvements erected by her, and inasmuch as the added value of these improvements, independent of the land, was fully ascertained by testimony taken before the master at the time and with the view to the partition sought, the enforcement of this equity here, and under the facts of the case, was not only proper, but was in full accord with the cases, supra, sustaining the modification of the general rule. It will be seen at

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once, therefore, that *there is no conflict between the case at bar and the cases referred to in the petition and cited to the general rule. Nor were said cases overlooked by us in rendering our judgment.

We have been more elaborate in giving the reasons for dismissing this petition than usual, for the reason that there is a manifest misapprehension on the part of counsel as to the decisions of this court on the subject of improvements by co-tenants. The petition is dismissed.

24 S. C. 266

ROBERTSON v. LYON.

(November Term, 1885.)

[1. *Insane Persons* ⇨ 2.]

In an action to vacate a finding of lunacy under proper proceedings had in the Court of Probate the question of plaintiff's sanity was

submitted to a jury, who found against the plaintiff, and the Circuit Judge approved their verdict. On appeal to this court the evidence was carefully examined and the same conclusion reached.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 4-10; Dec. Dig. ☞2.]

[2. *Insane Persons* ☞1.]

Per Hudson, J. What is a condition of lunacy, stated.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 1; Dec. Dig. ☞1.]

[3. *Appeal and Error* ☞1005.]

[A verdict or finding will not be set aside on appeal, as against the weight of evidence, if the lower court has refused to set it aside, unless the preponderance is very decided.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3950; Dec. Dig. ☞1005.]

Before Hudson, J., Abbeville, February, 1884.

The opinion sufficiently states the case. The Circuit Judge was requested by plaintiff to charge as follows:

1. Persons non compos mentis are those who have not the regular use of the understanding sufficient to deal with discretion in the common affairs of life.

2. The term non compos mentis and of unsound mind mean the same thing, and have a determinate legal signification, importing not weakness of understanding, but a total deprivation of sense. The fact of soundness or unsoundness of mind does not depend on nor can it be collected from particular actions, but upon the general frame and habit of the mind.

3. Where it is seen that the prevailing characteristic of the mind is the absence of reasoning faculties, accompanied with only occasional manifestations of them, or where only in rare instances the reasoning powers can be detected at all, or where all the evidence tends to the conclusion that the indi-

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vidual is incapable of *transacting the ordinary affairs of life, then it is unsoundness of mind.

The judge responded to these requests as follows: These propositions are correct and charged, but with such modifications as render them applicable to the case at bar.

His general charge was as follows: This is a grave issue to the plaintiff. If he is not a lunatic, he should be allowed the free use and enjoyment of his property during his life, and the unrestrained right of disposing thereof after death. On the other hand, if he is a lunatic, it is equally important to him that some prudent person should be appointed to manage and care for that property in the interest of the lunatic. The law, in a spirit of humanity, requires that such should be done and provides the mode of proceeding. In an issue of this grave character you are not to be influenced by feelings of prejudice arising from a supposition that the relatives of the alleged lunatic

may desire to place his property beyond his temporary control so that the remainder of it over and above his support may descend to them. You have nothing to consider in regard to their supposed cupidity, but must look with an eye single to the issue of fact here presented.

Now, what is lunacy? Much learning has been displayed upon the subject, much of it of a technical and abstruse character, but you must solve the question with the aid of common sense. In this present inquiry lunacy is a term of general import, embracing every kind of insanity or unsoundness of mind that incapacitates a person to attend to the ordinary business of life. It is not a mere weakness of mind nor a want of good business talent, nor is it thoughtlessness and improvidence in business. Men of sound minds are frequently spendthrifts. Such have the full right to use, enjoy, waste, and destroy their property, and it is nobody's business nor right to interfere. Some men waste their all in gambling and dissipation, but cannot be pronounced insane in the proper sense of the word. That unsoundness of mind, that lunacy which we are inquiring after in this issue, is such an unsoundness of mind as is evidenced by a total absence of sufficient capacity (mentally) to attend to the ordinary business of life. When one is

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entirely incapable of caring *for, controlling, and managing his own person and property, he is in the eye of the law a lunatic, requiring a guardian.

This may arise from various causes, and among them from old age, when it is termed senilis dementia. It happens when the body outlives the mind. Some men live to be very aged and very feeble in mind and in body, and yet it would be an act of inhumanity to have them declared lunatics and deprived of the free use and enjoyment of their property; whilst there are still others who, in their old age, become utterly incapable, mentally, to manage themselves and property, and in absence of relatives to take charge and manage for them the law and humanity require guardians to be appointed.

The language used in *Foster v. Meaus*, Speers Eq., 569 [42 Am. Dec. 332], and cited by Mr. Noble, is not exactly the language I would use. It is there said that the term "non compos mentis" means a total deprivation of sense. Now, if by this is meant that the mind is a blank, having not a spark of intelligence or sense, such language would be too strong and sweeping in the issue now before us. I take it that one may have a spark of intelligence, a scintilla of sense, and yet be a lunatic over whose property a guardian should be appointed. With this explanation or interpretation the law of that case is applicable to this, and I adopt and charge all the propositions of Mr. Noble with

this modification of the term "total deprivation of sense." A non compos mentis, a lunatic, is a person who is so far deprived (from any cause) of intelligence and sense as to be incapable of caring for and managing his person and property, and who for that purpose absolutely requires a guardian. You must gather from the testimony the general frame and state of the mind, the general habit of the man in connection with his business in daily life, in order to measure the mental capacity. It is not enough to justify you in pronouncing one a lunatic that he has been known now and then to do very foolish and silly things.

Now, in this case Mr. Robertson has been adjudged a lunatic by an inquisition duly appointed. That judgment is prima facie evidence of his lunacy and casts upon him the burden of traversing the same successfully. But you must remember that it was an ex parte proceeding, and by the evidence

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heard upon the stand *in this trial and that alone are you to be governed. In weighing this testimony you should attach more weight to the testimony of witnesses who give you facts than to that of those who are unable to state facts which shed light upon the condition and state of his mind. Ask yourselves the question, What has the man done and what is he still doing from which can be drawn the inference of sanity or insanity? That he bought goods, paid for them, walks the streets, recognizes acquaintances, these are tangible facts from which inferences can be drawn, and are better than a meaningless "because" in response to questions.

The testimony of experts is of much importance in issues of this kind, and is to have more or less weight according as the witness may or may not have had the advantage of experience and practice in such matters. But such testimony, like all others, is to be weighed by you and subjected to the test of the common sense method of scrutiny. That is, you must look to and examine the foundations upon which the expert bases his belief.

Weigh well all the testimony adduced and be governed by the preponderance of the evidence. If it be true that at the time of the inquisition Mr. Robertson was only mentally enfeebled from a "spree," and that though of weak mind he has capacity to manage his business, even though badly, the verdict of the inquisition was wrong and you should correct it. If, on the contrary, you find from the whole testimony that he was then and now is non compos mentis—a lunatic—in the sense in which I have explained the term, your verdict should so speak.

The jury having rendered a verdict in the negative on both questions submitted, the matter was further argued before the Circuit Judge, who rendered the following decree:

This case having come on for trial at the present term of said court, and after hearing the pleadings herein, the following issues of fact were submitted to a jury, to wit: 1st. Was John Robertson, the plaintiff, at the time of the inquisition of lunacy mentioned in the pleadings sane, that is, compos mentis? 2d. Is the said John Robertson now sane, that is, compos mentis? After a full hearing the jury rendered a verdict in the negative as to both said issues of fact.

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*Upon further argument of counsel, and after due consideration of all the facts in said case, I do not feel that there are such facts in the case as would warrant me in reversing said findings of fact. I feel constrained to concur in the findings of the jury under all the circumstances. The evidence is not such as will justify the court in overruling the verdicts of the inquisition and of the jury in this case and in restoring to the plaintiff, John Robertson, control of his property.

It is therefore ordered, adjudged, and decreed, that the proceedings of the Probate Court be confirmed and that the complaint herein be dismissed.

The plaintiff appealed.

Messrs. Noble & Noble, for appellant.

Mr. Eugene B. Gary, contra.

February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. On November 28, 1882, the appellant was adjudged a lunatic on inquisition in Probate Court for Abbeville County, the county in which he resided, the probate judge having first issued a writ de lunatico inquirendo to certain physicians of said county, who, after examination, reported that the intellect of appellant was impaired to such extent as to unfit him for the management of his business, which opinion was confirmed by the verdict of a jury organized according to law in such cases. The jury rendered the following finding: "At the time of the taking of this inquisition the said plaintiff is a lunatic. That his unsoundness of mind is such that he is not sufficient for the government of himself and property. That he is very old and feeble and his habits of late have been very intemperate, and that it would be best to appoint a suitable person to take charge of the person and property of the said plaintiff," which was confirmed by the probate judge. On the next day his honor, Judge Cothran, appointed the defendant, judge of Probate Court, guardian of the person and estate of said plaintiff, &c.

In May, 1883, the plaintiff instituted the

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proceeding below by *summons and complaint denying that he was a lunatic and unable to manage his own affairs, and praying that the whole proceeding before the

Probate Court be set aside as untrue, unfair, irregular, and illegal, &c. The defendant answered and the matter coming up before his honor, Judge Hudson, he, on motion of plaintiff's attorneys, submitted the following questions to a jury for determination, viz.: "1st. Was John Robertson, the plaintiff, at the time of the inquisition of lunacy mentioned in the pleadings, sane, that is, *compos mentis*? 2d. Is the said John Robertson now sane, that is, *compos mentis*?" He further ordered that "in this issue the plaintiff shall hold the affirmative, and that the issues heretofore ordered be modified to harmonize herewith." The jury, after full testimony and a charge from the judge, rendered a verdict in the negative as to both said issues of fact, which verdict, after further argument was confirmed by his honor.

The plaintiff has appealed upon three exceptions, two of them alleging not only insufficiency of evidence to sustain the verdict but a preponderance against it, and therefore the Circuit Judge should have set it aside; and the other, that the verdict was contrary to the charge and for that reason it should have been set aside.

The two first, it will be observed, ask a review of the facts, which can only be had in this court in a case in chancery. Assuming this to be a case of that character, we have taken cognizance of the questions submitted and have given them a careful consideration. We recognize this to be our duty in all cases, but especially have we felt it here when we remembered the grave consequences involved to the plaintiff, accompanied as the case is with the startling proposition that the entire property of the plaintiff, which he has accumulated it may be by his own toil and labor during a long life, should be taken from him against his protest and handed over to another, and also that his person should be under the control and direction of that other, thus depriving him of many of his rights as a man and citizen. In an ordinary case in chancery the rule which obtains in this court as to the facts is well understood to be that we do not feel ourselves at liberty to reverse

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the findings below unless they are *entirely without testimony, or manifestly against its weight and preponderance, and our inquiry in such cases is ordinarily confined to those points. But in view of the important considerations suggested above and involved here, and the earnest appeal of plaintiff, we have to some extent relaxed this rule, and in our examination of the testimony have directed our attention not simply to the absence of all evidence, or the alleged manifest repugnance of the verdict against it, but we have gone further and inquired as to the affirmative support of said verdict, and our conclusion is the same as that reached by the Circuit Judge.

We feel constrained to confirm the finding of the jury. Whatever may have been his capacity in former years, we think the weight of the evidence sustains the proposition that now the plaintiff is incapable of managing his business, and that this results not from negligence, carelessness, or indifference, but from unsoundness of mind, which may be the result of old age, or excessive drink, intemperate habits, but nevertheless amounting to an unsoundness. Two of the physicians, experts Drs. Parker and Gary, gave this as their opinion; the first saying "that he was a man of weak mind, amounting to unsoundness," and the latter that he did not think him a man of sound mind, and that his infirmity unfitted him to attend to business; that long and excessive drink would impair the mind and produce senile dementia, and that he thought that Mr. R. was then suffering from the impairment of mind. Dr. Mabry said that he could not say that he was insane or of unsound mind, but said that he testified at the former examination that, in his opinion, his intellect was impaired by infirmities and that he was incapable of attending to business. These opinions of the experts were supported by the testimony of several of the neighbors of the plaintiff. The testimony on the other side was negative, while all this was affirmative.

Besides this, it is a matter to be considered that the first proceeding was a writ de lunatico inquirendo, directed to three physicians to report his condition. Their report is found above. The next was a submission to a jury of the vicinage under the sanction and solemnity of legal proceedings. This jury found as the physicians had found,

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which was confirmed by the probate *judge, and the last was the submission of the questions to a second jury below who found with the previous findings, which was sustained and confirmed by an eminent and most careful Circuit Judge. Certainly under these circumstances, sustained as we think these different findings are by the testimony, it is our duty to confirm them.

We do not see in what particular the jury disregarded the charge of the judge.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 273

McLURE v. LANCASTER.

(November Term, 1885.)

[Reported and Annotated in 58 Am. Rep. 259.]

[1. *Appeal and Error* ⇨248.]

The object of exceptions in a case at law is to bring up some distinct principle or question of law claimed to have been violated by the Circuit Judge, and to present it in a distinct

and tangible form, so that it may be reviewed by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1432; Dec. Dig. [248](#).]

[2. *Husband and Wife* [39](#).]

As to any property acquired by a married woman by gift, grant, devise, inheritance, or otherwise, there may be dealings between herself and her husband as if she were discover.

[Ed. Note.—Cited in *Gwynn v. Gwynn*, 27 S. C. 526, 542, 4 S. E. 229; *Booker v. Wingo*, 29 S. C. 122, 7 S. E. 49; *Rowen v. Day*, 71 S. C. 498, 51 S. E. 274.

For other cases, see *Husband and Wife*, Cent. Dig. § 220; Dec. Dig. [39](#).]

[3. *Husband and Wife* [49](#)½.]

A gift from wife to husband may be inferred from circumstances, such as the use and appropriation by him for a series of years, the wife having knowledge and not objecting; the presumption in such a case being stronger between husband and wife than between strangers. Thus, where a wife permitted her husband to manage her property, receive the profits and issues, and expend the surplus without question for ten years, the judge properly left to the jury the question of gift of these profits and issues.

If there had been no such gift, the recovery of rents was limited, under the plea of the statute, to the six years next before action brought, measured by the condition of the property at the time the husband assumed the charge.

[Ed. Note.—Cited in *Martin v. Jennings*, 52 S. C. 382, 29 S. E. 807; *Sanders v. Standard Warehouse Co.*, 85 S. E. 902.

For other cases, see *Husband and Wife*, Cent. Dig. § 260; Dec. Dig. [49](#)½.]

[This case is also cited in *McKenzie v. Sifford*, 48 S. C. 469, 26 S. E. 706, without specific application.]

Before Cothran, J., Spartanburg, March, 1885.

The charge of the judge to the jury in this case was as follows:

There is no doubt, under the constitution of 1868 and the acts of the legislature passed in pursuance of it, that a husband and wife may deal with each other in business rela-

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tions as any other two persons. "The wife," says the constitution, "with reference to any property that she may acquire by gift, grant, devise, inheritance, or otherwise, shall be, with regard to that property, as if she were an unmarried woman." That admits of transactions between husband and wife in a business way, which did not obtain in this State before the adoption of the constitution. Before the constitution was adopted, the law regarded a man and his wife as one; but since 1868, the law has been changed or made different.

The plaintiff here is not entitled to recover for more than six years' rent of the place; for the statute of limitations has been pleaded, and that cuts off her right of recovery to everything beyond six years before the time of commencing her suit.

An important inquiry in the case, and the one which is more particularly for you, may

be stated in the form of questions to you, which you must answer and not the court; because these questions of fact are only to be determined by the jury. Did McLure appropriate the proceeds of that place as he pleased, and was such appropriation made with the full knowledge, consent, and acquiescence of his wife, Mrs. McLure, during the ten years of the marriage? Was he the sole manager of the property, claiming and using the profits of the place as his own for the joint support of himself and wife, and spending the overplus as he pleased? Was the plaintiff, Mrs. McLure, cognizant of this? Did she know this? Did she permit it? Or did she at any time object to it? Can the claim which the plaintiff presents here be reconciled with her course in regard to the property for ten years, or during the marriage? If it can be done, it is for you to do it, and not for the court.

I charge you as matter of law, that under the terms of this deed, Mrs. McLure had the right, if dissatisfied with her husband's manner of using the property, at any time to take charge of it and lease the land to him or to any other person. She had that right. Well, now, did she do it? Or, did she acquiesce in his use and management of the property? Did she consent to his doing it? How were the proceeds of this place disposed of? Were they carried into a common fund, the corn put into a common crib, the fodder into a common fodder-house, and all used under the direction of the husband, and was

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that done with her *acquiescence or consent? If it was, and you find so from the evidence, then you cannot find a verdict for the plaintiff. Because the law says that where the marriage relation exists, and the parties cohabit and live together in the same family, that the use of the property which belongs to the wife—if she permits the husband to use and control it as his own—cannot be made a charge upon his estate, nor could property which he bought with the proceeds of those farms, having the sole control, direction, and use of it, be recovered as her property.

The general law is, that where one person buys property with the money of another person and takes a deed in his own name, the law says that that creates in the person taking the deed a resulting trust for the use of the person whose money paid for it. That, now, is in the ordinary dealings of life. But where husband and wife, living together, using the proceeds of her property as a common means of support, increased, it may be, by his care and attention and activity and diligence, if she does not object to that arrangement, he has the right to appropriate it as he pleases. If she consents to that arrangement, he has the right to appropriate it to his own uses, and if he buys property

with it, or pays his own debts with it, or expends it in any way that he pleases, the law does not give her after his death the right to go upon that property and affix to it the character of a resulting trust. [Here the judge read to the jury parts of the cases of *Reeder & Davis v. Flinn*, 6 S. C., 240, and *Charles v. Coker*, 2 Id., 136.]

You must give effect to the acts of the plaintiff in this case according to what you as reasonable, sensible men judge to have been her manifest intent. What did she mean? Now, that is the question for you to determine. What did she mean by this course of conduct? Did she mean to turn that property over in the condition that it was when McLure married her? Did she mean to turn it over to him as her husband to manage and control and use and dispose of as he thought proper and best? Did she have that much confidence in the head of the family, in the husband whom she had taken, to entrust him with that sole control, direction, use, and management? If she did, then his estate cannot be held responsible for it. But that is for you to say.

The courts say: "The most favorable pre-

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sumptions are indulged *when the husband is permitted by the wife to be concerned in the management of the income of her separate estate as it occasionally accrues"—that is, from year to year—"between strangers a more strict and severe rule would be required." That is, where the wife is allowed by law to hold a separate property and contract with regard to it and deal with her husband as she would with a stranger, the law itself imposes a stricter relation between strangers than it does between husband and wife, and a severer rule would apply. Now, it is for you to say, under the circumstances of this case, what, from the testimony as you heard it showing the relation between these parties, was her manifest intent in turning that property over to the control, direction, and management of her husband?

Now, the law further says, that where this acquiescence continues for a number of years; where no claim is set up on the part of the wife to have her rights maintained as they exist in that relation; where a series of years is marked by that acquiescence, concurrence, and allowance of control to the management, direction, and use of the husband, it strengthens as it grows. Because she has the right, at any time during the existence of the relation and during the currency of years in which this state of things exists, to assert her claim to the property. The law does not debar her from doing it any more than it debars any other person who has the right. Because it is the boast of the law that wherever there is a right, the law will furnish a remedy, and where that state of acquiescence continues, the longer it continues, the stronger the presumption of acquiescence is.

Now, when was the first complaint made in this case on the part of the wife? That is a question of fact for you. Was there any complaint made during the marriage? Any assertion of right that was inconsistent with the continued use, direction, and management by the husband? It is for you to say whether there was or not. When was the first matter of complaint made that she had been wronged by her husband's taking this property? Was it made during the marriage? If it was not made during the marriage, then the acquiescence is strengthened in the absence of anything to contradict it, and if it was made after the death of the husband, it was too late. The law does not al-

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low any person *to make a gift and afterwards to revoke it. The law does not allow anyone to make a charge for a thing which is given, and the reason of it is this: perhaps if the person who accepts the gift knew that it was going to be charged for, he would decline to accept it. Maybe he did not want it very much. The article may have been worth all that the person giving it afterwards charged for it, but the person receiving it might have been able to have done without it, and might have preferred to do without it rather than accept it as a thing which had afterwards to be paid for.

In other words, that is the difference between gift and contract. One person may make a gift; two persons are required to make a contract. I may give you any article of personal property that I please, and you may accept it. I cannot afterwards say to you, for instance, "There is a pair of glasses that are worth \$5 or \$10. Won't you allow me to present them to you?" You thank me very kindly, and accept it. I cannot afterwards charge you for the glasses, because you might say, "Why, sir, I would have preferred a pair of steel glasses worth \$1.50 or \$2. I didn't want those. They are not suitable to my condition. I would rather have the steel, because they were cheaper." I could not recover from you the price of the glasses, although they might be worth all that I say they are worth.

A gift made cannot be afterwards converted into a charge. That is the meaning of the law, and it was illustrated to you by one of the counsel in the very familiar case of a man accepting the guardianship of an infant whom he is not bound to support. Now, if the guardianship is taken of your nephew, or your cousin, or some person not related to you, an infant, you are required by law to make annual returns of the disbursements and expenditures that are made by you on account of that ward. If you neglect to make a return of the board and clothing of that infant to the probate judge, when the child comes of age and demands a settlement, and you are called before the probate judge to have the account settled, you say, "Why, for ten years I furnished this child with

board and clothing worth \$100 a year. It amounts to \$1,000." The courts say: "You cannot charge for that. If you had intended to make a charge for that, you ought to have

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had it re*turned to the probate judge and the account vouched. The law says it was a gratuity. You gave it, and having given it, you cannot revoke it."

So that, as I understand it, is the law of this case. If you conclude in the plaintiff's favor here, then she is entitled to recover six years of whatever you conceive this rent to be worth. Therefore, if you find favorably for the plaintiff here, under the proof you will give her six years' rent of these premises, whatever in your judgment she ought to recover for the rents. And in making up that estimate, you ought to take into consideration the condition into which this dead man brought the land, and you ought to average the rents. If you should find favorably to her, his estate ought to have the benefit in some measure for the improved condition, if you believe it was improved, into which he brought the land; and, therefore, the fairest standard in that matter would be to average the rents and give her six years of whatever, in your judgment, the rents are worth.

But if you should find in favor of the defendants—if you believe from the proof in the case, and from the law as you have heard it, that there was acquiescence on her part and a free, full control given, then she cannot recover at all, and your verdict ought to be for the defendants.

The jury rendered a verdict for the defendants; and from the judgment entered up thereon, the plaintiff appealed upon exceptions (a motion for new trial having been made and refused), alleging errors, to the Circuit Judge, as follows:

I. In charging that the plaintiff, if entitled to recover at all, is not entitled to recover for more than six years' rent.

II. In charging that where husband and wife live together, using the proceeds of her property as a common means of support, if she does not object to that arrangement, he can appropriate it as he please and to his own use; there is no resulting trust, and after his death the wife cannot recover it from his estate.

III. In charging that where the marriage relation exists, and parties cohabit and live together in the same family, that the use of the property which belongs to the wife,

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if she permits the hus*band to use it and control it as his own, cannot be made a charge upon his estate.

IV. In charging that if the relations between the parties (Mr. and Mrs. McLure), and their conduct towards each other was such as to justify the implication that there was an acquiescence on her part, then it is just the same as if the property had been

given directly by gift and in the most formal manner.

V. In charging that if the wife entrusted the husband with the sole control, direction, use, and management of her property, his estate cannot be held responsible.

VI. In charging that even where the wife is allowed by law to hold a separate property, and contract with regard to it and deal with her husband as with a stranger, the law itself imposes a stricter relation between strangers than it does between husband and wife, and a severer rule would apply.

VII. In charging that where there exists a charge of acquiescence on the part of the wife in the control, management, direction, and use of her property by her husband, the longer it continues, the stronger the presumption of acquiescence.

VIII. In charging that if the plaintiff, during her married life, made no complaint that she had been wronged by her husband, her acquiescence is strengthened, in the absence of anything to contradict it, and, if made after the death of her husband, it is too late.

IX. In charging, in substance, that the case was the same as that between a guardian and ward; and if a guardian did not charge in his annual returns for maintenance of ward, the law regards such maintenance as a gratuity of the guardian.

X. In charging that if the jury believed there was an acquiescence on plaintiff's part, and a full and free control of the property given to the husband, the plaintiff cannot recover.

XI. In charging the jury, that they should average the rents and allow the same only for the last six years of testator's life; and in doing so, should take into consideration the improvements and ameliorations made upon said land by the testator.

XII. In charging the jury, in substance, that where the husband manages his wife's

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business, the presumption is that the *income is given to the husband, and that the burden of proof is upon the wife to show otherwise.

XIII. In charging the jury, if they believe there was an acquiescence on her part, and a free, full control given, plaintiff cannot recover.

XIV. In refusing the motion for a new trial.

Mr. J. S. R. Thomson, for appellant.

Messrs. Bobo & Carlisle, and Duncan & Sanders, contra.

February 24, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In 1871 the plaintiff intermarried with David A. McLure. At her marriage she owned certain real and personal property, which she, shortly after said marriage, conveyed by separate deeds to her husband, conditioned that she should

have the use and enjoyment of the rents and profits during her life, and in case of the death of her husband before her death, the property was to revert to her, &c. The husband died in 1882, having managed the farm during the marriage. After the death of the husband, the action below was brought by the plaintiff, the widow, against the executors of the deceased to recover the rents and profits of the land, accrued during the time the husband had been in possession.

The case was tried by the jury, who found for the defendants. The appeal is founded upon alleged errors in the charge of the Circuit Judge, his honor, Judge Cothran. The exceptions are numerous (fourteen in number); the most of them, however, seem to be objections to certain remarks made by the Circuit Judge in the course of his general charge, detached from the context. The object of exceptions in a case at law is to bring up some distinct principle or question of law claimed to have been violated by the Circuit Judge, and to present it in a distinct and tangible form, so that it may be reviewed by this court. Several of the exceptions here fail to conform in a strict sense to this rule. It will not be necessary, therefore, to take them up seriatim, especially as, when consolidated, they present but few legal points.

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These *points involve the rights of married women under the constitution and statutes of the State, and of gifts made by them to their husbands, arising from presumption inferred from conduct, acquiescence, or otherwise. The Circuit Judge charged upon these points, illustrating his views by the incidental remarks which are the foundation of many of the exceptions. Our examination has been directed to the principles laid down in the charge thus illustrated.

As to the rights and powers of a married woman, the judge charged, that with reference to any property that she may acquire by gift, grant, devise, inheritance, or otherwise, a married woman, with regard to that property, was as if she were unmarried, and that this right admitted of business transactions between husband and wife, as if they were non-covert. There certainly can be no objection to this under our recent decisions. *Witell v. Charleston*, 7 S. C., 88; *Pelzer, Rodgers & Co. v. Campbell & Co.*, 15 Id., 597 [40 Am. Rep. 705]. When the judge confined such transactions to the property of the wife, it cannot be said that he went too far. He then charged, in substance, that in reference to gifts from the wife to the husband, it was not necessary to show a direct and positive transaction of that nature, or an express gift, but that it might be inferred from circumstances, such as appropriation by the husband with the knowledge and consent of the wife, her acquiescence, a long acquiescence being stronger than a short one, the husband being the sole manager, claiming

and using the property as his own, and spending the overplus as he pleased, with the cognizance of the wife, and without objection.

He further charged that owing to the relation between husband and wife, the law allowed the most favorable presumption, when the wife permitted the husband to receive and enjoy the income of her property, but that the rule where strangers were concerned was more strict and severe. He, in addition, distinctly stated to the jury that while the wife might permit her husband to make use of such income, and acquiesce therein, yet that she had the right, if dissatisfied, to object and take charge herself, and even lease it out to others. And, finally, after propounding certain questions to the jury explanatory of the principles laid down, so as to enable the jury to apply these principles

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to the *testimony, he repeatedly said to them, that it was for them, and them alone, to pass upon that testimony, and to find the facts as evidenced thereby.

Now, was there error in the ruling of the Circuit Judge, as to gifts presumed by the circumstances referred to? In the case of *Reeder & Davis v. Flinn* (6 S. C., 240), it was held: "Where a wife permits her husband to manage her separate estate for a number of years, and dispose of the income as he sees fit, equity treats it as a gift to him." Further: "A wife, by negligence, or acquiescence, may forfeit her right to equities against her husband, which otherwise she might have asserted." This is even stronger than the charge of the judge. The court in that case, after stating the rule, and saying that there was no difference between a case where the husband secured the income from a trustee, and where he was in the immediate management himself, said: "That the rule rested on the assumption of either an express gift of the income to the husband, or one implied from her acquiescence." Citing *Hill Trust*, 425; *Powell v. Hankey*, 2 P. Wms., 82; *Beresford v. Archbishop*, 13 Sim., 643; *Thrupp v. Harman*, 3 M. J. & K., 513; and *Charles v. Coker*, 2 S. C., 136. And that this rule is stronger in matters between husband and wife than between strangers, as charged by the judge, see the remarks of Chancellor Kent in *Methodist E. Church v. Jaques*, 3 Johns. Ch. [N. Y.], 79.

We think the charge of the judge, when taken as a whole on the questions referred to above, was in accordance with the law, and fully supported by the authorities cited supra, and we do not see that the various detached portions of the charge found in the several exceptions where they are presented, modified or in any way relaxed the rule, or general principle laid down for the government of the jury, or was calculated to mislead them.

Inasmuch as the jury found for the de-

fendant, doubtless on the question of gift, it is hardly necessary to discuss the question of the six years to which the judge limited the jury, in case they found for the plaintiff, nor the averaging of the rents with the improvements considered. If there was a gift, these matters were immaterial, but even if they were before us properly, we think the charge was right.

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*There was no error in refusing the motion for a new trial.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 283

STATE v. BECKHAM.
(November Term, 1885.)

[*Homicide* ⚡112.]

If a person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself unless he kills the assailant, the killing is justifiable: but one cannot claim the privilege allowed by law of taking human life, unless the testimony show that he was entirely without fault in bringing about the difficulty.

[Ed. Note.—Cited in *State v. Jacobs*, 28 S. C. 36, 4 S. E. 799; *State v. Wyse*, 33 S. C. 595, 12 S. E. 556; *State v. Petsch*, 43 S. C. 154, 20 S. E. 993; *State v. Davis*, 50 S. C. 425, 27 S. E. 905, 62 Am. St. Rep. 837; *State v. Cobb*, 65 S. C. 325, 43 S. E. 654, 95 Am. St. Rep. 801.

For other cases, see *Homicide*, Cent. Dig. § 145; Dec. Dig. ⚡112.]

[This case is also cited in *State v. Ellison*, 95 S. C. 130, 78 S. E. 704, without specific application.]

Before Witherspoon, J., York, June, 1885.
The opinion fully states the case.

Messrs. Hart & Hart, for appellant.
Mr. Solicitor McDonald, contra.

February 25, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Under an indictment for murder the defendant was convicted of manslaughter. The counsel for defendant requested the Circuit Judge, amongst other things, to charge as follows: "That if the jury believe that the accused and others were in mutual combat, and the accused was attempting to withdraw, although he may have been in some fault in the first instance, but with no intent to commit a felony, and was followed and assaulted so dangerously as that escape was extremely hazardous, and he slew his assailant, it is excusable." The judge says that he refused to charge as thus requested: "As I thought that the law with reference to the right of self-defence, applicable to the case, had been sufficiently charged and explained to the jury."

The charge, as represented in the "Case," so far as this particular point was concerned,

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was as follows: "I charged the jury *that the right of self-defence was recognized and allowed by law under the plea of necessity: that the law was jealous of human life: and that before a defendant can claim the high privilege allowed by law of taking life, he must show by the testimony, and satisfy the jury that he was entirely without fault in bringing about the difficulty; in other words, that he must come into court with clean hands." Then after laying down the rule, as settled in the case of *State v. McGreer* (13 S. C., 464), as to who was to judge of the necessity, he proceeded as follows: "I instructed the jury that if they believed from the evidence that the circumstances were such as to justify the defendant in concluding at the time that it was necessary to fire to avoid immediate danger to his life, or to avoid great bodily harm, they should render a verdict of 'not guilty,' otherwise they should find the defendant guilty of murder or manslaughter, according to the view they should take of the testimony."

The only exception taken is in these words: "Because it was error to charge the jury that the defendant must show by the testimony that he was entirely without fault in bringing about the difficulty before he could claim the privilege allowed by law of taking human life."

We think the law was correctly expounded to the jury by his honor in his charge, and that the exception cannot be sustained. In 1 Bish. Crim. Law, sec. 865, that eminent author says (the italics being ours): "The rule is commonly stated in the American cases thus: If the individual assaulted, *being himself without fault*, reasonably apprehends death or great bodily harm to himself, unless he kills the assailant, the killing is justifiable;" and in support of this doctrine he cites quite a long list of American cases. Again he says, in section 869: "But one must not have brought on himself the necessity which he sets up in his own defence." It is true that there are some authorities which seem to support the view contended for, but when closely examined it appears to us that they go no further than to show that if the first combat, brought on by the accused, has terminated by his retiring therefrom, and a fresh assault is commenced by his adversary, that then the accused may,

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in defence of his life, or *to protect his person from great bodily harm, take the life of his adversary.

But whether this be so or not, it seems to us that the rule, as stated by Bishop above, is best supported by reason as well as by authority. All the authorities agree that the right of self-defence rests upon necessity, and if the necessity is created by the accused himself, arises from his own fault, he cannot

plead such necessity as an excuse for so grave an act as that of taking human life. Where one, without legal excuse, commences a combat, and finding himself getting the worst of the fight, undertakes to withdraw, but his adversary presses him so closely that he finds it necessary for his own protection to take the life of his adversary, he cannot avail himself of the plea of self-defence, for that would be allowing him to take advantage of his own wrong. His life would not have been endangered but for his own fault in bringing on the contest, and it cannot be said, in such a case, that there was any legal necessity for taking life.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 285

GRAHAM v. NESMITH.

(November Term, 1885.)

1. A finding of fact by the Circuit Judge, reversing the referee, approved.

[2. *Vendor and Purchaser* ⚡232.]

Possession of land is notice sufficient to put a purchaser from another upon inquiry, and furnishes notice of the possessor's rights.

[Ed. Note.—Cited in *Sweatman v. Edmunds*, 28 S. C. 63, 5 S. E. 165; *Daniel v. Hester*, 29 S. C. 149, 7 S. E. 65; *Tant v. Guess*, 37 S. C. 500, 16 S. E. 472.

For other cases, see *Vendor and Purchaser*, Cent. Dig. § 540; Dec. Dig. ⚡232.]

[3. *Evidence* ⚡561.]

Upon the question of genuineness of a signature, the Circuit Judge having determined that there was doubtful proof, and other writings admitted to be genuine being already in the case, there was no error in resorting to a comparison of handwriting.

[Ed. Note.—Cited in *State v. Ezekiel*, 33 S. C. 116, 11 S. E. 635; *Rose v. Winnsboro National Bank*, 41 S. C. 194, 19 S. E. 487.

For other cases, see *Evidence*, Cent. Dig. § 2381; Dec. Dig. ⚡561.]

Before Cothran, J., Williamsburg, October, 1883.

This was an appeal from the following decree:

On account of the lapse of time, manifest ignorance on the part of the plaintiffs of their rights, perfunctory agreement imperfectly performed, a series of annual rent notes for nominal sums, various ambiguous receipts, a multitude of chimney corner

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counsellors, an *attempted transfer of title to the land in dispute by one of the defendants to the other, a pretended tax sale, proceedings instituted for summary ejectment, and some appearances of artful design and unfairness, this matter is in great confusion. Without encumbering this decree with a detail of the evidence of these elements of confusion, I shall endeavor to make the

briefest statement of the case that I can to be perspicuous and announce the conclusions which I have attained.

On December 27, 1870, the defendant, Sarah Nesmith, and the plaintiffs entered into an agreement, in writing, by which the former agreed to sell to the latter the land in question, containing 168 acres, for the sum of \$400, payable in three annual instalments, after a cash payment of \$60, with interest on the deferred payments. The agreement contains a forfeiture clause, in effect that if default be made as to any of the stipulated payments, the vendor "shall be at liberty to consider the contract as forfeited and annulled, and to dispose of said land to any other person in the same manner as if this contract had never been made," and without liability to refund any portion of the money paid or to pay for any of the improvements, &c.

The purchasers went into possession immediately, making the cash payment of \$60. Up to January 1, 1874, the expiration of the three years, the purchasers paid in all the sum of \$310, in various amounts and at various times. The last of these payments, to wit, the sum of \$50, was made on December 27, 1873.

Immediately after January 1, 1874, B. M. Nesmith, the husband of Sarah Nesmith, notified the plaintiffs that their contract for the land was at an end. On the 12th of January, a few days after the notification, Sarah Nesmith accepted the sum of \$15 from the plaintiffs and receipted to them for the same without specifying on what account. There is no evidence of any other indebtedness by the plaintiffs to her. On the same day the plaintiffs made their note to Sarah Nesmith for the sum of \$1 for rent of the land for the year 1874.

On January 8, 1875, the plaintiffs paid to her the sum of \$44, and she receipted for the same on account of rent of land, and the plaintiffs gave her their note for \$1 for rent of land for the year 1875. On January 15,

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1876, they paid her \$30, for which *she gave a receipt expressing the payment to be "for land." They, as before, gave her their note for \$1 for rent of the land for the year 1876. On January 20, 1877, they paid to her \$28, for which she gave a receipt expressing the payment to be "for land." They again gave her their note for \$1 for rent of land for that year.

During the year 1877 the plaintiffs made in all four payments at different times, the receipts for which do not express the account on which they were made. On January 25, 1878, they paid to her \$2 "on land," and on February 18 following another payment of \$7.05, and made their note to her for \$1 for the rent of that year. Another payment of \$25 was made by them on December

25 following, the receipt for which does not state on what account.

On February 1, 1879, they paid to her \$9, and she gave them a statement in the following terms, viz.:

"This is to show that the amount still due on the land occupied by Dug Tucker, Bonus Graham, and Hope McNulty, is (\$71.63) seventy-one dollars and sixty-three cents.

"Sarah Nesmith.

"February 1st, 1879."

Ten days afterwards they paid her \$5.70, on what account not stated in the receipt, and made their note for \$1 for rent of land for that year. This note has been lost. On January 12, 1880, they paid to her the sum of \$24, the receipt does not state on what account, and they gave her their note for \$1 for rent of land for that year. On December 29, 1880, Sarah Nesmith executed and delivered her deed of the land in question to W. E. Nesmith, in which the consideration is stated to be the sum of \$165, which she said was duly paid to her by him.

No other payments are claimed by the plaintiffs to have been made to Sarah Nesmith on any account, though they say in their testimony reported by the referee that they tendered to her the balance due. In this they are sustained by one Sam McBride, a witness, who swore he went with them to Mrs. Nesmith and saw them offer the money. They further swore that the balance due to Mrs. Nesmith was borrowed by them from one Rhem for the purpose of paying the same

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to her, and D. D. Rhem swore that *he saw the plaintiffs borrow the money from his father and in a few days return the same to him.

W. E. Nesmith, who sets up title from Sarah Nesmith to the land in question, is her son; lives near her and within two or three miles of the land in question, and was living there when the plaintiffs went into possession. He was present on January 8, 1875, when the plaintiffs made a payment to his mother of \$44, drew up the receipt for the same which she signed, and also drew up the note for \$1 for rent that year.

It appears that for the year previous to the alleged sale of the land to W. E. Nesmith the plaintiffs had failed to pay the taxes for the first time since their possession of it. They undertake to explain their default by saying that upon application to the treasurer for that purpose they were told by him that the land had not been returned for taxation. W. E. Nesmith paid the taxes for it for that year and produced the receipt for the same, and although the land was perhaps in the "delinquent list," it cannot be true, as was stated by Mrs. Nesmith, that the land had been sold for taxes and had been purchased at the "tax sale" by her son, W. E. Nesmith. The execution of her deed conveying the land to her son, dated December

29, 1880, is inconsistent with the truthfulness of her statement, to say nothing of the production of the tax receipts held by W. E. Nesmith. When Mrs. Nesmith told the plaintiffs that her son had bought the land at the tax sale and referred them to him, they went at once to him to refund the amount of the taxes so paid. He declined to treat with them and claimed the land as his own.

Very soon afterwards he instituted proceedings before a trial justice to eject the plaintiffs from the land, in which he succeeded; and this complaint was filed to enjoin the enforcement of that process and for specific performance of the original contract of December 27, 1870.

Before entering upon the consideration of the gist of this action—the matter of the right to specific performance—it is proper to dispose of a serious question raised by the defendants as to the genuineness and efficiency of the statement alleged to have been given by Mrs. Nesmith to the plaintiffs, bearing date February 1, 1879, and set out in full supra.

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*In view of the extraordinary transaction hereinbefore set forth, the character and condition of the parties concerned, the continuous acceptance of money by Mrs. Nesmith after the technical forfeiture, the various and ambiguous receipts for the same given by her, annual rent notes for the nominal sum of \$1 each, and bearing in mind that equity is averse to regarding time as the essence of such contracts, I might safely conclude that there has been a waiver of the forfeiture clause of the agreement of December 27, 1870, and consequently adjudge this to be a proper case for the specific performance of that agreement.

The plaintiffs' right to such relief, however, cannot be denied if the statement of February 1, 1879, is a genuine paper. Is it genuine or not? The inquiry is not unworthy of the very best consideration. Mrs. Nesmith, who was put upon the stand by the plaintiffs to prove this and other papers, one of which was the original agreement, swore that she would not say whether she signed the papers exhibited to her or not. "I could not recognize my signature if it was shown me," etc. The plaintiff Tucker says, in his testimony, that Silas Nesmith wrote most of the receipts which his mother signed, and that he wrote the statement of February 1, 1879.

S. T. Cooper, a witness for the plaintiffs, said: "I have often seen the handwriting of Silas Nesmith, deceased. Think Silas wrote receipts dated February 10, 1877, February 1, 1879, February 23, 1877, and three receipts dated January 20, 1877; also, statement of amount due on land February 1, 1879." This statement was signed "Sarah Nesmith," and upon comparing it with her signature to the original agreement and with other acknowl-

edged signatures of hers, I am satisfied, as was the intelligent referee, that this instrument is genuine and that the signature is hers.

It is strenuously insisted, however, by the learned counsel for the defendant that the proof of this and of the other papers is insufficient, because violative of the rule of evidence that comparison as an original means of ascertaining the genuineness of handwriting will not be permitted; admitting, however, that it is allowable in aid of doubtful proof. The latest case upon the subject is that of *Benedict, Hall & Co. v.*

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Flanigan (18 S. C., *506 [44 Am. Rep. 583]), which reviews the former decisions in this State, and seems to me to be analogous to the one now under consideration. In that case the court say: * *

In this case Mrs. Nesmith declines to say whether the signature was hers or not; that she would not know her signature if she saw it, &c. Surely it would not be a violent presumption in the ordinary transactions of men, involving repeated payments of money, that the production by the payor of the payee's receipts is *prima facie* or presumptive proof of payments; but it becomes almost conclusive, scarcely needing the aid of comparative or other proofs, when the payors are ignorant and unlettered and the payee being put upon the stand refused to admit or deny her signature.

I think the referee was right in admitting supplementary testimony.

Another obstacle to a decree for specific performance is interposed by the defendant, W. E. Nesmith, who claims, under the deed of his mother, dated December 29, 1880, to be the real owner of the land in question. The referee has found that W. E. Nesmith did not have actual notice of the plaintiffs' claim to the land, and that the facts proved were not sufficient to charge him with constructive notice. I am unable to concur in this conclusion. The facts proved in the case, the proximity of W. E. Nesmith to the premises, family connection, preparation by him of receipts for a part of the money paid previously to his mother, continued possession by plaintiffs for nearly ten years, annual payment of taxes not stipulated for in the annual \$1 rent notes, one of which W. E. Nesmith drew up—all, taken together, were abundantly sufficient, in my judgment, to have given to him both actual and constructive notice, and, if not, should certainly have put him upon inquiry as to the true state of affairs. *Massey v. McIlwain*, 2 Hill Eq. 421.

Nor am I able to concur with the referee in his conclusions as to the \$1 rent notes (so-called). The plaintiffs were either lessees or vendees. The referee found that they were the latter. In this I think he is right, and if so it would be inconsistent with the character of vendees to hold them liable for rent

of their own land; and the \$1 rent notes, in
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my judgment, are void for want of consideration. The defendant, Sarah Nesmith, in taking them from the plaintiffs, could justly have valued them only as furnishing evidence of attornment to herself as landlord of the premises, and as fixing upon the plaintiffs the condition of tenants; and by reason of the fact of waiver, and of other circumstances hereinbefore stated, these notes, being insufficient for that purpose, are devoid of all value as money obligations and should be delivered up to the plaintiffs.

Not having been furnished with the notes given for the purchase money of the land, and having reason to believe from the testimony that a special rate of interest is set forth in them, which does not appear in the original agreement, I am unable to estimate the balance due to the defendant, Sarah Nesmith, for the land. This calculation should be made by the clerk of this court, attended for that purpose by the respective counsel engaged in the case, and the true amount ascertained after allowing the plaintiffs all just and proper credits, disregarding the \$1 rent notes (so-called).

Wherefore it is ordered, adjudged, and decreed, as follows:

I. That the exceptions on the part of the plaintiffs' and defendants' counsel respectively to the report of the referee be sustained or overruled as they may be found in conformity with, or in antagonism to, the principles herein decided, and that the report of the referee be in like manner modified.

II. That the plaintiffs herein are entitled to specific performance of the written agreement of date December 27, 1870.

III. That the defendant, Sarah Nesmith, have judgment for the balance due to her upon the original contract of sale, after allowing all just and proper credits to the plaintiffs for payments by them heretofore made to her.

IV. That in default of payment by the plaintiffs of balance due to the defendant, Sarah Nesmith, as soon as the same is ascertained by the clerk's calculation, that the sheriff of Williamsburg County do proceed, after due and legal notice, to sell, on sale day in February next, or some convenient sale day thereafter, in the usual manner of judicial sale, and for cash, the premises described in the pleadings, executing and delivering to the purchaser thereof his title deed as such sheriff.

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*V. That from the proceeds of sale he do pay to the defendant, Sarah Nesmith, the amount of the balance of principal and interest due to her as the purchase money of said land.

VI. That in event the payment of the same be made to the said Sarah Nesmith without sale, as herein provided for, that she do, upon

receipt of the money, execute and deliver to the said plaintiffs her deed of conveyance, in conformity with the covenants contained in the written agreement of date December 27, 1870.

VII. That the deed of conveyance executed by Sarah Nesmith to her son, W. E. Nesmith, bearing date December 29, 1880, be delivered up to the clerk of this court, to be cancelled by him and returned to the said W. E. Nesmith, for such other use than as a claim of title to the premises in question he may see proper to make of it.

VIII. That the parties hereto respectively pay their own attorneys' and witnesses' costs and the cost of subpoenaing the same; and that the cost of the referee and the officers of the court be paid to them—one-half by the plaintiffs and the other half by the defendants.

Mr. J. A. Kelley, for appellant.

Mr. T. M. Gilland, contra.

February 25, 1886. The opinion of the court was delivered by

Mr. Justice MELVER. On December 27, 1870, the defendant, Sarah Nesmith, entered into a written contract with the plaintiffs for the sale of a certain tract of land to them on certain terms stated in said contract. The only one of these terms which it is necessary to notice, is expressed in the following language: "That if default be made in fulfilling this agreement, or any part thereof, on the part of the parties of the second part, then, and in such case, the party of the first part, her heirs and assigns, shall be at liberty to consider this contract as forfeited and annulled, and to dispose of said land to any other person in the same manner as if this contract had never been made; and,

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further that the said *party of the first part, her heirs and assigns, shall not be required to refund any portion of any sums which may have been paid in pursuance of this agreement, or be required to reimburse or pay to the said parties of the second part, their heirs and assigns, any sum or sums of money for means and labor expended, or time consumed in making any improvements or repairs whatever on the said land."

Under this agreement the plaintiffs went into possession of the land and made numerous payments towards the purchase money, but did not pay the same in full within the time limited for that purpose by the agreement. The defendant, Sarah Nesmith, claiming that by reason of this the contract was forfeited, sold and conveyed the land to her son and co-defendant, W. E. Nesmith, on December 29, 1880. The plaintiffs, on the other hand, claim that after the time limited for the payment of the last instalment, and before the conveyance of Sarah Nesmith to her son, W. E. Nesmith, the said Sarah Nesmith waived the forfeiture by accepting several

payments on account of the purchase money and receipting for the same as such, and especially so by a statement in writing, bearing date February 1, 1879, purporting to be signed by said Sarah Nesmith in these words: "This is to show that the amount still due on the land occupied by Dug Tucker, Bonus Graham, and Hope McNulty is (\$71.63) seventy-one dollars and sixty-three cents." The defendants, however, contend that there was no legal evidence that Mrs. Nesmith had ever signed these receipts or the statement above copied, and this is one of the questions made by the appeal. The defendant, W. E. Nesmith, also claims that he is a purchaser for valuable consideration without any notice of the plaintiff's equity, and this is the only other question made by the appeal.

The action was for specific performance, and it was referred to a referee to take the testimony and report his conclusions of law and fact to the court. Without going into the various matters considered in the report, which are not now before us, it is sufficient to say that as to the two questions raised by the appeal, the referee found as follows: "On February 1, 1879, the plaintiffs paid Sarah Nesmith \$9.00; at the same time she gave them a statement showing the amount

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still due on the land occupied by *the plaintiffs to be \$71.63." And as to the other question raised by the appeal, the finding of the referee is as follows: "The question whether W. E. Nesmith had notice of the plaintiffs' claim is involved in some doubt. He did not have actual notice, and my opinion is that the facts proved by the plaintiffs do not amount to constructive notice."

The case was heard by his honor, Judge Cothran, upon the report of the referee, "and exceptions filed thereto by both plaintiffs and defendants," as he says, though we do not find any exceptions to the report incorporated in the "Case," and therefore cannot tell with certainty whether the two findings of the referee, upon which the questions raised by the appeal largely depend, were properly excepted to. But as the Circuit Judge seems to have considered them, we will assume that these questions were properly raised. In speaking of the statement of February 1, 1879, his honor says: "This statement was signed 'Sarah Nesmith,' and upon comparing it with her signature to the original agreement, and with other acknowledged signatures of hers I am satisfied, as was the intelligent referee, that this instrument was genuine, and that the signature is hers." And after discussing the point raised by the appellant as to the admissibility of testimony as to handwriting by comparison, says: "I think the referee was right in admitting supplementary testimony"—referring doubtless to the fact that at the reference a witness, who claimed to be a judge of handwriting, was permitted by the referee to testify, after

comparing the signatures to the receipts and statement of February 1, 1870, with the acknowledged signatures of Mrs. Nesmith to the deed to her son, to the original agreement for the sale of the land, and to an affidavit made in the application for injunction, that the signatures to the receipts and statement were in the same handwriting.

As to the question of notice to the defendant, W. E. Nesmith, the Circuit Judge said that he was unable to concur with the referee in his finding, that there was no proof of actual notice; but, on the contrary, concludes that the various circumstances, mentioned in the decree, were abundantly sufficient to have given him both actual and constructive notice, and if not should certainly have put him upon inquiry as to the true

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state of affairs. *He, therefore, rendered judgment that the deed from Sarah Nesmith to W. E. Nesmith should be cancelled and that the former should be required to perform specifically her agreement of December 27, 1870, upon the payment by the plaintiffs to her of the balance due on the purchase money.

From this decree defendants appeal upon the following grounds: "I. Because his honor erred in holding that the defendant, W. E. Nesmith, was not a bona fide subsequent purchaser of the land in question without notice of the sale to the plaintiffs. II. Because his honor erred in holding that the various receipts and statements signed by the defendant, Sarah Nesmith, were completely proven, it being respectfully submitted that there was no evidence to sustain his honor's conclusions that a comparison of handwritings was in aid of doubtful proof, but that these receipts and statements were only proved by a comparison with other handwritings of the defendant, Sarah Nesmith, as original evidence. There being no other evidence introduced as doubtful proof, consequently every receipt and statement signed by defendant, Sarah Nesmith, was entirely incompetent and violative of the well settled rule of evidence on the subject of a comparison of handwriting."

As to the first ground of appeal, we agree entirely with the Circuit Judge. All the circumstances proved in the case which have been adverted to in the decree, and need not be repeated here, pointed very strongly to the conclusion that the defendant had notice of the claim of the plaintiffs when he took his conveyance from his mother. But waiving this, there can be no doubt that he had constructive notice. It is well settled that possession is notice sufficient to put a party upon inquiry, and that is enough. *Massey v. McIlwain*, 2 Hill Eq., 421; *Sheorn v. Robinson*, 22 S. C., 32; *Bienau v. White*, 23 Id., 490. Finding these plaintiffs in possession, his duty was to inquire of them by what right they claimed to hold the land, and such

inquiry would have led to a notice of their equity which they are now seeking to set up.

As to the second ground of appeal, we see no error on the part of the Circuit Judge, conceding the general rule to be as claimed by appellants, that comparison of handwriting

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ing cannot be resorted to as original evidence, but only in aid of doubtful proof, yet we do not think the rule was violated in this case; though, in common with many other judges who have treated of this matter, we may add that we are unable to see any reason for the distinction. For, as is well said by the Chief Justice, in *Benedict, Hall & Co. v. Flanigan*, 18 S. C., 506 [44 Am. Rep. 583]: "The testimony of those who are acquainted with the writing of the party in question, either from having seen him write or [are] otherwise familiar with his acknowledged writing, has invariably been allowed. From a knowledge thus acquired the witness is supposed to have a standard in his mind impressed by his memory with which he can compare the disputed writing and thus reach a correct conclusion. This being the theory upon which such testimony has been uniformly received, it is somewhat illogical that comparison on the witness stand of a disputed signature with one acknowledged to be genuine has been as uniformly rejected by most courts."

So that in reality all testimony as to handwriting, except where the witness testifies that he saw the party sign, or heard him admit that he did sign, is, in effect, by comparison. But there seems to be an exception to this rule (1 Greenl. Evid., § 578), to wit: "Where other writings admitted to be genuine are already in the case. Here the comparison may be made by the jury with or without the aid of experts." Now in this case the comparison was made with other writings admitted to be genuine which were already in the case, viz.: the original agreement for the sale, the deed to W. E. Nesmith, and some affidavits made in the case upon the application for injunction. So that this case falls clearly under one of the exceptions mentioned by Mr. Greenleaf.

But, more than this: we think that the Circuit Judge whose province it was, according to the case of *Benedict, Hall & Co. v. Flanigan*, supra, to determine in the first instance whether there was such doubtful proof as authorized a resort to comparison of handwriting, having determined that question, and there not being any patent error or any error at all in such determination, according to our view, the question is concluded. There was some testimony by the plaintiff, Tucker, tending to show, although possibly not sufficient to show, that the papers in

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question were signed by Mrs. Nesmith, and that makes just such a case as lets in proof by comparison of handwriting. So that it seems to us that in no view of the question

was there any error on the part of the Circuit Judge in resorting to proof by comparison of handwriting.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 297

BENEDICT v. ROSE.

(November Term, 1885.)

[*Bills and Notes* ⚭502.]

In a civil action on a note in which the defendant denies his alleged signature, a record of the Court of Sessions showing the conviction of a prior endorser upon this note of forgery of another paper, is inadmissible testimony.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 1714; Dec. Dig. ⚭502.]

Before Witherspoon, J., Richland, July, 1882.

The opinion fully states the case.

Mr. John T. Sloan, jr., for appellant.

Mr. L. F. Youmans, contra.

February 26, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This is the third time this case has been before this court. It was an action on a promissory note, as follows:

"\$4,000.00. Columbia, S. C., January 9, 1874.

"Thirty days after date I promise to pay L. Cass Carpenter, or order, four thousand dollars, payable at the South Carolina Bank and Trust Company, S. C., value received. If not paid at maturity, interest thereafter to be at the rate of thirty per cent. per annum.

"(Signed) J. L. Neagle.

"(Endorsed): Renewal. L. Cass Carpenter, W. E. Rose."

The note was transferred for value to the plaintiff who brought this action against Neagle, the maker, and Carpenter and Rose, as endorsers.

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*At the first trial there was judgment against Neagle, the maker, but the Circuit Judge granted a non-suit as to Carpenter and Rose for want of sufficient notice of protest. The Supreme Court set aside the non-suit and remanded the case. At the second trial Rose contested, denying that he had ever signed the endorsement on the note, or received legal notice of the protest; and henceforth the contest was narrowed down almost entirely to the question whether Rose signed the endorsement or it was a forgery. The plaintiff produced witnesses, including Neagle, who testified that the signature of Rose as endorser was genuine, and after contest the plaintiff had a verdict against him for the balance due on the note. But the Supreme Court set aside the verdict on the ground that the presiding judge had charged

upon the facts. See *Benedict v. Rose*, 16 S. C., 629.

At the third trial it seems that Rose made the old question as to want of legal notice of protest, but the principal contest was as to whether the signature of Rose as endorser was genuine or a forgery. Upon that point there was a good deal of testimony on both sides. As part of his testimony the defendant offered the record of an indictment for forgery against L. Cass Carpenter, which the judge at first held to be inadmissible, but afterwards recalled his ruling and allowed it to be put in evidence. This time there was a verdict for the defendant, and the plaintiff appeals upon the following grounds:

I. "Because his honor erred in admitting in testimony the record of the case of the State v. L. Cass Carpenter, indictment for forgery.

II. "Because his honor erred in charging the jury that from the testimony the jury must believe that Rose signed and delivered it for value.

III. "Because his honor erred in charging the jury that the notice of protest of the dishonor of the note must have been given within the day after the dishonor."

IV. "Because his honor erred in his charge that there was a great deal of testimony in this case and that they must consider it all."

V. "And plaintiff excepts to the order of

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his honor July 24, *1882, refusing a new trial in the case, and appeals from said order to the Supreme Court."

From the view the court take it will not be necessary or proper to consider any of the exceptions except the first, which alleges that it was error to admit in evidence the record of an indictment for forgery in the case of the State v. L. Cass Carpenter. In reference to this point it strikes us that the first impression of the Circuit Judge was correct and that the record from the Court of Sessions was not admissible. As a judgment to estop the parties from disputing the matters adjudged it was clearly inadmissible. In the first place, it did not appear that the subject matter of the indictment had any connection whatever with the issue between Benedict and Rose as to the alleged indorsement of the note sued on. To have the force of res adjudicata it is necessary that the subject matter should be the same. In the next place, the parties were not the same. Neither Benedict nor Rose had anything whatever to do with the indictment against Carpenter, and therefore it was res inter alios acta. And finally it was a criminal proceeding, and for that reason the record was not admissible in a civil action. The authorities go so far as to hold that even if the forgery charged in the indictment was as to the very paper sued on in the civil action, the record of conviction will

not be admitted as evidence therein. 1 Stark. Evid., 281; Cluff v. Ins. Comp., 99 Mass., 317; Cottingham v. Weeks, 54 Ga., 275; Ryer v. Atwater, 4 Day [Conn.], 431; 1 Greenl. Evid., § 537; 2 Whart. Evid., § 776. In this latter reference Mr. Wharton says: "A judgment of conviction on an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive but is not even admissible evidence of the forgery in an action on the bill."

It is contended, however, that the record of an indictment from the Court of Sessions is always admissible to prove the fact of conviction—that is to say, to prove itself. Properly understood this is true. The judgment being a public transaction, rendered by public authority and presumed to be faithfully recorded, is the only proper legal evidence of itself and the legal consequences resulting from the fact; and when it is offered

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for that purpose *cannot be said to be inter alios and is admissible whoever may be the parties to the suit in which it is offered. But as we understand there is a wide difference between the admissibility of a judgment as a fact and as evidence of ulterior facts. These distinct objects for which the judgment is admissible must not be confounded. As Judge Wardlaw said, in *Etters v. Wilson*, 12 Rich., 152: "The mistake that has given rise to the objection has proceeded from confounding the purposes for which a judgment may be offered, first to show the truth of what has been adjudged, and second to show the fact that the judgment was rendered and the legal consequences thence deducible. For the latter purposes a judgment inter alios is always admissible, and often is not only conclusive, but the only proper evidence."

Mr. Greenleaf (vol. 1, section 527) states the principle as follows: "A judgment when used by way of inducement or to establish a collateral fact may be admitted though the parties are not the same. Thus the record of a conviction may be shown in order to prove the legal infamy of a witness." That is to say, if Carpenter had presented himself as a witness, the record might have been offered as conclusive evidence of the fact that he had been convicted of forgery. But Carpenter was not offered as a witness nor do we see that there was any occasion for proving the conviction as a collateral fact. It must have been offered in the case with a view to its indirect effect upon the issue, as tending to lead the mind to the conclusion that Carpenter may have forged the name of Rose as endorser on the note; and for such purpose it was not admissible. Considered simply as evidence in the case, we cannot see that, on the issue made, the defendant had any more right to offer in evi-

dence the forgery record from the Court of Sessions than he had to go into any other proof in a civil suit of the general bad character of Carpenter. It was irrelevant.

The judgment of the court is, that the judgment of the Circuit Court be reversed, and the cause remanded for a new trial.

24 S. C. *301

*DANIEL v. HESTER.

(November Term, 1885.)

[1. *Mortgages* ⇨452.]

A plaintiff must prove his case as made by the pleadings. In action for foreclosure, an allegation of title in the mortgagor is not required, but is involved in the other usual allegations; and in this case, these allegations were not so controverted by the defendants in possession as to make it incumbent upon plaintiff to prove title in the mortgagors.

[Ed. Note.—Cited in *Loan & Exchange Bank v. Peterkin*, 52 S. C. 239, 29 S. E. 546, 68 Am. St. Rep. 900.

For other cases, see *Mortgages*, Cent. Dig. § 1316; Dec. Dig. ⇨452.]

[2. *Mortgages* ⇨460.]

The answer not having controverted the allegation in the complaint that the defendants were claiming some interest accruing subsequent to the mortgage, the assertion of present title in themselves was new matter, and in the issue ordered they were properly required to be the actors.

[Ed. Note.—Cited in *Loan & Exch. Bank v. Peterkin*, 52 S. C. 236, 29 S. E. 546, 68 Am. St. Rep. 900.

For other cases, see *Mortgages*, Cent. Dig. § 1348; Dec. Dig. ⇨460.]

Before Witherspoon, J., Colleton, February, 1884.

The opinion states the case.

Messrs. Howell & Murphy, for appellants.
Messrs. Edwards & Tracy, contra.

February 26, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action in the usual form to foreclose a mortgage upon a lot of land in St. George's, Colleton County, given by Joseph G. Hester and his wife, Josephine N. Hester, September 2, 1868, to secure a note to the plaintiff for \$750. The action was not commenced until 1883, and the plaintiff, finding that the mortgagors, Hester and wife, had left the country, and the mortgaged premises were in the possession of other persons, made those in possession as well as the mortgagors parties defendant. The complaint alleged the execution of the note and mortgage, that the debt was not paid, and, stating that the persons in possession of the land set up some interest therein "accruing since the execution of the mortgage," prayed foreclosure.

The mortgagors, Hester and wife, did not answer, but let the case go by default. The answering defendants, however, claimed

that they had been in possession of the land for more than ten years, and "deny that the

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mortgagors have any interest in the *premises, and allege that they, the said defendants, are seized in fee thereof."

The plaintiff made the usual proof of the note, mortgage still due, &c. The answering defendants offered no proof whatever as to their claim of title, but moved to dismiss the complaint on the ground that the plaintiff failed to prove that Hester and wife were the legal owners of the land when they executed the mortgage. The Circuit Judge refused to dismiss the complaint, and upon the proof gave judgment of foreclosure against the mortgagors, Hester and wife, but enjoined its enforcement until an issue could be decided, which he ordered, as to the title of the mortgaged premises, in which the answering defendants who set up title were made the actors.

From this decree and order the said defendants appeal to this court upon the following exceptions:

I. "For that the plaintiff having failed to make good by testimony his allegation, 'that the defendants, T. O. McAlhamy and others, claim some interest in, or lien on, the mortgaged premises accruing since the lien of said mortgage,' and having failed to show title in the mortgagors, the judge erred in refusing to dismiss the complaint as against said defendants: such proof being necessary to give the Court of Equity jurisdiction, and enable that court to adjudicate the defendants' title.

II. "For that his honor erred in ordering that an issue be tried by a jury, 'whether or not the defendants have title to the land in these proceedings mentioned,' and that at such trial the defendants shall assume the burden of proof, and shall establish their affirmative defence as set forth in their answer. Whereas, it is submitted, his honor should have held that it was incumbent on the plaintiff to make out his case; that the burden of proof was on the plaintiff, and that the defendants' title was good against all except him who showed a better title, &c.

III. "For that the tenor of the order is against the settled policy and law of this State, in that it requires the defendants to show that the plaintiff is not entitled to recover," &c.

There is a good deal of confusion in this case, resulting from a want of fulness and perspicuity in the pleadings. It is undoubtedly true that the plaintiff must prove his

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case, but there is *always a preliminary question as to what is the case made. What was the issue made here by the pleadings? The complaint was in the usual form, to foreclose a mortgage, stating the execution of the note and mortgage, that the debt is still due and unpaid, &c. We do not understand

that in such case it is usual for the plaintiff to go on and allege in terms that the mortgaged premises belonged to the mortgagor, but such allegation is always involved. Considering it as made here by the plaintiff, it does not seem to us that it was controverted by the defendants in such way as to make it incumbent on the plaintiff to prove, in the first place, that Hester and wife had title at the time they executed the mortgage. The mortgagors themselves certainly made no such issue, for they made default, and judgment of foreclosure was properly rendered against them.

Did the answering defendants make any such direct issue? Their answer is very peculiar, and really seems carefully to avoid such issue. They do not state how or when their alleged interest arose, but simply that they have had possession for more than ten years, that they are now seized in fee, and that the Hesters now have no interest in the land. It is insisted that this was equivalent to denying that Hester and wife ever had title, but it does not so strike us. Their assertion of title is carefully limited to the present—that they are now seized, &c. This does not, necessarily, exclude the idea that Hester and wife had title when they executed the mortgage, but had subsequently transferred it to them, and that they, being in under the Hesters or with their consent, their title had been perfected by long possession. We cannot say that the plaintiff failed to prove his case, as made by the pleadings, or that the judge erred in refusing to dismiss the complaint.

But who should be the actor in the issue ordered? That must depend upon the inquiry, whether the claim of title by these defendants was what is called new matter; that is to say, whether it is analogous to the plea of confession and avoidance, which admits the cause of action alleged did once exist, and alleges subsequent facts which operate to discharge it. The new matter of the code admits all of the material allegations of the complaint, and consists of facts not alleged therein, which destroy the right

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*of action and defeat a recovery. From what we have already said, it will be seen that, under the pleadings, the title set up by the answering defendants must be regarded as new matter. The plaintiff stated in the complaint that the claim of the defendants, whatever it might be, "accrued after the lien of the mortgage." This statement was not denied by the answer of the defendants, and the effect of that failure to controvert was to admit the truth of it. "Every material allegation of the complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the answer, not relating to a counter-claim or of new matter in a reply, is to be deemed controverted."

verted by the adverse party, as upon a direct denial or avoidance, as the case may be." Code, § 189. We agree with the Circuit Judge, who ordered the issue, that, under the pleadings in this case, the answering defendants should be the actors and prove their allegations of new matter made by them.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 304

SMITH v. SMITH.

(November Term, 1885.)

[1. *Boundaries* ⇨37.]

The decision of the Circuit Judge on a question of location approved; and the courses of a deed, which purported to convey 150 acres, held not to include an adjoining tract of 1,100 acres.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. ⇨37.]

[2. *Wills* ⇨608.]

Under a devise to W. in trust for the use of S., to permit S. to have the rents and profits for the term of his natural life, and then to hold for the children of S. until the eldest arrives at the age of 21, and then to convey to such children, the use was not executed, but the legal estate remained in W., as trustee, to enable him to perform the duties imposed upon him.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1374; Dec. Dig. ⇨608.]

[3. *Wills* ⇨608.]

If the use were executed by the statute, the rule in *Shelley's Case* would not apply, but the children of S., after his death, would take as purchasers from the testator.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1374; Dec. Dig. ⇨608.]

[4. *Wills* ⇨497.]

The word "children" in this devise means the immediate offspring, and is not synonymous with "heirs of the body" or "issue."

[Ed. Note.—Cited in *Robert v. Ellis*, 59 S. C. 161, 37 S. E. 250; *Clark v. Neves*, 76 S. C. 486, 57 S. E. 614, 12 L. R. A. (N. S.) 298.

For other cases, see *Wills*, Cent. Dig. §§ 1080-1086; Dec. Dig. ⇨497.]

[5. *Fraudulent Conveyances* ⇨96.]

Where a father bona fide made a voluntary deed to his daughter, and subsequently sold other lands to A., with a covenant of general warranty, which was afterwards broken, the daughter is entitled to retain her land against the claim of A., the subsequent creditor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 293; Dec. Dig. ⇨96.]

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*Before Hudson, J., Marion, July, 1885.

This was an action by Stephen Smith against the administratrix and children of Samuel S. Smith, to recover under a covenant of warranty contained in a deed of Samuel S. Smith to Stephen Smith, the breach being a prior encumbrance fixed by the case of *Clark v. Smith*, 13 S. C., 592. The opinion states the case. The Circuit decree, after stating the facts and quoting the words of the will of Samuel Smith, jr., proceeded as follows:

I have taken the trouble to copy in full these clauses before commenting upon them, because of the vast research and learning brought to bear by the counsel for the plaintiff in giving construction to them. He contends, in the first place, that the trust here created is one that is executed by the statute and converted into a legal estate in Samuel Smith, the life-tenant, and that the trust being thus removed, the limitations are such as give a fee simple to the said first taker, Samuel Smith, jr., under the rule in *Shelley's Case*.

I will not attempt to follow the learned counsel through his able argument upon this construction, neither as regards the application of the statute of uses, nor the rule in *Shelley's Case*. The simple question is, whether Samuel Smith, jr., under this devise took a life estate or a fee simple. It is difficult for me to conceive what language could be used more clearly creating a life estate in Samuel, than the language of the testator, and I hold that such is all he had, and it matters not whether it was legal or in trust, whether the statute executed the use or not. But the statute did not execute the use, nor do the limitations come within the rule in *Shelley's Case*. At the death of Samuel, jr., his estate terminated, and the children he left surviving him take as remaindermen under the will, and not as heirs at law of the life-tenant. They hold none of this property as descended real estate, so far as the will affects it.

But it is contended by the plaintiff's counsel that the testator, Samuel Smith, sr., revoked or abrogated this part of the will, because, after its execution and before his death, he conveyed this land by deed to his son, Samuel Smith, jr., in fee simple, bearing date January 22, 1857. This deed con-

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veys one hundred and fifty acres of land, more or less, calling for a plat as representing the boundaries, and gives the metes and bounds in a very general manner. The only plat then proved to be in existence is one made as far back as 1840, by surveyor Carmichael, and is a plat of one hundred and fifty acres of land, conveyed by one Turberville to the testator May 14, 1839, and it lies adjacent to, and north of, the Robbins tract, which latter tract is very large, containing over one thousand acres, a fact well known to the testator when he devised it in trust for Samuel and his children, as above set forth. He could not have been so careless and thoughtless as to convey the Robbins land as containing only one hundred and fifty acres, more or less. The description by metes and bounds in the deed of January 22, 1857, fits reasonably well the metes and bounds of the Turberville tract, as found upon the only plat then in existence, and to which he evidently refers, and made it a part

of the deed. The area or quantity fits it exactly. Whilst it would be against all the facts and circumstances of the case to so strain matters as to make the deed include the Robbins land within its metes and bounds, I hold that it does not, and that the will alone conveys the latter large tract. The bequest and devise above were never revoked.

But plaintiff's counsel contends that at all events, and in any view of the case, Samuel Smith, jr., died intestate as to this 150 acres of land. It is conceded that on August 16, 1862, he sold it to his daughter, Mrs. Virginia Connerly, who was then a young girl; and this was nearly a month before he entered into the contract of warranty, in selling a six hundred acre tract to his brother, the present plaintiff. But when his deed was put on record on June 28, 1866, Mrs. Connerly did not have it probated, and plaintiff's counsel says that such record is no notice, and that his client stands in the position of a subsequent creditor without notice. I don't think he can, after so long a time, nor in any point of view, make assets descended out of this land. This was in 1862, about twenty years before this suit was instituted, when Samuel Smith, jr., so far as we know, was perfectly solvent. In 1869, for the sake of a more formal deed, and a more definite description of the land, he executed a deed of confirmation, which was duly recorded; an unnecessary act, however.

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*The daughter has all along been in possession; and to say now that this deed can be set aside as a fraud, or as void for want of probate when recorded, and thus make the land assets descended; that is, that grantor was seized as of fee of this land at the time of his death in 1880, eighteen years after he had in due and proper form conveyed it to his child, would be doing violence to every principle of law and equity. I hold that under no legal or equitable right can the plaintiff subject this land to the payment of a debt accruing upon a contract entered into with the grantor, after he had parted with this land, and upon which contract a right of action did not accrue for seventeen or eighteen years thereafter. There is no shadow of evidence that when Samuel Smith, jr., gave this land to his daughter, he had in contemplation the committing of a fraud upon his brother Stephen by subsequently selling to him an encumbered tract of land. I conclude that in no point of view can this daughter's land be regarded as derived from her father by descent.

The plaintiff, in my judgment, has failed to show that at the time of his death Samuel Smith, jr., was seized and possessed of any lands now in the hands of his heirs or of any land whatever. The defendants, having

received no assets by descent from their said father, are not liable in this action.

It is therefore ordered, adjudged, and decreed, that the complaint be dismissed with costs.

From this decree, the plaintiff appealed upon the exceptions stated in the opinion of this court.

Mr. W. W. Sellers, for appellant.

The statute executed the use in this case, for there was nothing for the trustee to do. 1 Lead. Cas. Eq., 60, 61; 4 Rich. Eq., 476; 2 McCord, 252; 1 Speer, 365; 4 Strob. Eq., 66; 3 Jarm. Wills, 134; 10 S. C., 376; 18 Id., 184. And under the operation of the rule in Shelley's Case, the heirs of Samuel S. Smith take by limitation and not by purchase. 2 Bl. Com., 242; 1 Rich. Eq., 404; 3 Id., 156; 3 Hill, 193; 3 Jarm. Wills, 103, 106, 115-8, 150-3, 182-3; McMull. Eq., 347; Bail. Eq., 48; 4 Kent., 228; 1 Rich. Eq., 265, 268. The devise was revoked by the subsequent alienation of the land to Samuel S.

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Smith, by *courses which included this Robbins land. 1 Rich., 491; 3 Strob., 122, 127; 2 Mill Con. R., 98.

Mr. Ferd. D. Bryant, contra.

March 3, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The facts of this case are somewhat involved, and in order to understand the points made, it will be proper to make a short statement. Stephen Smith, the plaintiff, claiming to be a creditor of his deceased brother, Samuel S. Smith, instituted this proceeding against his children (heirs), to make liable for his alleged debt certain lands in their possession, claimed to have descended to them from their father, the said Samuel S. He died intestate, leaving no personal estate, and his heirs at law deny that they inherited any lands from him, and whether they did so or not was the question in the case. The contention was principally in regard to two tracts of land, viz., the "Robbins land," consisting of something over 1,000 acres, and a small tract of land adjoining, consisting of 150 acres, and known as the "mill tract," or "Turberville land;" and to prevent confusion we will take them up separately.

As to the Robbins land. Samuel Smith, sr., the father of Samuel S. Smith and the grandfather of most of the defendants, died in 1857, leaving a will bearing date in 1849, by which he devised the Robbins land as follows: "I also give and bequeath to my said son, Wm. H. Smith, the tract of land known as the Robbins land, to have and to hold and to stand seized and possessed of the same to and for the uses and purposes that I have given the three last named negroes, Randall, Betty, and Handy, for the benefit of my son, Samuel Smith, to be held, conveyed, and disposed of by him in the same

manner and upon the same trusts and limitations as the said last mentioned negroes given to him, the said Wm. H. Smith."

The uses and purposes declared as to the negroes in a former part of the will were as follows: "In the further trust and confidence, also, that he, the said Wm. H. Smith, do stand seized and possessed of the negroes (naming them) to the use and benefit of my son, Samuel Smith, and that he permit the

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said Samuel to *have the labor, hire, and services of the said negro slaves and their increase for and during the term of his natural life, and at his death, if there be no child of the said Samuel, who shall have arrived at the age of twenty-one years (when the division hereinafter is to take place), to hold the said slaves and their increase for the use and benefit of the children of the said Samuel until a child of the said Samuel arrives at the age of twenty-one years; and if the said child be dead, until such time as such child would have arrived at such age if living, then to convey and deliver the said slaves and their increase to the children of the said Samuel or the survivors of them, the child or children of any such child or children to represent or receive the share or shares that the parent or parents would have received if living," &c.

In a subsequent clause of the will, and affecting all the bequests and devises to his various children, the testator further says: "It is, further, my will and desire that if any of my above named seven children should die without leaving a child or children or grandchildren him surviving, the share or shares which I have given such child or children who may die as aforesaid, shall be equally divided between the survivor or survivors of them, and the children of them who may be dead, the child or children of any such who may be dead at the happening of such event to represent and receive the portion or portions of such that the parent of such child or children would have received if living. Such portion of such child or children dying without child or children or grandchildren, as aforesaid, to be vested in the trustee or trustees, when the same appointed to be held by such trustee, upon the same trusts, limitations, and conditions which are provided in the respective clauses relating thereto," &c.

Under these provisions of the will of Samuel Smith, sr., it was contended for the plaintiff, that though the land was devised to Wm. H. Smith, as trustee, for the use of Samuel S. Smith during his life, and then over to his children, the statute executed the use; and, the trust being thus removed, the limitations are such as, under the operation of the rule in *Shelley's Case*, to give a fee simple to the first taker, Samuel S. Smith, of which he died seized and possessed. Upon this question of construction the Circuit

Judge held with the defendants—that they

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did not inherit *the Robbins land from their father, but received it as devisees under the will of their grandfather, Samuel Smith, sr.

But assuming this to be the proper construction of the will of Samuel Smith, sr., the plaintiff further contends that the Robbins land did not pass under and subject to the trusts and limitations of the will: but that the testator, after he had executed his will (in January, 1857), in consideration of \$400, conveyed directly to Samuel S. Smith a tract of land, described in the deed itself as containing 150 acres, but which deed, properly understood, embraces and conveys in addition to the 150 acres the whole of the Robbins land, containing something more than a thousand acres. The defendants, on the other hand, contest this construction of the deed, and insist that the only land intended to be conveyed, or actually conveyed by that deed, was the mill or Turberville tract of 150 acres, which corresponded precisely with the number of acres and reasonably well with the description in the deed. This was little more than a question of location, as to which also, the Circuit Judge held with the defendants—that the aforesaid deed did not cover and convey the Robbins land, which remained the property of Samuel Smith, sr., until his death, and passed under his will.

As to the small parcel known as the mill tract. We have already seen that this tract did not pass under the will of Samuel Smith, sr., but on January 22, 1857, was conveyed directly to Samuel S. Smith by deed. It also appeared that on August 16, 1862, the said Samuel S., in consideration of love and affection, conveyed this land, united with 100 acres of the Robbins land, making 250 acres, to his daughter, Virginia Alice Smith (now Connerly), when she was a little girl. This deed was recorded June 28, 1866, but it did not appear that it had been probated, and a more full and formal deed was executed in 1869. The deed was made before S. S. Smith executed the covenant of warranty, out of which arose, years after, the claim of plaintiff as creditor, and, as far as appears, the donor was then solvent. The donee, Virginia Alice, married F. H. Connerly in 1869, and they have been in actual possession of the land ever since. The plaintiff claims that, although a subsequent creditor of the donor, he is a creditor without notice, as the first

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informal deed, having been *recorded without regular probate, was not constructive notice to him, and he may have it set aside as void, leaving the land as the intestate property of Samuel S. Smith, deceased. The Circuit Judge ruled with the defendants, saying: "I hold that under no legal or equitable right can the plaintiff subject this land to the payment of a debt, accruing upon a contract entered into with the grantor, after he

had parted with this land, and upon which contract a right of action did not accrue for seventeen or eighteen years thereafter. There is no shadow of evidence that when Samuel S. Smith, jr., gave this land to his daughter, he had in contemplation the committing of a fraud upon his brother Stephen by subsequently selling to him an encumbered tract of land. I conclude that in no point of view can this daughter's land be regarded as derived from her father by descent," &c.

The plaintiff appealed upon the following grounds:

1. "Because his honor erred in not decreeing that the statute of uses executed the trusts of the will of Samuel Smith, sr., so far as it related to Samuel Smith, jr., and transferred the legal estate to Samuel, junior, the cestui que trust.

2. "Because his honor erred in not decreeing that the life estate given to Samuel Smith, jr., in the will of testator was by proper construction and operation of law enlarged into an estate in fee simple.

3. "Because his honor erred in not decreeing that, the statute executing the use, the rule in Shelley's Case applied, and the children (heirs) of Samuel, jr., took by limitation and not by purchase.

4. "Because his honor erred in not decreeing that testator revoked his will quoad hoc by his deed of January 22, 1857, to Samuel, jr., conveying 150 acres of land, more or less, adjacent to the lands devised, and so bounding the lands conveyed as to include the lands devised.

5. "Because his honor erred in not decreeing that the will, being thus revoked, the heirs at law of Samuel, jr., had real assets by descent, and were liable for the breach of their ancestor's covenant of warranty, after eviction.

6. "Because his honor erred in not decreeing that the four deeds of Samuel, jr., to his four daughters, and especially the one

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*to his daughter, Virginia A., on August 16 and 17, 1862, being voluntary and not recorded, were fraudulent and void as to plaintiff, a subsequent creditor without notice, under 13 and 27 Statute Elizabeth.

7. "Because the plaintiff was not barred, either by the statute of limitations or by lapse of time, by any of the four deeds of August, 1862, or by possession under them, as the plaintiff had no right of action, as to the fraudulent conveyances, until breach of the covenant by eviction."

First. In regard to the construction of the deed from Samuel Smith, sr., to Samuel S. Smith, of date January 22, 1857. We concur with the Circuit Judge, that said deed, properly construed, did not include the Robbins land, of which at that time there was no plat. The description of the land conveyed is not as full and precise as it might have been, but we think the intention was to con-

vey the little tract on Buck Swamp, known as the mill tract, and no more. That tract had been purchased from Turberville, contained 150 acres, lay north of the Robbins land, and adjoined it for some distance. One Carmichael had made a plat of the tract in 1840, which was manifestly before the parties when the deed in question was made, for the deed also calls for the precise quantity of 150 acres, and gives reasonably the outline of the Carmichael plat nearly down to the point in Buck Swamp where the mill tract touched the Robbins land, and then the description proceeds as follows, "thence down said swamp, as the plat represents, by the Edwards land, thence around to the beginning corner." In order to supply the hiatus, it is necessary to determine what was meant by the phrase, "thence around to the beginning corner." Around what? Hardly the Robbins land, of which there was no plat, to which no reference had been made, and which in itself contained about 1,100 acres. We would rather think that the grantor meant around the lines as represented on the plat before him; that is to say, by running down the interior line of the Carmichael plat, which divided the mill tract from the Robbins land, and closing precisely at Bennett Peritts' land, mentioned as the beginning corner. This, we think, is the natural construction, and is the only one which recon-

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ciles all parts of the *deed, and is in exact conformity to the number of acres mentioned in it.

Second. Assuming, then, that, the Robbins land passed under the will of Samuel Smith, sr., what is the proper construction of its provisions—what estate did it give and to whom? It is very certain that the land was not devised directly to Samuel S. Smith or his children but to William H. Smith as trustee, "to have and to hold, to stand seized and possessed of the same for certain uses and purposes * * to the use and benefit of my son Samuel, and that he permit the said Samuel to have the profits, rents, and issues for and during the term of his natural life, and at his death, if there be no child of the said Samuel who shall have arrived at the age of twenty-one years, to hold the same for the use and benefit of the children of the said Samuel until a child of the said Samuel arrives at the age of twenty-one years, &c., then to convey and deliver the same to the children of the said Samuel or the survivors of them," &c. It is contended, however, first, that the statute of uses executed the trust and thereby converted the equitable interests of the beneficiaries into legal estates; and then, second, that the life estate given to Samuel S. Smith by operation of the rule in Shelley's Case was enlarged into a fee, and that his children did not take by purchase under their grandfather's will, but from their father by descent.

It is possibly true, as stated at the bar, that on this subject there is some want of clearness and consistency in the cases; but as we understand it, certain principles have been established with reasonable certainty, which, without undertaking to follow the very learned argument of appellants' counsel, we will endeavor to apply to this case. All trusts are not forbidden by the law. It only declares executed a certain class of trusts, the leading test of that class being "that where the intention is that the estate shall not be executed in the *cestui que use*, and any object is to be affected by its remaining in the trustee, then it shall not be executed." Tried by this test we are of opinion that the trusts here belong to that class which the law will not execute. There cannot be the least doubt about the intention. Most manifestly the testator did not intend that the estate should be executed. And it seems to us equally

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clear that there were several objects *to be effected by its remaining in the trustee. The land was devised to him, and he was to "hold, stand seized, and be possessed of it" for the use of Samuel S. Smith during his life, then until a child should attain the age of twenty-one years, and then to convey and deliver the same to the children of the said Samuel or the survivors of them. We cannot think this was a mere passive trust. The *Escheator v. Smith*, 4 McCord, 452; *Posey v. Cook*, 1 Hill, 414; *Porter v. Doby*, 2 Rich. Eq., 52; *McCaw v. Galbraith*, 7 Rich., 80; *Bristow v. McCall*, 16 S. C., 546, and *Farr v. Gilreath*, 23 Id., 502.

Third. But if the statute eliminated the trusts and converted the interests given into direct legal estates, we do not see that the limitations are such as to make the rule in *Shelley's Case* applicable. We know of no clearer definition of the rule than that given by Chancellor Harper in *Williams v. Foster*, 3 Hill, 194: "By the rule in *Shelley's Case* it was determined that if an estate of freehold is given to the ancestor and a remainder be therein limited to his heirs or the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the freehold and he takes an estate in fee or in tail according to the terms of the limitation." As we understand it, the principle is that where the remainder is given to the very persons who would without such remainder take by descent from the life tenant, they shall be held to take by descent and not by purchase. Now, the persons who would have taken by descent from Samuel S. Smith were his lineal descendants in an unbroken line to the remotest generation as his heirs.

Was the remainder in this will given to such heirs by an indefinite line of descent? It seems to us not. Neither heirs, nor heirs of the body, nor even issue are mentioned in the will. The word used is "children," the

legal construction of which accords with its popular signification, namely, as designating the immediate offspring; for in all the cases in which it has been extended to a wider range of objects, it was used synonymously with a word of larger import as issue. See 2 Jarm. Wills, 690, and notes to 4th Amer. Edit. There is nothing in the will which requires us to construe "children" as synonymous with "heirs," or "issue," or "heirs of the

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body." On the contrary, *the will indicates clearly a class of persons to take at a particular period, and they therefore take as purchasers—devisees under the will of their grandfather, and not by descent from their father. See *McLure v. Young*, 3 Rich. Eq., 574; *Bannister v. Bull*, 16 S. C., 228; *McIntyre v. McIntyre*, *Ibid.*, 291; *Reeder v. Spearman*, 6 Rich. Eq., 88.

Fourth. The only other question is that in reference to the mill tract, which, as we have seen did not pass under the will. This tract was conveyed directly to Samuel S. Smith, and he, in August, 1862, in consideration of love and affection, conveyed by deed to his young daughter, Virginia Alice, who, in January, 1869, married F. A. Commerley, and they have been in possession of it ever since, more than ten years. The plaintiff's claim as creditor of the donor, Samuel S. Smith, arose in this way: After the aforesaid deed to Virginia Alice was executed by her father he sold a tract of land to the plaintiff with warranty of title, which was broken by eviction as late as 1879, and the proceeding is for damages on that covenant of warranty. So that whether we consider the date of the warranty or the breach of it, the claim arose subsequent to the execution of the deed. "It is well settled that a voluntary deed of conveyance by one who is at the time free from debt is not presumptively fraudulent and void as against subsequent creditors; there being no *prima facie* presumption against its validity, the burden of proof rests upon the subsequent creditor, who impeaches it, of showing either an actual fraudulent intent or circumstances from which such fraudulent intent may be inferred." 2 Pom. Eq. Jur., § 973, and notes. See, also, *Hey v. Niswanger*, 1 McCord Ch., 518; *Henderson v. Dodd*, Bail. Eq., 138; *Blake v. Jones*, *Ibid.*, 141 [21 Am. Dec. 530]; *Egleberger v. Kibler*, 1 Hill Eq., 114 [26 Am. Dec. 192]; *Footman v. Pendergrass*, 3 Rich. Eq., 42.

From the circumstances of the case, and particularly in view of the fact that the claim of the creditor consists in damages for a breach of warranty made many years ago, the Circuit Judge held that the deed from her father to Virginia Alice, though voluntary, was bona fide and without any intention on the part of the donor to commit a fraud subsequently upon his brother, Stephen, by selling him a tract of land from

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which, as it turned out, he was evicted by paramount title; and in this finding we cannot say that he committed error. As was said by Judge Evans, in *Henderson v. Dodd*, supra: "This contingent liability was not such, in my opinion, as to authorize the court to set aside the conveyance of Mrs. Henderson to her son John merely because it was voluntary."

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 316

MOORE v. SMITH.

(November Term, 1885.)

[1. *Appeal and Error* ⇨66.]

Where a verdict has been rendered establishing the legal title of the plaintiff to the land in dispute, but judgment is suspended to await an investigation of the equities set up by defendant as a defence to the action, an appeal would ordinarily be premature (*Whitesides v. Barber*, 22 S. C., 47); but the defendant here having moved for a new trial of the issue submitted to the jury, and his motion being refused, he has the right to have his appeal heard now. Code, § 11, ¶ 2.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 330; Dec. Dig. ⇨66.]

[2. *Executors and Administrators* ⇨380.]

Where an administrator filed in the Probate Court an ex parte petition praying the sale of the lands of his intestate in aid of assets, and the heirs were not mentioned in any of the proceedings, in action subsequently brought by the heirs to recover the land from the purchaser at the Probate Court sale it cannot be presumed that these heirs, who were necessary parties to such a proceeding, had been brought within the jurisdiction of the Probate Court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1562; Dec. Dig. ⇨380.]

[3. *Ejectment* ⇨106.]

In an action by these heirs to recover the possession of this land, the defendant alleged that the purchase money paid by him had been applied to the payment of debts of the intestate. The Circuit Judge properly submitted only the legal issue to the jury, withholding from their consideration the equitable defence; and upon verdict rendered for plaintiffs, he properly suspended the entry of judgment thereon, and referred the equitable defence to the master for testimony and report.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 310; Dec. Dig. ⇨106.]

Before Kershaw, J., Richland, July, 1885. The opinion fully states the case.

[For subsequent opinion, see 29 S. C. 254, 7 S. E. 485.]

Messrs. Lyles & Haynsworth, for appellant.

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*Mr. J. M. McMaster, contra.

March 6, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover possession of a tract of land, both plaintiffs and defendant claiming under a common source of title, to wit, one Edgar Doby; the plaintiffs claiming as his heirs at law, and the defendant under a sale made by the judge of probate under a proceeding to marshal the assets of Doby's estate. The sale was made upon a proceeding instituted in the Court of Probate by the administrator of Edgar Doby to which the heirs at law of said Doby do not seem to have been made parties. The defendant in his answer, after denying plaintiffs' title, sets up as a second defence the fact that the land was sold in aid of the personality to pay the debts of said Edgar Doby and bought by Andrew Crawford, Esq., for the sum of two hundred and fifty-five dollars, which was paid by him into the Probate Court and the largest portion thereof was applied to said debts. He therefore, as the alienee of said Crawford, claimed that he should be subrogated to the rights of the creditors of Doby whose debts had thus been paid, and that he is entitled to recoup from the plaintiffs the said sum of two hundred and fifty-five dollars so paid by said Crawford. The plaintiffs replied admitting the payment of the two hundred and fifty-five dollars by Crawford, but denying each and every other allegation in respect thereto.

At the trial the plaintiffs proved seizin in Edgar Doby and that they were his heirs at law, together with the rental value of the land, and then introduced the record of the proceedings in the Court of Probate under which the sale was made, by virtue of which defendant claimed title. When the plaintiffs closed their case the defendant submitted a motion for a non-suit upon the following grounds: "1st. That in the absence of any proof to the contrary there was a presumption from the proceedings appearing in the record that the Probate Court had obtained jurisdiction of the persons of the heirs at law of Edgar Doby by the service of the necessary process. 2d. That the real estate of said Edgar Doby, deceased, being assets for the payment of debts and at the time in

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the possession of the administrator, a sale thereof by such administrator, under the orders of the Probate Court, even without the heirs at law being parties, would convey a good title. 3d. That the land in question having been sold for the payment of the debts of Edgar Doby, deceased, by order of the Probate Court, and the money having been applied to the payment of such debts, the plaintiffs were not entitled to maintain this action for the possession of the land without first tendering a return of the money, although the sale might have been void." The motion was refused and the defendant duly excepted.

The Circuit Judge then charged the jury that the plaintiffs, having established their legal title, were entitled to a verdict for the possession of the land, "though it would still be a question for the court, in the exercise of its equity powers, to determine what relief should be granted to the defendant." To this charge defendant excepted on the same grounds as those taken for a nonsuit. The defendant requested his honor, the Circuit Judge, to charge as follows: "That if the jury believe that the land in question was sold by order of the Probate Court for the payment of the debts of Edgar Dobeý, deceased, and that the money was applied to the payment of the debts, the plaintiffs are not entitled to maintain this action for the possession of the land without first tendering a return of the money, although the sale may have been void." His honor declined so to charge and the defendant excepted.

The jury having found a verdict for the plaintiffs the defendant moved for a new trial, which was refused in an order in which the Circuit Judge held that, "although the verdict must stand, execution and enforcement thereof must be suspended until the equities of the defendant are heard and determined. The facts are not before me in such shape as to enable me to decree thereupon intelligently, but in accordance with the case of *Cathcart v. Sugenhimer* (18 S. C. 123), I do adjudge that if the facts sustain the allegations of the answer that the said purchase money was applied in due course of administration to the payment of debts of the decedent, Edgar Dobeý, to that extent the defendant is entitled to be reimbursed before he can be compelled to surrender the land to the plaintiffs. In or-

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der that the *facts may be made to appear in such form as will enable the court to make a final decree, it is ordered that it be referred to the master to take testimony and report how much, if any, of the purchase money paid for the land in dispute at the sale thereof by order of the Probate Court to Andrew Crawford, was applied to the just and bona fide debts of the deceased, Edgar Dobeý, in due course of administration. And that the judgment herein upon the verdict of the jury be suspended until the coming in and hearing of said report and the judgment of the court thereon." The defendant excepted to the refusal of his motion for a new trial.

The defendant also gave the following notice of appeal: "Please take notice that the defendant will appeal from the judgment entered upon this cause upon the grounds stated in the exceptions heretofore taken."

This case is very much like the case of *Whitesides v. Barber* (22 S. C. 47), where the appeal was held to be premature, there having been there, as here, no final judgment entered; and, on the contrary, the same hav-

ing been suspended until the facts, upon which the equities set up by the appellant rested, were ascertained and the same adjudged. But in that case there was no order refusing a motion for a new trial of the issue submitted to the jury, while here there is such an order; and hence, under subdivision 2, of section 11, of the Code, we suppose that the appellant has a right now to have his appeal heard. We will proceed, therefore, to consider whether there was any error in refusing the motion for a new trial. The grounds of this motion are the same as those relied upon on the motion for a nonsuit hereinabove set out.

We do not see how, in the face of the record to the contrary, any presumption can arise that the Court of Probate had obtained jurisdiction of the persons of the heirs at law of Edgar Dobeý. The proceeding does not purport to be anything more than an *ex parte* proceeding of the administrator. The heirs are not even named as parties, and certainly the record does not show that they were ever made parties by any proper process for that purpose. The order of the judge of probate does not recite that all proper and necessary parties were before him. In fact,

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there is *nothing whatever to indicate that the heirs were even intended to be made parties, and, on the contrary, everything to show that they were not parties. That they were necessary parties cannot, for a moment, be doubted. The title to Edgar Dobeý's real estate descended to them immediately upon his death, and could never be divested except by some act of theirs, or by some order of court made in a proper proceeding to which they were parties.

The other grounds are based upon a misconception of the nature and object of the action, and the defences set up. The action was simply an action at law to recover the possession of real estate, to which two defences were pleaded, one a denial of plaintiffs' title, which was plainly legal in its nature, the other that defendant should be subrogated to the rights of the creditors of Edgar Dobeý, whose debts, as it was alleged, had been paid by the purchase money of the land, which was plainly equitable in its nature. One of these issues was triable on the law side of the court, with the aid of a jury, while the other was triable on the equity side, by the court alone: and it would have been error to confuse the two. *Adickes v. Lowry*, 12 S. C. 97, and many other cases of a similar character. The defendant having denied plaintiffs' title, the issue thus raised was properly submitted to a jury, and that branch of the court had nothing to do with the equitable features of the case. Those features were to be considered and determined by the court after the verdict of the jury had established the legal title of the plaintiffs. There was, therefore, no error in refusing the

motion for non suit on the grounds taken, or in refusing the request to charge above set out, as they involved matters not proper for the consideration of the jury, but were alone cognizable by the court after the issue as to the legal title had been determined by the verdict of the jury.

We agree entirely in the view taken by the Circuit Judge. Whether there were any bona fide debts due by the intestate Dobey, and whether the proceeds of the sale, or any part thereof, had been properly applied to the payment of such debts, were matters which could only be determined in a proceeding to which the heirs were parties, where they could be heard as to such questions. It did not appear that any debt had been reduced to judgment against the administrator, and

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it did not even appear that any claim had been established before the judge of probate, in the proceeding for the sale of land, in the usual way under a proceeding to marshal assets, which, however, would not have been binding on the heirs, inasmuch as they were not parties to such proceeding. The only thing that does appear is that in the ex parte return of the administrator he credits himself with paying sundry alleged debts of the intestate, which, so far as appears, had never been legally established in any form whatever.

The judgment of this court is, that the order of the Circuit Court refusing a new trial be affirmed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the order of the Circuit Judge.

24 S. C. 321

GILKERSON v. CONNOR.

(November Term, 1885.)

[*Appeal and Error* ⇨879.]

M. contracted to purchase a lot of land from C. and made sundry payments, leaving a balance due. M., being indebted to G., gave to him the following paper: "Mr. C., you will please see that G. is paid for all my indebtedness to him for * *, before you make titles to me for the land and lot purchased of you." G. brought an action alleging these facts, and stating that nothing had been paid him, and he demanded judgment for the amount due him, and if not paid that the land be sold and the proceeds applied to the costs, then to the payment of the balance due C., and then to plaintiff's claim. The defendants demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The Circuit Judge overruled the demurrer, and M. appealed. *Held:*

1. That the order must be sustained as to C., as he did not appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3581-3583; Dec. Dig. ⇨879.]

[2. *Pleading* ⇨193.]

That the complaint stated a cause of action against M., in that it alleged a debt due by him and demanded judgment therefor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 439; Dec. Dig. ⇨193.]

[3. *Bills and Notes* ⇨66; *Mortgages* ⇨11.]

That the equitable interest of M. in this land might be mortgaged, but that this paper was not a mortgage, but a simple order on C. to pay G. a certain debt. As C. never accepted the order and had no funds in hand, he was not liable.

[Ed. Note.—Cited in People's Loan & Exchange Bank v. Garlington, 54 S. C. 423, 32 S. E. 513, 71 Am. St. Rep. 800.]

For other cases, see Bills and Notes, Cent. Dig. § 107; Dec. Dig. ⇨66; Mortgages, Cent. Dig. §§ 10-12, 16; Dec. Dig. ⇨11.]

[4. *Assignments* ⇨71; *Mortgages* ⇨28.]

The plaintiff is not entitled to specific performance, as the paper he holds does not assign him, either legally or equitably, the interest of M. in the original contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 132; Dec. Dig. ⇨71; Mortgages, Cent. Dig. § 44; Dec. Dig. ⇨28.]

Before Hudson, J., Abbeville, February, 1884.

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*The opinion states the case. The order of the Circuit Judge was as follows:

According to the allegations of the complaint, the defendant, Ned Murphy, acquired, by his contract to purchase the small lot of land of F. A. Connor, an equitable interest or estate therein. Connor's bond for titles and the possession of Murphy thereunder gave him such an estate in the land as could be aliened by conveyance, absolute or by way of mortgage. See 1 Jones Mort., §§ 172, 173; Roddy v. Elam, 12 Rich. Eq., 343.

I construe this paper in the form of an order, notice, or instruction, which was delivered by Murphy to Gilkerson, a copy of which is set out in the pleadings as an assignment of so much of Murphy's interest in the land, as is sufficient to pay his indebtedness to Gilkerson and a notice to Connor of the fact. It is in the nature of an equitable mortgage on the estate of Murphy in the land. I interpret the complaint to be an action having for its object the foreclosure of this mortgage with all parties in interest properly before the court.

It may be viewed in another light, viz., as an action for specific performance by an assignee of the original contract.

Viewed in either light, the complaint is not obnoxious to a demurrer as not stating facts sufficient to constitute a cause of action.

It is adjudged, therefore, that the demurrer be overruled with costs to abide the event of suit; and that the defendants, F. A. Connor and Ned Murphy, have leave to answer the said complaint within thirty days from the filing of this judgment.

Mr. W. C. Benet, for appellant.

Mr. Eugene B. Gary, contra.

March 6, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Sometime in 187-, the defendant Murphy contracted to buy

from the defendant Connor a certain lot of land situate in the town of Cokesbury, in this State, at the price of —, which was to be paid "within a reasonable time" after said contract, upon which payment Connor

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agreed to *execute titles. Murphy paid a portion of the purchase money, and was let into possession. He has since made various other payments, but there still remains unpaid some \$155. Since Murphy has been in possession, he has become indebted to the plaintiff, and on February 21, 1881, he executed to the plaintiff a paper, of which the following is a copy: "South Carolina. Abbeville County. Mr. F. A. Connor: You will please see that Mr. Gilkerson is paid for all my indebtedness to him for advances, and for his security to Wm. Z. McGhee for one horse, before you make titles to me for the land and lot purchased of you, &c. (Signed) Ned Murphy, [L. S.] In the presence of F. F. Gary, &c."

The complaint of the plaintiff stated the above facts, in substance, with the further statement, that the amount due the plaintiff from the defendant Murphy was \$259, no part of which had been paid, and that Connor had been duly notified of the execution of the paper above referred to, but that Connor and Murphy had refused to adjust and settle the matter; wherefore he prayed judgment against Murphy for the amount aforesaid, and in case of his refusal or inability to pay the same, that the land be sold, the proceeds to be applied, first, to the costs and expenses of suit; second, to the payment of the balance due Connor; and, third, to the claim of the plaintiff, &c.

The defendants demurred to the complaint, because it did not state facts sufficient to constitute a cause of action. His honor, Judge Hudson, overruled the demurrer, on two grounds: First, because, in his opinion, the paper in question was an equitable mortgage of Murphy's interest in the land, and the action being an action to foreclose this mortgage, it was maintainable; and, second, the action might be regarded as an action for specific performance by an assignee of the original contract. The defendant Murphy appealed upon several exceptions, contesting both the grounds upon which his honor overruled the demurrer.

We think his honor's order must be sustained, but upon other grounds than those upon which it was based. In any event, it must be sustained as to Connor, because he has not appealed, and it must be sustained as to Murphy, for the reason that the complaint states a cause of action against him,

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independent of the *relief sought, by foreclosure of the equitable mortgage. It is stated that Murphy is indebted to plaintiff in the sum of \$259, which the paper in question was executed to secure, and it demands

that Murphy be required to pay this amount. In other words, it demands judgment, and only seeks a sale of the land in the event that Murphy refuses, or is unable to pay the said debt. Here, then, is a clear cause of action, which was sufficient to sustain the complaint and keep it in court, although one of the remedies sought may not have been appropriate or pertinent. We do not think, however, that the paper in question was either an equitable mortgage, giving a lien upon the lot, which the plaintiff Gilkerson could enforce, nor did it authorize Gilkerson, as assignee of the original contract of purchase, to demand specific performance.

What is the legal character of the paper? It is nothing more than an order drawn by Murphy on Connor in favor of the plaintiff. Connor, as it appears, had no funds in his hands belonging to Murphy, nor did he accept the order. Connor was, therefore, in no way liable upon this order. It may be said, however, that while Connor had no funds in his hands belonging to Murphy, yet that he held titles to the lot in question, in which Murphy had an equitable interest, to the extent of the purchase money paid by him, and that this paper was drawn on the land to that extent, and, therefore, a mortgage on it to that extent, as an equitable interest may be mortgaged. 1 Jones Mort., §§ 172-3; Roddy v. Elam, 12 Rich. Eq., 345.

It is true, that where one gets possession of land under a contract of purchase with bond for titles, or, perhaps, even under a mere contract of purchase without the bond, in terms, for titles, he may have such an equitable interest therein as would be the subject of mortgage; and if it appeared that such was the intention of the parties here, that is, that Murphy intended to mortgage his equitable interest in the land to the plaintiff, and give him a specific lien thereon, it might possibly be enforced. But does this intent appear, from a legitimate construction of the paper? The land is not mentioned as a pledge to the plaintiff, nor does it appear anywhere in the paper, expressly or impliedly, that it was intended to be a security for

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the plaintiff's claim. On *the contrary, as already stated, the paper is a mere order on, or rather a request to, Connor, that he pay a debt to the plaintiff, which Murphy acknowledges he owes to said plaintiff, saying, in substance, if he would do so that he might hold on to the titles until he was reimbursed. But Connor has not made the payment requested; he has declined. Nor has he assigned any rights he had, if any, under it to the plaintiff.

Under these circumstances, it seems to us that it would be stretching the doctrine of mortgages of equitable interests too far to allow the plaintiff a specific and prior lien on this land by virtue of a paper of the kind before us. The authorities cited in the argu-

ment before us sustain the proposition that certain equitable interests in land may be the subject of a mortgage, but that is not the question here. The question is, does the paper in question amount to a mortgage, and not whether the interest of Murphy is mortgagable. It is certainly not a mortgage in form, and, therefore, it is not a legal mortgage. Nor does it appear to us to have been intended as a mortgage to the plaintiff, and, therefore, it is not an equitable mortgage, of an equitable interest, as claimed. Nor do we think that the action can be construed to be an action for specific performance by the plaintiff as an assignee of the original contract, as, in our opinion, the paper does not assign said original contract, either legally or equitably.

It is the judgment of this court, that the judgment of the Circuit Court, overruling the demurrer, be affirmed, as to both defendants, on the grounds stated above.

24 S. C. 325

FRANK & ADLER v. HUMPHREYS.

(November Term, 1885.)

[1. *Appeal and Error* ⇨213.]

A reference to the jury of all the issues in a chancery cause cannot be declared error, where it was done without objection, and where none of the exceptions raises this question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1165; Dec. Dig. ⇨213.]

[2. *Trial* ⇨133.]

The Circuit Judge committed no error in correcting counsel's statement to the jury of the evidence, and in directing the jury to be governed by his notes of testimony as read to them.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 316; Dec. Dig. ⇨133.]

[3. *Equity* ⇨380.]

In the trial by a jury of an issue ordered out of chancery, involving the validity of a composition made with creditors, the Circuit Judge

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*charged the jury that "if defendant innocently omitted to mention the insurance money or to include it in his statement of assets, it was no fraud." *Held*, that as this issue was to inform the judge's conscience, and as he himself found that this money was not properly a part of the debtor's assets applicable to the claims of his creditors, his charge, if erroneous, was not material.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 820; Dec. Dig. ⇨380.]

[4. *Appeal and Error* ⇨1005; *Fraud* ⇨64.]

An issue of fraudulent misrepresentation is a question of fact, and the verdict of a jury thereon, approved by the Circuit Judge, not disturbed, the weight of testimony not being opposed to their findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ⇨1005; *Fraud*, Cent. Dig. §§ 65½, 67-71; Dec. Dig. ⇨64.]

[5. *Appeal and Error* ⇨1050.]

Error in the admission of testimony, not affecting the result, no ground for new trial in this case.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4153; Dec. Dig. ⇨1050.]

Before Kershaw, J., Greenville, November, 1883.

This was an action by Frank & Adler against William C. Humphreys, commenced in February, 1883. The appeal was from the following decree:

This action was brought by the plaintiffs to set aside the release of a debt due them by the defendant, alleging that it was given upon a general composition of debts between the defendant and all his creditors, whereby defendant was discharged upon the payment of forty per cent. of the amount due upon the claims against him, which was procured by a false statement of the amount and value of his assets and other misrepresentations made by the defendant to his creditors. The prayer of the complaint in substance is that the release of plaintiffs' demand be declared null and void, and the payment stand merely as a payment pro tanto; that the plaintiffs have judgment for the balance of their debt, or such other relief as they may be entitled to. The defendant by his answer denies the frauds alleged.

The cause was placed upon calendar one, and heard as a jury case. After a protracted hearing, a great deal of testimony, and an exhaustive argument, both upon the law and the facts, the case was submitted to the jury and they found for the defendant. The jury were charged in accordance with the requests in writing of plaintiffs' counsel, with such further explanation as occurred to the presiding judge to be proper. After the rendition of the verdict, plaintiffs' counsel made a motion, upon the minutes, for a new trial, heard upon the facts, and upon supposed errors of the presiding judge.

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*While they moved for a new trial, the plaintiffs' counsel also insisted that this was really a case in chancery, to be decided by the judge, one of them claiming, however, that the verdict should not have the usual effect of findings on issues submitted. Defendant's counsel conceded that this was properly a case in chancery, to be decided by the court upon the facts as settled by the verdict, so far as the court was satisfied with the verdict, as in all cases submitted from a court of chancery to a jury. In this latter view I fully concur, and if the case had resulted differently, and the court had gone on to decree relief to the plaintiffs, all the creditors would have been called in to share in the benefit of the decree, if the entire compromise had been held void, or at least all the compromising creditors, if the release was confined to subjecting a particular fund to distribution among them. There will be

something more to be said upon this subject hereafter.

The complaints against the presiding judge will now be noticed. Upon his examination in chief, when the defendant was stating in a narrative form his means of meeting the compromise, he said: "I had two thousand dollars, and was selling a hundred dollars a day, and therefore I asked for thirty days' time. I also went to Alexander and asked him about getting the insurance money. I had the insurance money then in my safe. Alexander had signed the receipts under the assignments; the money was to come to Alexander, and the companies required his receipt. I used the money in my business and in settling these claims." The witness was here led by the examination to speak of other matters. Afterwards the subject was resumed, and he said: "I commenced paying off on the 9th day of February. From sales and cash I had \$5,600. After the creditors had accepted I took the checks for the insurance money to Alexander. The checks were payable to Alexander. I did not get permission to use the money until after the compromise. That was \$1,760. It was paid a little before it was due."

Plaintiffs' counsel in the argument to the jury—the closing argument—having insisted to them that defendant had said that, at the time of the compromise, he "had the insurance money then in his safe," without any qualification, I thought it my duty to remind the jury of what else he had said on

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the subject, in order to prevent their being misled as to what the evidence had been. I therefore read the passage of the testimony last quoted to the jury. The counsel then turned to the jury, and, as I thought, appealed to their recollection, against my statement as to what the witness had said. I told him he must not do that. This was one of the grounds insisted on for a new trial.

I am authorized by law to state the testimony, and when counsel in the closing argument undertake to say what a particular witness said, and confines his statement to a single remark, and insists upon that as the testimony of the witness upon that point, I consider that I would be derelict to my duty if I did not also call to the attention of the jury whatever else the witness may have said upon the same point, explaining or qualifying the remark stated to the jury as his evidence upon the subject. If that be my duty, I cannot conceive that it is proper for counsel, when I have stated the testimony, to insist to the jury that his own statement was the correct one. As I do not consider that the jury were misled in any way by this circumstance, I do not regard the point as material in any respect. If what was said by the presiding judge was calculated to induce the jury to believe that they were bound to accept the statement of the judge as to what the testimony really was, in the place of their

own recollection or knowledge of it, plaintiffs' counsel ought to have asked that the jury be charged otherwise.

I have no doubt, however, that the jury understood as I did, that, when the witness loudly said, "I had the insurance money then in my safe," he had referred to the checks for the insurance money, as was made fully to appear when he came to speak of particular transactions thereto. The checks, he said, were afterwards transferred to him by Alexander, and if that statement were not true from the nature of the business, its falsity could easily have been shown. The policies of insurance were produced in evidence, with Alexander's receipts endorsed upon them, Mr. McBee testifying that the companies would not recognize his receipts, but required Alexander's before they would pay the money. All this goes to confirm the statement of defendant, that the money was paid in checks payable to Alexander, and it could not have been difficult to show when the checks were

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transferred to defendant, or when they were paid to him. But even if the checks had been collected before the compromise, and lay in defendant's safe at the time, the money, according to the testimony, was turned over to defendant to be applied to the repairs or improvement of the building, and could not, without the consent of Messrs. McBee and Alexander, have been diverted to any other purpose, and the point is, under those circumstances, wholly immaterial.

The next point of complaint of the presiding judge was that he instructed the jury in regard to the insurance money as follows, to wit: "That the evidence tended to show that the policies stood in Alexander's name, and that, if so, the money legally belonged to him; that defendant said he considered it Alexander's, though both Alexander and McBee seemed to have claimed it; that if it was Alexander's or McBee's money, still if they had held it the mortgage would have been credited with the amount, and the incumbrances on the property could have been reduced by that amount; that for this reason the creditors ought to have been informed about it; that if it was omitted from the statement innocently, it would not give the plaintiffs a right to recover on that ground. But if it was intentionally omitted, it would be a fraud upon the creditors, and the plaintiffs would be entitled to a verdict on that ground." Plaintiffs insist that whether the omission were intentional or the result of an innocent mistake as to the bearing of the matter upon the value of the securities, it was constructive fraud and sufficient to avoid the compromise.

This is really the only point in the case affecting the verdict of the jury, which I consider at all debatable. In all other respects the verdict of the jury was wholly unaffected by any alleged error of the presiding judge, and is entirely satisfactory to my view and

conclusive of all the alleged frauds. It is important to bear in mind that the jury have negatived any fraudulent intent on the part of defendant in his failure to disclose the fact concerning the claim for the insurance money. The only question, therefore, in regard to it is, whether the innocent and unintentional failure to make the disclosure ought to vitiate the settlement between the defendant and his

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creditors. If it was a *fact which it was his duty to disclose, and if the failure to disclose it may be supposed to have misled the creditors, and to have induced them to agree to the proposed compromise, which they would not have done had they possessed full knowledge of the facts, then it is true that to that extent the compromise would be liable to be set aside.

The property in question had been sold to the defendant by one Alexander, several years before the compromise, for \$10,000, of which \$3,000 were paid in cash, and the balance secured by a mortgage on the property, payable with interest in annual instalments of \$1,000. At the time of the compromise \$8,000 remained due on the mortgage. The mortgage debt had been assigned to Mr. Alexander McBee by Alexander as a security for six thousand dollars due by the latter to the former. To the extent, therefore, of \$2,000, Alexander retained an interest in the mortgage after Mr. McBee should be satisfied therefrom. The policies of insurance on the property were in Alexander's name, though by him also assigned to Mr. McBee. The creditors appear to have regarded the encumbrance of \$8,000, which was represented in the statement submitted to them by the defendant to be upon the property as sufficient to shut them off from any expectation of payment from that source.

There is evidence going to show that Alexander was not satisfied that the property, after the fire, would bring more than enough to satisfy Mr. McBee's debt of six thousand dollars. Mr. McBee said he felt secure of his money, and was willing that defendant should have the insurance money to do what he pleased with it. He said defendant might have thrown it into the river if he chose, so far as he (Mr. McBee) was concerned. Alexander, however, insisted that defendant should only have it upon the condition that it should be laid out on the building, in order to restore the security to its former value. Defendant says that after his compromise, Alexander consented to his using the money otherwise in his business and settling with his creditors, but still upon the express condition that a like sum should be laid out on the building. If Alexander's estimate of the value of the property as a security was correct, then it would require the insurance money and the property to secure the \$8,000

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due *on the mortgage to him and McBee, and if the creditors were of the like opinion, a

knowledge of all the facts would not have affected their decision to accept the proposed compromise.

There is nothing to show that Alexander's estimate was not correct or reasonable. It is true that the property had sold for \$10,000, on long time, but it had suffered a direct injury to the amount of \$1,760 at least, and valuable buildings adjoining it had also been recently destroyed by fire, and it is not improbable that that would affect its marketable value until they were restored at least. If the creditors had been forced to resort to that property, they would have had to sell it subject to the rights of the mortgages. Who is to say it would have yielded them anything under the circumstances as they then stood? In the evidence before me, I cannot undertake to say that it would.

There is no evidence that the creditors were misled in any way. The plaintiffs were represented by their Mr. Frank, who was in Greenville for some days before the meeting of creditors, for the purpose of making an investigation into defendant's affairs. He was in defendant's store, the building which had been damaged by the fire in question. The fire had then recently occurred. He must have known of the fire. It is not reasonable to suppose that he made no inquiry as to whether there was an insurance upon the building, or as to the amount and condition of the fund. Many of the creditors were represented by astute and industrious attorneys, local lawyers. It is not reasonable to suppose that they were all ignorant of the fire, the insurance, and condition of the fund. These are not matters of a private nature. Nothing is more common than the publication in the newspapers of the amount of losses, and of the insurance on property destroyed or injured by a fire so destructive as this in a city like Greenville. Mr. McBee, who held the mortgage and claimed the insurance moneys, was present at the meeting of creditors representing his debt. He had no intent or motive in concealment upon this subject. He was incapable of acting upon it, if he had such motive. It did not seem to have occurred to him that the subject was one which was required to be brought to the notice of the creditors.

It is noticeable, too, that this concealment

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is not one of the *matters alleged in the complaint as a ground for attacking the compromise, and was first brought into the case by the defendant when giving testimony as a witness at the trial. It would seem, therefore, that the plaintiffs either continued in ignorance of what they now deem a most important fact for all these years, with the fullest opportunities of inquiring of Mr. McBee, Mr. Alexander, the insurance companies and agencies, the bank, and others having knowledge; or they considered the matter of

no importance. When a matter is involved in so much doubt, I am not disposed to set aside a settlement like this, after so long a time, upon the mere possibility that the creditors might have insisted on better terms had they known the facts.

There is another question which has occurred to me, during the investigation of this case, the solution of which is not favorable to the plaintiffs. They do not occupy such a position in relation to the subject as to entitle them to any special favor. They endeavored, by a side bargain, to get an advantage over the other creditors, by contracting with defendant for the payment to them of five hundred dollars, under the guise of compensation for using their influence with the other creditors, to induce them to accept the compromise, which they claim to have done by writing some letters and sending some telegrams. The bargain was rescinded by defendant the next day after it was made, as a wrong to other creditors; but it was afterwards insisted on by plaintiffs, with threats of litigation in other courts than that of South Carolina; when this failed, the present action followed, after the lapse of three years from the date of the settlement. No other creditor has joined in the complaint, nor is it a creditors' bill, but a suit solely for the benefit of the plaintiffs. All the allegations of fraud stated specifically against the defendant have been found by the jury in his favor.

The plaintiffs are placed in the position of having pursued the defendant without just cause. While a fraudulent debtor ought to be prosecuted and pursued ruthlessly for the public good, charges like these ought never to be made unless the proof be clear and convincing. Nor should a creditor, who has joined in a general composition, separate himself from his associates in such litigation. If in this case the fraud had been establish-

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ed, it would have been the duty of the court to call in the other creditors before the master. Plaintiffs would not have been permitted to get the advantage over their associates in the compromise. If the settlement had been set aside only on account of the failure to mention the insurance money at the creditors' meeting, but without fraudulent intent on the defendant's part, the relief would have been confined to the distribution of that fund among the compromising creditors, and they must have been called in. If, however, the jury had found actual fraud, and the whole settlement had been thus vitiated, all the creditors would have been called in to share in the distribution of the defendant's assets.

Therefore, under such circumstances, a single creditor would not be allowed to sue alone. A demurrer would have laid to this complaint on this ground, or the objection might have been made in the answer. Not

having been made, the defendant has waived it. In a meritorious case, the court would, under such circumstances of waiver, cure the irregularity by calling the creditors before the master. But the plaintiffs do not appear before the court under such a favorable aspect as to entitle them to the exercise of this administrative power of the court in their behalf, even if a stronger case had been made against the defendant. Mr. Justice Story, in his work on Equity Pleadings (§ 103), says: "A single creditor, in cases of this sort, would not be permitted by a court of equity to sue for his own single demand without bringing the other creditors in some form or manner before the court, from the obvious inconvenience and apparent injustice in deciding upon the extent of their rights and intents in their absence."

Joy v. Wirtz (1 Wash. C. C., 417 [Fed. Cas. No. 7,553]) was a suit in equity, brought by two creditors, for the purpose of setting aside a release made by all the creditors to a debtor, upon an assignment of his estate for their benefit. Mr. Justice Washington thought that all the creditors should have been made parties, or the bill should have been brought in behalf of all, for all of them might be affected by the decree setting aside the release, as it would not be set aside as to a part of the creditors, and left optional as to others. He stated the rule thus: "Where the creditors are to be paid out of a particular fund, or united in the same transac-

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tion so as to produce a privity between them, all are to join in either by name or by being represented by a part serving in the names of all." The whole subject is discussed ably and fully in the case of Johnston v. R. R. Bank, 3 Strob., 337, and especially in the dissenting opinion of Ch. Johnstone in that case.

On the whole case, therefore, it is ordered, adjudged, and decreed, that the findings of the jury upon the issues submitted to them herein be and they are hereby confirmed, and that the complaint herein be dismissed, and that the defendant have leave to enter up judgment against the plaintiffs for his costs and disbursements herein, and that execution issue therefor.

Plaintiffs appealed upon the following exceptions:

1. Because his honor erred in failing to decree that the \$2,500 taken out of his store by the respondent and turned over to his wife shortly before the settlement, belonged to him, and was fraudulently concealed from his creditors.

2. Because his honor erred in not decreeing that the concealment of the \$1,700 insurance money by respondent was a fraud upon his creditors, and that the settlement should be set aside on that ground.

3. Because his honor decided that the verdict of the jury negatived any fraudulent in-

tent on the part of the respondent in his failure to disclose the facts about the insurance money to his creditors.

4. Because his honor erred in deciding that the appellants and other creditors must have known of the insurance money, when there was no evidence at all that they had any knowledge or even a suspicion of it, and all the evidence on that point shows that none of the creditors knew anything about it.

5. Because his honor erred in deciding that the creditors did not regard the insurance matter as of any importance, because none of them had discovered it before the trial of this action on the Circuit.

6. Because the duty of the respondent to know his rights as to the insurance money, cannot be overcome by his feigned ignorance thereof.

7. Because the respondent's testimony

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showed that at the *meeting of creditors he falsely represented the mortgage of Mrs. Thurston to amount to \$660, when in fact he only owed \$600 on it.

8. Because the testimony of the respondent shows that at the time of the creditors' meeting he had property outside of what was represented by him to his creditors.

9. Because the respondent wilfully and knowingly misrepresented the extent and condition of his property to his creditors at the time of the compromise, and for that reason his honor should have decreed for the appellants.

10. Because the respondent wilfully concealed facts which it was his duty to disclose to his creditors, and for that reason his honor should have decreed in favor of the appellants.

11. Because his honor erred in attempting to define what misrepresentations of the respondent would or would not be sufficient to influence the minds of the creditors in accepting the compromise.

12. Because his honor should have held that a composition with creditors being a bounty bestowed upon the debtor, the utmost good faith is required in his representations of his assets, and creditors are not required to investigate for themselves, but may rely wholly upon debtor's statements.

13. Because his honor directed that there was no evidence that the creditors were misled in any way.

14. Because his honor accepted the verdict of the jury as conclusive of all alleged frauds in favor of the respondent, and made his decree in accordance therewith, without coming himself to a conclusion as to said frauds.

15. Because his honor erred in deciding that the jury had specifically found all the allegations of fraud against the appellants, and in decreeing that the findings of the jury upon the issues submitted to it be confirmed,

when in fact no specific issues had been submitted to it.

16. Because his honor having erred in his statement of the respondent's testimony in reference to the insurance money to the jury, and also in charging the jury that if the insurance matter was omitted from the statement to the creditors innocently, the appellants could not recover, which points were

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made material by the effect which was given to them, the verdict cannot be allowed to stand, and his honor erred in refusing to entirely disregard it in making up his decree.

17. Because his honor erred in stopping appellants' counsel in the closing argument because he did not, as his honor thought, state all that respondent had testified to on a particular point.

18. Because his honor erred in interrupting appellants' counsel, and in stating to the jury that the respondent had not sworn at the time he made the offer of compromise he had the insurance money in his safe; and he erred further when the counsel appealed to the recollection of the jury, by again interrupting him and saying that counsel could not appeal from his statement of the testimony to the recollection of the jury, and that the jury must take the testimony from his notes, from which he read in part.

19. Because his honor erred in deciding that this action was not meritorious because the appellants had attempted at the time of the settlement to get something for their services in making the settlement.

20. Because his honor having decided upon the objection of the appellants that it was not competent for the defendant to give in evidence any conversation between himself and Alexander, who was dead at the time of the trial, it was error for him to allow it to go as evidence to the jury, and to use it as proof in making up his decree.

Messrs. Wait & Westmoreland, for appellants.

Messrs. Perry & Heyward, A. Blythe, contra.

March 8, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The defendant, a merchant at Greenville, being in failing circumstances, called his creditors together, and effected a compromise at forty cents on the dollar. The plaintiffs attended the meeting, and, consenting to the compromise, received their pro rata and receipted the defendant in full. Afterwards they instituted the action below, alleging that defendant had falsely represented his ability

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to pay, and that at *the time his creditors accepted his offer of compromise he was able to pay in full, which he kept concealed for the purpose of defrauding his creditors, with other circumstances of fraud, and they pray-

ed that the compromise be declared void and the payment of forty cents on the dollar be regarded as a payment pro tanto, and that they might have judgment for the balance of their debt, to wit, \$1,914.20, with interest. The defendant denied the fraud.

Upon the call of the case on calendar I, Judge Kershaw presiding, "it was determined, without objection, that all issues, and especially the two issues of fraud or no fraud and the amount due, if they should find for the plaintiffs, be referred to the jury without framing any issues specially." The plaintiffs made several requests to charge, all of which his honor charged. The verdict was for the defendant, whereupon, it being conceded by the counsel on both sides that the case was a case in chancery, to be decided by the court upon the facts as settled by the verdict, so far as the court was satisfied therewith, his honor, after taking the papers and full time for consideration, filed a written decree, in which he confirmed the verdict, and dismissed the complaint with leave to defendant to enter judgment and execution for his costs and disbursements.

The appeal presents a number of exceptions in form, twenty in all. The first sixteen, however, may be consolidated under one head, to wit, because his honor confirmed the verdict, when he should, in the opinion of the appellant, have disregarded it, and have found the compromise fraudulent for the causes stated in these exceptions. The 17th and 18th assign error because his honor interrupted appellant's counsel in his argument, and corrected his statement of the testimony, in certain particulars, in which his honor thought counsel was mistaken. 19th, because his honor "decided the action was not meritorious," the appellant having attempted at the time of settlement to get something for their services in making the settlement. And the 20th, "because his honor, having decided upon the objection of the appellant that it was not competent for the defendant to give in evidence any conversation between himself and Alexander, who

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was dead at *the time of the trial, it was error for him to allow it to go to the jury, and to use it as proof in making up his decree."

The appellant's counsel have not discussed their exceptions seriatim, but submitted their argument under several propositions. First proposition: That his honor erred in refusing to set aside the verdict, (1) because his honor erred in refusing to submit specific issues of fact to the jury upon plaintiffs' motion, and in submitting the whole case, the issues of law as well as of fact. We find it stated in the "Case," that after some discussion by counsel, it was determined, without objection, that all issues, &c., should be referred to the jury. Besides this, there is no exception which raises this question.

This subdivision, therefore, and the discussion under it must be passed over.

(2) "Because his honor erred in stopping plaintiffs' counsel in the manner he did, and in stating only a part of defendant's testimony on a given point, and in telling the jury they must decide according to his notes of testimony as read to them" (16th and 17th exceptions). No error of law can be assigned to a Circuit Judge for correcting counsel in their statements where he, the judge, conceives that a mistake as to the testimony is being made. While the judge, under the constitution, cannot charge upon the facts, yet it is his duty to take down the evidence, or have it taken, and so far as what is said by the witnesses, he is arbiter between counsel, and his notes of testimony may be read. From what is said in the "Case" as to what occurred, we not only see no legal error affecting the issues involved, but we think his honor was quite within his power over the conduct of the business before him when he ruled that plaintiffs' counsel must not appeal from his notes of the testimony to the recollections of the jury, which, before the counsel's disclaimer, he, the judge, thought was rudely made, as it is stated. Counsel have the right to defend their clients' interests with earnestness and ardor, and it is commendable for them to do so, but their zeal should be restrained within proper bounds, and to this end much should be left to the discretion of the court.

(3) The next subdivision under the first proposition is, "Because his honor erred in charging the jury, that if the defendant innocently omitted to mention the insurance

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money, or to include *it in his statement of assets, it was no fraud." If the case was a case at law, and the presiding judge had charged the jury in the general terms as stated, doubtless it would have been error, as even an innocent omission of property, where the creditors are relying upon the statements of the debtor, might vitiate the compromise, at least to the extent of the value of the property thus omitted. But this is not a case at law—it is a case in chancery, and the reference to the jury was to inform the chancellor's conscience. He was not bound by the verdict; in fact, under the law, even after verdict, he was not relieved from examining for himself and finding his own conclusions. This, it seems, he did. In his well considered written decree, he discusses this very matter fully and satisfactorily, to which we refer.

In it, it appears that the policies of insurance were in the name of one Alexander, from whom the defendant had bought the property insured, though they had been assigned to McBee, who held them and the mortgage on the premises to secure a debt of \$8,000, \$6,000 of which belonged to McBee and the remaining \$2,000 to Alexander. The

property had been considerably injured by fire, and Alexander was not satisfied but that it would take the insurance money as well as the property in its then condition to indemnify McBee and himself, and he claimed the insurance money as his. Under these circumstances, the defendant did not estimate it as a portion of his assets, to be used in compromise with his creditors. It is true that he did use it afterwards in settling with his creditors, but this was done with the consent of Alexander, and with the express understanding that a like sum should be expended by Humphreys in repairing the property, so as to reinstate it as a security for the mortgage debt. And it was upon these grounds that the judge held, for himself, that the failure of the defendant to mention this money at the compromise was not fraudulent, express or implied. So that his charge to the jury, whether in the abstract right or wrong, was not material. Even supposing that the verdict was influenced thereby, yet his honor went behind the verdict and decided for himself, as was his right and duty. We think his finding and ruling in this respect was correct.

It will not be necessary to consider the

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other propositions severally on the question of fraud, or their subdivisions. They resolve themselves into a general allegation, that his honor erred in not finding fraud, actual and intentional, or, at least, implied and constructive, and, therefore, the composition should have been vacated. The fact of fraud, or its existence in a transaction, when alleged, is always a question of fact, and although when it comes before this court in a case in chancery we are at liberty to look into and pass upon it, yet our examination is subject to the familiar principle, that we should not disturb the finding below, except where that finding is wholly unsustained by the evidence, or is manifestly against its weight.

Now, wherein is the decree objectionable as to either of these rules? The specific allegations of fraud alleged in the complaint are, 1st, that the defendant sought to account for his deficiency in assets, because he had unexpectedly been called upon to pay a large sum to the United States Government by reason of some connection with a distillery; and, 2d, that the defendant falsely represented his ability to pay his debts, having more property than stated, which he kept concealed from his creditors. Nothing is said in the exceptions in regard to the distillery; we must, therefore, regard that charge as satisfactorily explained. The other misrepresentations as to the amount of property on hand, or that should have been on hand, specified in the exceptions, were \$2,500 alleged to have been taken from the store and turned over to defendant's wife, just before the compro-

mise; also \$1,760, the insurance money, and a mortgage of Mrs. Thurston put down by him at \$660, when it should have been \$600. We have looked into the testimony as to these matters, and we cannot see that his honor's refusal to set aside the compromise was wholly unsupported, or against the weight of the testimony as to these matters. And the same may be said as to the other exceptions in which the appellants allege, generally that the evidence showed that the defendant had other property than that disclosed, &c., and that his honor erred in confirming the verdict, &c.

The 19th exception raises no question of law or fact.

As to the 20th. It appears that his honor sustained appellants' exception to conversation with Alexander, and if he afterwards permitted it to go to the jury, we have not

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found such fact *in the "Case"; but even if he did, it would not be sufficient to reopen the case, and have the matter reinvestigated. The main question involved was one of fraud in the conduct of the defendant. This question has been passed upon by a jury after full and most thorough examination and argument. The verdict was for the defendant. This verdict the Circuit Judge has confirmed, and made its result his finding—not hastily, but after taking the papers and giving the case mature consideration, as is apparent from his decree. Under these circumstances, it should require a stronger showing than that made by the appellants, to overthrow the judgment.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 341

SULLIVAN v. SULLIVAN MANUFACTURING COMPANY.

(November Term, 1885.)

[1. *Corporations* ⇨340.]

Under the decision of this case on a former appeal (20 S. C., 92) the statutory liability of the directors of the defendant corporation for its debts, did not attach to the note sued on, which was a renewal and consolidation of other items of antecedent indebtedness; the directors in office when such indebtedness was created were liable, and not the directors in office at the date of the consolidation. But that case did not decide the facts as to a note consolidated into the note sued on, which was itself a consolidation of antecedent indebtedness. This court, however, concurred with the finding below, that it, too, was a mere renewal and not payment.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1473; Dec. Dig. ⇨340.]

[2. *Corporations* ⇨327.]

The directors' liability, where not barred, was upon the original notes creating the liability, according to their terms; and therefore the directors were not liable for a high rate of interest stipulated in the consolidated note.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1444; Dec. Dig. ⇨327.]

Before Hudson, J., Greenville, April, 1884.

The opinion states the case. The Circuit decree was as follows:

This case was heard before me on the report of the master, to whom it was referred by the decree of Judge Pressley, herein, of date September 28, 1882, to take testimony

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and report as to what items of debt and their respective dates were consolidated in the note of October 16, 1876, being the note for eight thousand and eight dollars and twenty-seven cents, herein sued on, and also to report who were the directors of the Sullivan Manufacturing Company at the time each debt was contracted. The master in his report gives each item of indebtedness from the beginning, showing the different consolidations and renewals down to the note now in question. The plaintiff's counsel contend that the note for \$3,852.52 was a payment of the pre-existing notes and constituted a new contract, especially where the former notes were payable to different parties.

I have carefully examined the opinion of the Supreme Court and the decree of Judge Pressley, and in the light of these decisions, I am satisfied that the position of the plaintiff's counsel is not tenable. Judge Pressley held that this legal note was made up of a series of notes. He says: "I find that the company is indebted to the plaintiff in the sum of eight thousand and eight dollars and twenty-seven cents, on the note dated October 16, 1876, with interest at ten per cent. from December 25, 1876." He thus fixes the liability of the company; but he further says: "The directors have pleaded the statute of limitations, and my judgment is that the statute runs in their favor from the time the several debts were contracted. There is no sufficient proof before me as to the exact date of the several contracts which were consolidated in the said note of October 16, 1876." He therefore refers it to the master to ascertain and report the items of debt and their respective dates, and who were directors at the time each debt was contracted. He has thus found, in substance, that the pre-existing notes have not been paid by the giving of the new notes.

Now, the very question here made before me was made and fully argued, and the Supreme Court was asked on the appeal to enlarge Judge Pressley's order. The plaintiff's second ground of exception was: "Because every new note given by the defendant, the Sullivan Manufacturing Company, was a new debt created in satisfaction of an anterior existing debt or debts, and not a mere renewal of the same, especially when the anterior debt or debts were due to strangers

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and the notes representing the same were delivered up to the said defendant." From the printed arguments used in the Supreme Court and submitted to me, it appears that

this exception was argued before that court. They sustain Judge Pressley's decree in every particular. He had sufficient testimony before him to satisfy him that the intention of the parties, which is to govern in all such cases, was consolidation or renewal and not payment, and so found.

I am therefore satisfied that I have not the right, even if I desired to do so, to disturb that which has been settled by these decisions. It is *res adjudicata*. But even if it was an open question and not *res adjudicata*, I should still hold that the new notes were renewals, and not payment of the pre-existing debts. The question is simply one of intention, and the onus probandi is on the plaintiff who alleges payment. Yet I am satisfied from an inspection of the different notes themselves, with the endorsements thereon, and from the concurring testimony of the plaintiff and defendants on this point, that the intention of the parties was renewal and not payment, and that the various small notes were consolidated into the large one merely for convenience. Some of the debts which entered into the consolidation were payable to outside parties, and that is the strongest view which can be taken of plaintiff's position. But even that would not justify the conclusion that the debts were paid by the consolidation and new debts created. The treasurer or other financial officer of the company could not thus shift the liability of the directors. They were liable only for the debts which were contracted, or which fell due, during their term of office, and even though the form of the debt was changed, the same liability existed. The liability could not be thus shifted from one set of directors to another set. Such is my construction of the 29th section of the statute.

This suit was instituted on February 17, 1880, and therefore all debts contracted prior to February 17, 1874, are barred. It is, then, simply a question of calculation. The testimony and the report of the master show what notes were renewed and their respective amounts and dates, and who were the directors at said dates. It is only necessary to calculate the amount of each note not barred, according to its tenor, up to the ma-

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turity of the large *note, and the interest on each amount thus ascertained up to date at ten per cent. per annum. This will furnish the amount on each note, for which the directors are respectively liable. I find the following notes and due bills which are not barred according to the principles enunciated in this decree, and I number them according to the enumeration set forth in the master's report, to wit: * * *

I further find that George W. Sullivan, sr., George W. Sullivan, jr., and D. Dunklin Moore were the directors during the time the obligations numbered 16 and 17 were contracted and became due, and that George W.

Sullivan, sr., and George W. Sullivan, jr., were the directors at the time the obligations numbered 13, 14, and 15 were contracted and became due. I further find that the obligations reported by the master, and numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, respectively, are barred by the statute of limitations.

It is therefore ordered and adjudged, that the plaintiff have judgment against the defendants, George W. Sullivan, sr., George W. Sullivan, jr., and D. Dunklin Moore, for the sum of thirty-five hundred dollars and eighty-five cents, and against the defendants, George W. Sullivan, sr., and George W. Sullivan, jr., in the further sum of twenty-six hundred and seventy-six dollars and twenty-two cents. It is further adjudged, that the plaintiff recover of the defendants the costs of this case on Circuit, except as hitherto adjudged; as to any costs on appeal incurred, this court adjudges nothing in relation thereto now.

Messrs. Perry & Perry and J. H. Whitner, for plaintiff.

Messrs. M. F. Ansel and G. G. Wells, contra.

March 8, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff brought the action below on a note for \$8,008.27, dated October 16, 1876, and bearing interest at 10 per cent. per annum. The note was under seal and was given by the defendant company. Judgment was demanded on this note against the company, and the plaintiff also sought judgment thereon

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against the defendants, directors of said company, under certain provisions of a certain act of the legislature, which it was alleged in the complaint made the directors liable. The plaintiff also prayed that the corporation be dissolved, that a receiver be appointed, and that an assignment made by the company be set aside as fraudulent and void. These latter prayers, however, are not now involved, having been adjudicated and disposed of on a previous appeal from a decree of Judge Hudson. *Sullivan v. Sullivan Manufacturing Co.*, 17 S. C., 588. After this the case came before his honor, Judge Pressley, who, considering the matters left open by Judge Hudson, gave judgment against the company for the note and interest mentioned above, and also for an open account amounting to \$1,432.98, claimed in the complaint. He also authorized judgment against the defendants, G. W. Sullivan, sr., and G. W. Sullivan, jr., for the amount of the account, it being in proof that these defendants were directors during the year this account was contracted. As to the liability of the directors for the large note, *supra*, he found as matter of fact, that this note was made up by

the consolidation of previous debts and indebtedness of the company combined into one, which was the note in question, and that the liability of the directors was not upon the note, but attached to the different items embraced in the consolidation, the directors for the years in which the original items respectively were contracted being liable, subject to the statute of limitation, which was plead, and he referred it to the master as to what items of debt and their respective dates were consolidated in said note, and who were the directors at the time each item of debt was contracted. This decree on appeal was affirmed by this court, 20 S. C., 92.

The case was then remanded, and the master proceeded to make the inquiry ordered, and having reported the various items, amounts, and dates embraced in the consolidated note, with the names of the directors in office when these several items were consolidated, Judge Hudson, after eliminating such debts as were barred by the statute, ordered and adjudged that the plaintiff have judgment against the defendants, Geo. W. Sullivan, sr., Geo. W. Sullivan, jr., and Dunklin Moore, for \$3,500.85, and against Geo. W. Sullivan, sr., and Geo. W. Sullivan, jr., \$2,676.22.

From this decree both parties have ap-

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pealed: the plaintiff, "I. *Because his honor erred in ruling that, under the Circuit decree of Judge Pressley, as affirmed by the Supreme Court, all the points involved in plaintiff's position were *res adjudicata*. II. Because his honor erred in ruling that even if the matters in plaintiff's position was an open question, under the evidence, the note for \$3,852.52 was a renewal of pre-existing debts, rather than a payment thereof, and a new debt of the said company for which the directors then in office were liable, according to the terms of said note." The defendants (Sullivans) appealed: "Because his honor allows interest against them as directors at the rate of 10 per cent. from the maturity of the large note sued on; whereas they claim that the interest should have been computed in accordance with the terms of the several demands for which they were found liable."

The first exception of plaintiff is very general and fails to raise in itself any separate and distinct legal proposition applicable to the case. It complains that his honor ruled that all of the points involved in plaintiff's position were *res adjudicata*, but it is not stated what legal points were involved. We suppose, however, from the terms of the second exception, and from what is said by Judge Hudson in his decree, that the error alleged, and complained of, is in reference mainly, if not altogether, to the \$3,852.52 note, and we have directed our attention to that. The plaintiff's counsel contended before his honor, Judge Hudson, that whether

that note was a payment of pre-existing notes consolidated constituting a new debt, or simply a renewal, was an open question, which they urged should be determined in favor of payment, and therefore that the directors were liable upon it as a new debt. The judge ruled to the contrary: first, because he held that the question was res adjudicata by the former decree of Judge Pressley, affirmed by this court (20 S. C., supra); and secondly, because upon the evidence it was intended as a renewal.

There is no doubt but that this court in the previous appeal (20 S. C., 93) affirmed the decree of Judge Pressley. What was that decree? What was its proper construction? is the real question before us. The plaintiff had sued upon a large note, amounting to \$8,008.27, given by the company, upon which he prayed judgment not only against the company, but against the

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*directors. Judge Pressley found and held that (this note was a consolidation of previous indebtedness of the company, as a renewal and not the creation of a new debt, and therefore that the directors could not be liable on the note; but he held further, that the directors who were in office at the time of the creation of the debts which made up the large note sued on by the consolidation, were respectively liable therefor, subject to the plea of the statute, and he ordered the master to report as to said items, their dates, and the names of the directors then in office. All this this court affirmed, and all this, therefore, is res adjudicata.

It is contended, however, that the note of \$3,857.52, now under consideration, which was consolidated into the \$8,008.27 note, was itself a consolidation of other and previous notes, and that such being the fact, that plaintiff was not precluded by the decree of Judge Pressley from showing that, as to that note, its consolidation was not renewal, but payment of the previous notes consolidated, and therefore a new debt for which the directors then in office were liable. The principle laid down by Judge Pressley, and upon which his decree was based, was that where consolidation was intended as a renewal of the notes consolidated and not payment, that the previous notes were not extinguished, and in a case of this kind, that the liability of the directors, which existed on the consolidated items, at the time of the consolidation, would still remain, without regard to the renewal note. No doubt he supposed that the items in the large note were made up of original indebtedness, and therefore the master would not go behind these items.

He knew nothing of the fact that some of these items might themselves be consolidations. He did not in his order, therefore, direct the master to inquire whether one or more of these items consolidated into the

large note, were themselves made up of previous indebtedness, and if so, whether such consolidation was intended as payment or renewal. Nor did this court, in affirming his judgment, make any ruling on that precise point. We affirmed the principle, to wit, that a mere renewal consolidation did not create a new liability on the directors, and impliedly, that a consolidation intended as payment, and amounting to payment of the previous debts, would be the creation of a new debt.

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*for which the directors then in office might be held responsible. Under this principle, we think that either party had the right to make the question of payment or renewal as to the \$3,852.52 note, below. In other words, that note, not having been before the court previously, nor any inquiry made in reference to its basis, the question of the application thereto of the principle laid down had not been determined so as to be res adjudicata.

But we do not see at last how this can benefit the plaintiff, because we concur in the judgment of the Circuit Court upon the other ground. We think with the Circuit Judge, that the preponderance of the evidence sustains the finding that the note in question was a renewal and not payment, and therefore that defendants, directors, had the right to go back to its several items. This disposes of the plaintiff's appeal.

As to the defendants, we think it was error to charge them with interest on each note not barred up to the maturity of the large note, and the interest on the amount thus ascertained up to date at 10 per cent. per annum. The directors, in our view, were not liable for any portion of the large note, principal or interest. Their liability, under the decree of Judge Pressley, had been determined to rest on the notes consolidated, and the plaintiff was thrown back upon them, and his recovery against the directors must be upon them according to their terms.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed, except as to the interest mentioned. Let the case be remanded so that the judgments rendered may be corrected accordingly.

24 S. C. 348

SULLIVAN v. HUFF,

(November Term, 1885.)

[1. *Appeal and Error* ¶1022.]

Findings of fact by master and Circuit Judge, affirmed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4015-4018; Dec. Dig. ¶1022.][2. *Sales* ¶270.]

Where parties purchase machinery at public auction, and, after full opportunity to examine the property and after an inspection thereof, complete their purchase by executing their bond and mortgage, they cannot afterwards

resist foreclosure upon the ground of failure of consideration, nor invoke the principle that a sound price warrants a sound commodity.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 767; Dec. Dig. ⚡270.]

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*Before Hudson, J., Greenville, April, 1884.

This was an action by William D. Sullivan against P. D. Huff, C. A. Parkins, J. H. Latimer, and Hewlet Sullivan, commenced in July, 1883. So much of Master Douthitt's report as relates to the matters considered by this court was as follows:

The master, to whom it was referred to hear and determine the issues of law and fact involved in the above entitled cause, with leave to report any special matter, begs leave to report that he has held references, and from the evidence adduced and herewith filed, he respectfully submits the following report:

As matters of fact, he finds:

I. That the plaintiff, as assignee of the Sullivan Manufacturing Company, advertised the real estate, the factory, and other appurtenances for sale at public outcry, at Greenville Court House, on Saturday, the 1st day of July, 1882, for one-third cash and the remainder on a credit of twelve months; the credit portion to be secured by bond of the purchaser and a mortgage of the premises. The factory and other buildings to be insured and the policy of insurance to be assigned to the plaintiff. In the advertisement the factory was represented as containing 1,136 frame ring spindles, 316 twister spindles, and 960 mule spindles, with accompanying machinery of modern style, and that there were also 50 four-quarter looms for plain sheetings, which were idle, but in good repair.

II. That the property was sold on the day advertised, and was purchased by the defendants (with the exception of Hewlet Sullivan) for \$25,000. The said Hewlet Sullivan, on behalf of the purchasers, in compliance with the terms of sale, deposited with the plaintiff \$5,000 as security that the terms of sale would be complied with as soon as the titles could be investigated. The keys were then turned over to the purchasers, and they were virtually put in possession. On the following Monday, at the request of the plaintiff, the superintendent of the factory carried Messrs. Huff and Parkins, two of the purchasers through the factory and showed them all the machinery, and explained to them what belonged to J. H. Sullivan & Co., lessees, which was reserved and excepted at the sale, and on Thursday or Fri-

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day following *they, in company with their superintendent, were again shown through the factory by G. W. Sullivan, and all the machinery was shown to them. On Friday, the 7th of July, 1882, defendant Sullivan, for the purchasers, paid the balance of the

cash portion, and they at once commenced operating the factory, but they did not deliver to the plaintiff their note and mortgage until the 21st day of August, 1882, nor was the deed to the property delivered to them until then. They continued to operate the factory, and made no complaint to the plaintiff about the machinery being defective, or not being as represented in the advertisement, until after their note had become due, and he demanded payment of them. They then claimed that it was defective, but offered to compromise and settle if he would discount, according to their statement, \$3,000, and according to his, \$2,500, which he refused, and in a few days thereafter instituted this suit.

* * * * *

V. That by mistake the plaintiff advertised eight spindles more than were actually in the factory, which were worth about \$24.

VI. That the purchasers operated the factory about thirteen months, and lost during that time between \$2,500 and \$3,000, exclusive of improvements made by them, which cost from \$2,500 to \$2,800.

VII. That at the sale of the property, G. W. Sullivan, sr., who was a large stockholder, a large creditor, and former president of the old company, bid \$24,000 for it, and before the bidding commenced deposited with the assignee a check for \$5,000; and it also appears from his testimony that he intended to make it bring the amount it sold for.

VIII. That when the lessees leased the factory, they found the machinery full of wrought cotton, and when they turned it over to the purchasers, they left it in the same condition; that said cotton was worth \$150, and it was not included in the advertisement.

The foregoing are the undisputed facts, and the matters in dispute are whether the spindles, with accompanying machinery, were of modern style, and the looms in good repair, as represented in the advertisement. There is a great deal of testimony on these points, from which it will be seen that there

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is quite a difference *of opinion touching the same, and it is very hard to reconcile, as all of the witnesses are equally entitled to credit as to veracity, so far as the master knows. * * *

It must be remembered that this factory was started in 1872, and that constant improvements and modifications have been made in machinery since then, and what might have been considered modern then might not have been considered, technically speaking, modern at the date of the sale; that is, it might not have had all of the latest patents and attachments; still it might have been sufficiently modern to justify the plaintiff to advertise it as such, and the master is inclined to that opinion, as there

is a slight preponderance of testimony given, and that after making an examination and actually testing the machinery by operating it for about six weeks, they chose to stand by their bargain, gave their bond and mortgage, and accepted a deed to the property. The master is of opinion that the maxim, that a sound price warrants a sound commodity, cannot be applied to this case, even if had been known that the property sold was not the kind represented in the advertisement, which certainly has not been done by a preponderance of the testimony. The master, therefore, finds that the plaintiff is entitled to recover the full amount of his mortgaged debt, which at this date amounts to eighteen thousand seven hundred and seventeen 55-100 dollars.

But admitting that it did not strictly come up to the representations made in the advertisement, are the defendants entitled to any discount on account thereof? They claim that a sound price calls for a sound commodity, which is correct as a general proposition of law, but is this proposition of law applicable to all the facts in this case? The maxim of the civil law, that a sound price calls for a sound commodity, which has been adopted in this State, applies to cases where the defect in the thing sold was unknown to the purchaser at the time of the sale, or where, by fraud or misrepresentation, the purchaser is misled as to the character, extent, or probable consequences of the defect known to him at the time of the sale. The object of the rule formulated in this maxim is to protect the purchaser against latent defects and against fraud and circumvention, and it was never designed to enable persons to get rid of injudicious contracts fairly made, under a full knowledge of all the circumstances relating to the subject matter of such contracts." *Thomson v. Sexton*, 15 S. C., 93.

The evidence in this case shows that the purchasers have resided in this county from the time the factory was first started up to the time of sale; one of them, it seems, was one of the original stockholders; all of them are nearly related to, or connected by marriage with, the founders of this factory, and must have known when the machinery was first put in, and could thus form an opinion as to how long it had been in use. They assumed the responsibility of buying it without first making an examination of it, or without employing an expert to do so for them

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(which *two of the witnesses, Messrs. Hammett and Launeau, testify that they never would have thought of doing). But after they had purchased, and before they had complied with the terms of the sale, Messrs. Huff and Parkins were twice shown through the factory, once in company with Mr. Jones, their own superintendent, and all of the machinery was pointed out to them. The evidence further shows that they operated the factory for about six weeks before they finally complied with the terms of sale by giving their bond and mortgage, and receiving a deed for the property.

Now, is it reasonable to suppose that the purchasers, who are all intelligent men, would have made so important a purchase on the mere representations made in the advertisement without knowing something of the condition of the property they were buying? But if they were imprudent enough to do this, had they not ample opportunity after the sale, and before complying with the terms thereof, to ascertain its true condition? The evidence shows that they did,

and that after making an examination and actually testing the machinery by operating it for about six weeks, they chose to stand by their bargain, gave their bond and mortgage, and accepted a deed to the property. The master is of opinion that the maxim, that a sound price warrants a sound commodity, cannot be applied to this case, even if had been known that the property sold was not the kind represented in the advertisement, which certainly has not been done by a preponderance of the testimony. The master, therefore, finds that the plaintiff is entitled to recover the full amount of his mortgaged debt, which at this date amounts to eighteen thousand seven hundred and seventeen 55-100 dollars.

The master further finds that the plaintiff is entitled to recover two hundred and forty dollars on account of the insurance, less twenty-four dollars for the deficiency in the number of the spindles, which leaves due on account thereof two hundred and sixteen dollars.

Exceptions taken by defendants to this report were overruled by the Circuit Judge, and the report was confirmed. Defendants appealed.

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*Messrs. Perry & Perry, for appellants.

Messrs. Wells & Orr, and M. F. Ansel, contra.

March 8, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, as assignee, held a large note on the defendants, other than Hewlet Sullivan, given in the purchase of certain real estate situate in Greenville County, including the factory buildings erected thereon, with all the machinery thereof, known as the property of the Sullivan Manufacturing Company, the said note being secured by a mortgage of the property purchased, which property was afterwards sold by the aforesaid defendants to the defendant, Hewlet Sullivan, the said Hewlet obligating himself to pay whatever sum might be justly due and recoverable on the mortgage debt. The action below was brought on this note, and to foreclose the mortgage. The property was purchased by the defendants first named, other than the said Hewlet, at public sale, made by the assignee under an advertisement, in which it is alleged that certain false statements were made as to the character, quantity, and quality of the machinery. The defendants resisted full payment on the ground that the property bought was not as represented in the advertisement; that it was greatly deficient, both in quantity and quality; that there was failure of consideration; and that they had been misled by these misrepresentations, and thereby damaged to a large amount. And they asked that these matters should be inquired into, and that the amount

of damage sustained by them be deducted from the mortgage debt, with leave to pay the balance into court, and be dismissed with their reasonable costs and charges.

The case was referred to the master, who, upon the testimony, reported, in substance, that the plaintiff as assignee acted in good faith in his advertisement; that the statements as to the modern character of the machinery, &c., were justified by the preponderance of the testimony; that there was no failure of consideration, but even if there was, that the defendants could not claim the benefit of the doctrine, that a sound price demands a sound commodity, for the reason they must have known all about the char-

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acter of the property bought, or might have known it, from their near residence thereto, and their familiarity with the factory during all the time it had been in operation before the purchase—one at least having been a stockholder, and two or more of them having been shown through and afforded ample opportunity to examine the machinery before the purchase was completed. And he concludes, therefore, that even if it had been shown before him that the property was not as represented in the advertisement, yet the defendants could not, under the circumstances, claim a deduction: stating distinctly, however, that this was not shown by the preponderance of the testimony. He reported that plaintiff was entitled to recover the full amount of his mortgage debt, which at that date amounted to \$18,717.55. He also reported in favor of an insurance claim, not involved here.

To this report the defendants excepted: 1st, as to the findings of fact on the question of misrepresentations in the advertisement, and the failure of consideration. And, 2d, because the master erred in holding that the doctrine of sound price, &c., did not apply to the case. His honor, Judge Hudson, overruled these exceptions and confirmed the report, ordering a foreclosure sale, with leave to issue execution for any deficiency, &c. The appeal raises the same questions as those below.

As to the questions of fact. The testimony is very fully reported, as taken down from the witnesses and then examined and discussed in the elaborate report of the master, in which he shows very satisfactorily that its preponderance sustains his findings. True, the witnesses do not entirely harmonize, and there is some difference of opinion between them as to the quality of some portions of the machinery, but upon weighing the whole evidence, we do not feel at liberty to reverse the master's finding, sustained as it is by the unqualified concurrence of the Circuit Judge.

Nor was there error below, by the Circuit Judge, in overruling the exception to the

master's report in regard to application of the doctrine of a sound price, &c. *Thomson v. Sexton*, 15 S. C., 93, and the cases there cited. It is apparent, from what is stated, that the defendants (purchasers) had full opportunity to examine the property; some of them went through the factory more than once, after they had bid it off, and be-

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fore the contract was con*summated by the execution of papers; one of them had been an original stockholder; all were near neighbors; they completed the contract without complaint; and nothing was ever said about misrepresentation or failure of consideration until the note fell due and payment was demanded. But even if it had been otherwise, the complete answer to all this is, that the master has found as matter of fact that there was no misrepresentation nor failure of consideration of any kind. The Circuit Judge has confirmed this finding, and we cannot say that the finding is either without testimony to sustain it, or is against the manifest weight thereof.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 355

ASBILL v. ASBILL.

(November Term, 1885.)

[1. *Judges* ⇨32; *Records* ⇨18.]

The judge should construe a written paper, but, in a chancery case, he may submit as an issue to the jury, what the terms of a lost paper were; and such an issue having been ordered, the succeeding judge could not disregard the order.

[Ed. Note.—Cited in *Coates & Sons v. Early*, 46 S. C. 228, 24 S. E. 305; *Holmes v. Weinheimer*, 66 S. C. 22, 44 S. E. 82.

For other cases, see *Judges*, Cent. Dig. § 158; Dec. Dig. ⇨32; *Records*, Cent. Dig. § 41; Dec. Dig. ⇨18.]

[2. *Trial* ⇨255.]

An omission to charge a matter not requested, is not error of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 627; Dec. Dig. ⇨255.]

[3. *Appeal and Error* ⇨1005.]

Findings of fact by a jury on issues referred to them out of chancery, adopted by the Circuit Judge, approved, being sustained by the testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3950; Dec. Dig. ⇨1005.]

[4. *Dower* ⇨99.]

Where commissioners in dower assign one-sixth in value of the lands to the widow in fee for her dower, and the return is confirmed, and no appeal taken, the assignment cannot afterwards be questioned.

Mr. Chief Justice Simpson concurred in the result, and Mr. Justice McIver dissented as to the effect given to the parol testimony.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. § 347; Dec. Dig. ⇨99.]

Before Wallace, J., Edgefield, October, 1884.

This appeal was from the following decree:

After the death of A. W. Asbill, his estate, being insolvent, was settled by proceedings in the court, to which his widow, Elizabeth Asbill, was a party. In her answer to the complaint she elected to take dower, and it was ordered that dower be assigned to her. A part of the land held by her husband at the time of his death was surveyed by direction

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of the commissioners *in dower, and Mrs. Asbill put in possession. Subsequently she acquired more land by purchase, and executed two deeds to her youngest sons, Michael and William Asbill, conveying the land of which she had been put in possession by the commissioners in dower, as well as the land which she had subsequently acquired. These deeds were delivered by her to G. W. Asbill, to be delivered to the grantees after her death. They were delivered to Michael and William at their request a short time before the death of their mother.

Mrs. Elizabeth Asbill having died, her older children bring this action to partition the land which had been assigned to her, and by her conveyed to her two youngest children, and claim that she only had an estate for life in the land, and at her death it became divisible among the heirs of A. W. Asbill. Upon the other hand, the grantees of Elizabeth Asbill, Michael and William, allege that one-sixth in value of their father's land was assigned in fee to the widow in lieu of dower, by the commissioners to lay off dower, and that that assignment was confirmed by the court by the consent of all parties in interest. It thus appears that the pivotal question in the cause is, what was the nature of the interest of Mrs. Asbill in the land assigned to her by the commissioners' return which was confirmed by the court?

The cause came on to be heard before Judge Aldrich, who, after listening to the argument of counsel, directed that an issue be submitted to a jury to say, "What was the return of the commissioners in dower, confirmed by Chancellor Carroll November 13, 1867?"

The cause came on to be heard before me and the issue directed by Judge Aldrich was submitted to a jury. The testimony taken before the master was read over to them, and after able and exhaustive argument by counsel, the jury found in substance that the land assigned to Mrs. Asbill was assigned absolutely and in fee, and was not assigned for her life only. It should have been stated before that this inquiry was rendered necessary by the loss of both the writ and the return of the commissioners. The order of confirmation, however, was on the record. I think the preponderance of the testimony is in favor of the finding of the jury, which is therefore approved. The assignment of one-

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*sixth in value of the land having been confirmed by the court, and not appealed from, the absolute right of Mrs. Asbill to the fee became fixed and cannot now be disturbed. It is a necessary consequence that her deed conveyed the fee to her two sons, Michael and William. It is therefore ordered, adjudged, and decreed, that the complaint be dismissed.

From this decree the plaintiffs appealed.

Messrs. Arthur S. Tompkins and L. Charlton, for appellants.

Messrs. Sheppard Bros., contra.

March 8, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. A. W. Asbill died intestate in 1867, possessed of a considerable property, consisting for the most part of several tracts of land. He left as his heirs at law, his widow, Elizabeth, and eight children. Being largely indebted, a bill was filed to sell the lands and marshal the assets. The widow claimed dower, and commissioners were appointed to lay it off. Three of them, L. P. Rutland, Charles Pardne, and William Powell, executed the writ and made return, which (as appears from the records of the office of the then commissioner in equity) was confirmed in general terms by an order of Chancellor Carroll, Nov. 13, 1867. It appeared that all the lands of the estate were sold except the tract marked "No. 1," to which reference was made in bounding "No. 2," as having been "assigned to widow as her dower." The widow and her two youngest sons, Michael and Willie, lived on this place until she died in 1882, when this action was commenced by some of the other children to partition the same as of the estate of the intestate, A. W. Asbill, in the view that, having been assigned to the widow as her dower, her interest expired at her death, and the land is now subject to partition among all his heirs.

The younger sons, Michael and Willie, being in possession, answered, denying the right to partition. They claimed that their mother had fee simple title to the whole tract of 195 acres; that 133 acres of it were assigned to her in fee by the commissioners in dower as her one-sixth part in value of all the

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lands of *which her husband died seized, and the same was conveyed by her to them on May 26, 1871; and that afterwards, in February, 1872, she acquired by purchase from Lewis G. Asbill the remaining 34 acres, and also conveyed the same to them on February 13, 1874, and that they together now have a fee simple title to the whole of the said land.

Judge Fraser referred it to the master to take the testimony, which was done. Among other things, it appeared that the writ in dower and the return of the commissioners

in the original bill of *M. B. Asbill et al. v. Elizabeth Asbill et al.*, to marshal assets, were lost, and Judge Aldrich ordered an issue to be submitted to a jury to say "what was the return of the commissioners in dower, confirmed by Chancellor Carroll, Nov. 13, 1867." The issue came on for trial before Judge Wallace. The testimony was read to the jury and, under the charge of the judge, they found in substance that the land assigned to Mrs. Asbill was assigned absolutely and in fee, and was not assigned for her life only. Whereupon the judge held, "that the preponderance of the testimony was in favor of the finding of the jury, which was approved. The assignment of one-sixth in value of the land having been confirmed by the court and not appealed from, the absolute right of Mrs. Asbill to the fee became fixed and cannot now be disturbed. It is a necessary consequence that her deed conveyed the fee to her two sons, Michael and William."

From this decree the plaintiffs appeal upon various grounds, involving in substance these propositions: First, that Judge Aldrich erred in ordering an issue to determine "what was the return of the commissioners," as it could not, according to law, have been other than an assignment for life; that the statute authorizing one-sixth of the fee simple value of the lands to be given for dower is limited to the case of an assessment of money in lieu of dower; but when lands are assigned it can only be one-third and that for life. Second, that Judge Wallace erred in not charging the jury as to what are the powers and duties of commissioners in dower, and as to the well defined methods and established usages of this State in assigning dower. Third, that he erred in submitting the issue to the jury and in approving their finding. Fourth, that he erred in finding that Mrs.

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Elizabeth Asbill purchased any of the land in dispute. "She did bargain for some, but never paid for it, and titles were never made to her, and the court misconceived the testimony on that point."

This was a case for equitable relief, and Judge Aldrich had the right to order an issue to determine any fact as to which there was conflicting testimony, and which was pertinent to the decision of the case under consideration. As we understand, the issue was not ordered to construe a written paper in existence, but to determine, as a fact, what were the terms of the lost paper. It is true that dower at common law was one-third for life of the lands of which the husband was seized during coverture; but our statute provides that a sum of money may be assessed in lieu of dower, and in that case it has been adopted as a rule of practice to give one-sixth of the fee simple value of the lands; for the reason that—assuming a life estate to be seven years, and the interest on money to be

equivalent to the use of lands—the interest on one-third of the value of lands for seven years is found to be within a fraction of one-sixth of the value of the whole. *Wright v. Jennings*, 1 Bail., 277; *Douglass v. McBill*, 1 Speers, 140.

This being established as the money value of dower, it is not as a fact impossible that commissioners, when the widow desired it, should undertake to assign as dower, not one-third of the land for life, but one-sixth in fee simple. Such assignment would be out of the usual course, and irregular, but could hardly be said to violate any substantial rights; and if those who were parties to the proceeding in which it was made, stand by and allow it to be confirmed, giving to the widow the use of less land, in consideration of that being in fee, we do not see that they could afterwards object, and cut down the fee to an estate for life, simply for the reason that it was assigned as dower. Suppose we had the return before us, and it gave in express terms the land as one-sixth in fee, would the parties who were before the court when that return was confirmed, be heard now to object to it? If not, the tenor of that return was an important fact in the case. See section 2285 of the General Statutes; *McCaw v. Blewitt*, Bail. Eq., 98.

We do not see that Judge Wallace erred in

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submitting the issue to the jury. It was the order of the judge who preceded him, and he could not disregard or reverse it. Nor did he commit error of law in omitting to go on and instruct the jury as to the powers of commissioners in dower and the established practice in assigning dower in this State. There were no requests to charge in the particulars indicated, and therefore the omission so to charge was not error of law appealable to this court.

But it was urged that the judge erred in finding that the land was assigned to Mrs. Asbill as one-sixth absolutely and in fee, and not for life only. This was a question of fact, as to which there was concurrence between the jury, who tried the issue, and the Circuit Judge, who approved the finding. In such case, it is the settled practice of this court not to disturb the finding, unless it is without any evidence to sustain it, or is manifestly against the weight of the evidence. In this particular the case is like that of *Pressley v. Kemp*, 16 S. C., 343 [42 Am. Rep. 635]. That, also, was an equity case, in which there were findings of a jury on issues of fact approved by the Circuit Judge. The court says: "Under these circumstances, this court will generally accept as established the facts there found. Inquiry must end somewhere. A jury of the vicinage acquainted with the witnesses, &c., is peculiarly fitted to weigh conflicting testimony and decide contested questions of fact. Where the finding of such a body of twelve men is approved and adopted by the Circuit Judge, intelligent, disinterested, and accustomed to consider the force

of testimony, it would seem that the verdict ought to be as near absolute truth as is attainable under imperfect human institutions," &c.

We have looked carefully through the testimony, only the more closely because of the strange disappearance of the return, and the peculiar character claimed for it; and we cannot say that the finding was against the weight of evidence. On the contrary, we incline to agree with the Circuit Judge that it was in accordance with the weight of the testimony. There was some conflict, but both the surviving commissioners, Rutland and Pardue, who assisted in laying off the dower, concurred in their impressions, that one-sixth in value was assigned in fee. It appeared with reasonable certainty that before the assignment, Mrs. Asbill expressed the wish to have what was given to her in such way that

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*she "could do what she pleased with it;" and after the assignment, that continued to be her view: for as early as 1871 she got her brother-in-law, G. W. Asbill, to draw the deed of 133 acres assigned to her, and afterwards to draw the other deed of 34 acres, which she acquired from Lewis G. Asbill, saying that "Michael and William, at the death of their father, were quite small and weakly, and have since been feeble, and had none of the advantages enjoyed by the other children."

From the view taken, we do not see that it was important to determine whether the whole 195 acres or only the 133 acres were assigned as dower, except as bearing upon the question of fact, whether one-third or one-sixth was assigned. But if it were important, we think there can be no doubt that the parties themselves considered that only the 133 acres were effectively assigned as dower; for when Mrs. Asbill made her first deed to her sons in 1871, she only conveyed that number of acres; but after Lewis G. Asbill (who had purchased the land at the sale) made a deed to her of the 34 acres, she also conveyed that in 1874.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON. I concur in the result of this case on the ground that the parties to the action to marshal the estate and sell the real estate of the deceased, in which the widow claimed dower, submitted to the confirmation of the assignment of dower by the commissioners without appeal. But I cannot agree to the proposition, that commissioners in dower have the power to assign any portion of the real estate in fee, as an original question.

Mr. Justice McIVER. As I cannot accept the conclusion reached by the majority of the court upon the main question involved in this case, I propose to indicate as briefly as practicable some of my difficulties.

It seems to me that there was no room for the question of fact upon which the decision is made to turn. There is no doubt that the land in question, or, rather, the larger portion of it, was assigned to the widow as her dower; and, according to my

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understanding, there is but one way by which this can be done—that is, by the assignment of one-third in value of the land, in which the right of dower exists, for the life of the widow. It is true that our statute provides that in certain contingencies a sum of money may be assessed to the widow in lieu of dower; but, properly speaking, that is not an assignment of dower, but by the express terms of the act is compensation in lieu of dower. Whenever, therefore, the fact is ascertained that dower has been assigned to the widow, then the law steps in and fixes absolutely the nature of the interest so assigned. In this case, the fact that dower was assigned is conceded, and those portions of the record which have been preserved demonstrate that the fact is as it is conceded to be, and, hence, it does not seem to me that there was any room for further inquiry as to the facts.

But, more than this, the record shows that there was an order of the court, directing "that a writ for the admeasurement of the widow's dower do issue," directed to certain persons named, requiring them "to admeasure the widow's dower," and another order in these words: "On hearing the bill and answer, together with the return of the cause [no doubt a misprint for commissioners] to the writ to admeasure dower in this cause, on the motion of Mr. Clark, complainant's solicitor, and with the consent of Messrs. Abney & Wright, defendant's solicitors, ordered, that the said return be confirmed." The writ for the admeasurement of dower and the return of the commissioners were, however, lost. Now, it seems to me that, upon well settled principles, we are bound to assume, from this order confirming the return of the commissioners, which was in effect the final judgment as to the matter of dower, that all the previous and intermediate proceedings—the writ and return—were regular and proper; and if so, then the conclusion is inevitable, that the land assigned to the widow as her dower was only assigned to her for life, and not in fee.

As to the other points involved, I concur with the majority of the court.

Judgment affirmed.

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*Ex parte SCHMIDT.
(November Term, 1885.)

[1. *Certiorari* ⇨1.]

Certiorari from the Court of Common Pleas goes to an inferior tribunal to keep it within

the scope of its powers, if not to correct errors of law, but certainly not to correct errors of fact.

[Ed. Note.—Cited in *City Council of Anderson v. O'Donnell*, 29 S. C. 366, 7 S. E. 523, 1 L. R. A. 632, 13 Am. St. Rep. 728.

For other cases, see *Certiorari*, Cent. Dig. § 1; Dec. Dig. ⚡1.]

[2. *Drunkards* ⚡10; *Municipal Corporations* ⚡592.]

The offence charged and the punishment imposed in this case were within the terms of an ordinance of the city of Columbia, passed pursuant to powers granted by charter, and such ordinance, which was a local regulation for this city, was not repealed by section 1739 of the General Statutes, which is a provision in the general license law applicable to the whole State; nor is the offence of "being drunk and disorderly" under the ordinance identical with that of "drunk or grossly intoxicated" prohibited by the statute.

[Ed. Note.—For other cases, see *Drunkards*, Cent. Dig. § 10; Dec. Dig. ⚡10; *Municipal Corporations*, Cent. Dig. § 1312; Dec. Dig. ⚡592.]

[3. *Constitutional Law* ⚡27.]

Articles 5 and 6 of the amendments to the Constitution of the United States impose no restrictions upon legislation by the States.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 31; Dec. Dig. ⚡27.]

[4. *Jury* ⚡23.]

Offences against city ordinances need not be prosecuted by indictment nor tried by a jury.¹

[Ed. Note.—Cited in *Ex parte Brown*, 42 S. C. 184, 185, 188, 20 S. E. 56.

For other cases, see *Jury*, Cent. Dig. § 152; Dec. Dig. ⚡23.]

[This case is also cited in *City Council of Greenville v. Eichelberger*, 44 S. C. 355, 22 S. E. 345, and *City Council of Anderson v. Fowler*, 48 S. C. 14, 25 S. E. 900, without specific application.]

Before Witherspoon, J., Richland, March, 1885.

This was an appeal from an order of the Court of General Sessions dismissing a writ of certiorari. The opinion states the case.

Mr. John Banskett, for appellant.

Mr. F. W. McMaster, contra.

March 10, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Frederick Schmidt petitioned the Court, stating that the city council of Columbia had tried and convicted him of "disorderly conduct in the opera house of said city"; that he had no right of appeal from the sentence pronounced, which was that he should pay a fine of forty dollars, or be confined in the guard house for ten days; and being about to be deprived of his liberty by reason of said sentence, which was erroneous and illegal, the city council

¹It will be observed that the charter of the city of Columbia has no provision like that of Beaufort and Lexington, upon which was based the decision in *Beaufort v. Ohlandt*, ante, p. 158, and *Lexington v. Wise*, ante, p. 165.—RE-PORTER.

being wholly without juris*diction in the premises, prayed for a writ of certiorari, to inquire into the cause of such findings and sentence.

Upon the affidavit made, Judge Wallace granted the writ requiring the mayor and aldermen to return the judgment and sentence, and all the proceedings upon which said judgment and sentence were founded. They made return, that "The mayor's court of the city of Columbia is not a court of record; that on September 16, 1884, the petitioner, Frederick Schmidt, was brought before the mayor, acting in his official capacity as judge of the city court, on the following charge: 'violation of an ordinance to amend an ordinance concerning the city police, drunk and disorderly conduct in the opera house'; that the mayor in his official capacity, being satisfied with the proof of said charge, sentenced said Frederick Schmidt to a fine of forty dollars, or ten days in the guard-house of said city, which said fine was within the jurisdiction of said mayor; that said petitioner appealed from said sentence to the city council, and they sustained the decision of the mayor." &c.

Upon hearing the return, Judge Witherspoon dismissed the writ, and the petitioner appeals on the grounds: "1. Because the ordinance of the city of Columbia, under which the relator was tried and convicted, was repealed by section 1739, chapter XV., of the General Statutes, and Mayor Rhett exceeded his jurisdiction in taking cognizance of the cause and in passing said sentence. 2. Because the proceeding ab initio was in violation of sections 14 and 19, article 1, of the Constitution of this State. 3. Because the proceeding ab initio was in violation of article V. and section 1, article XIV., of the Constitution of the United States."

As we understand it, certiorari from the Court of Common Pleas goes to an inferior tribunal to keep it within the scope of its powers, if not to correct error of law, but certainly not to correct error of fact. It is not denied that the ordinance under which the relator was convicted covered the offence charged and authorized the punishment imposed. Nor can it be denied that the city authorities had the right to pass the ordinance under their charter, which enacts that "The mayor and aldermen shall have full and ample power to establish such by-laws, not in-

consis*tent with the laws of the land, as may tend to promote the quiet, peace, safety, and good order of the inhabitants thereof; and the said mayor and aldermen, or the said mayor alone, may fine and impose fines and penalties for violations thereof, which may be recovered in a summary way, to the extent of forty dollars; * * and also are authorized and empowered to impose the

alternative punishment of hard labor in the work house: provided the term of imprisonment shall not exceed ten days for any single offence." 14 Stat., 571.

It is, however, insisted that the ordinance under which the relator was tried and convicted had been repealed by section 1739 of the General Statutes, which enacts that "Any person who shall be found drunk or grossly intoxicated in any street, highway, public house, or public place, shall be fined upon view of, or upon proof before any mayor, &c., not exceeding five dollars, and, if the same is not paid, imprisoned five days." We do not think this provision repeals the ordinance referred to. One is a provision in the general license law, applicable to the whole State, while the other is a local regulation for the government of the city of Columbia. Besides, they are not inconsistent. The offences are not identical. Being "drunk and disorderly" is very different from being simply found "drunk or grossly intoxicated."

But it is further insisted that the act of the legislature granting the charter in the terms stated is in conflict with the constitution of the State as well as that of the United States, particularly in respect to the right of trial by jury. We need not consider the objection, that the charter was in violation of the provisions of the constitution of the United States, articles 5 and 6 of amendments, for it has been settled that the provisions indicated impose limitations on the exercise of power by the government of the United States, and has no application to the legislation of the States. *State v. Shirer*, 20 S. C., 404.

Then, as to the provision in the Bill of Rights of the State Constitution, that "No person shall be arrested, imprisoned, despoiled, or dispossessed of his property, * * or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land." Assuming that the phrase, "judgment of his peers," means the verdict of a jury, there has always been some lack of

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*clearness and certainty as to the other phrase, "the law of the land." See *State v. Starling*, 15 Rich., 120. It seems to us that it would be fatal to the peace and good order of cities and towns, if every one brought before the municipal authorities for the violation of an ordinance, simply of a police character, should have the right to demand a trial by jury, with all the expense and necessary delays incident thereto.

Without reopening the argument, we agree with Mr. Dillon, when he says: "Offences against ordinances, properly made in virtue of the power of the corporation, or in the exercise of its legitimate police authority for the promotion of the peace, good order, safety, and health of the place, and which relate

to minor acts and matters not embraced in the public criminal statutes of the State, are not usually or properly regarded as criminal, and, hence, need not necessarily be prosecuted by indictment or trial by jury." See 1 Dill. Corp., § 361, and notes; *Ryers v. Commonwealth*, 42 Penn. St., 89; 1 Bish. Cr. Proc., § 758; *McGear v. Woodruff*, 33 N. J., 213; *Williams v. Augusta*, 4 Ga., 509; [*Floyd v. Com'rs of Town of Eatonton*] 14 Ga., 358; [*Vason v. City of Augusta*] 38 Ga., 542; *State v. Sims*, 16 S. C., 486; *State v. Bowen*, 17 S. C., 61.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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THOMPSON v. RICHMOND & DANVILLE R. R. COMPANY.

(November Term, 1885.)

[1. *Evidence* ⇨99.]

In action against a railroad company under section 1511 of General Statutes to recover damages for personal property destroyed by fire beyond defendant's right of way, testimony is inadmissible to prove that defendant had paid for cotton burned at the same time, which had been received by the company for carriage.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 138; Dec. Dig. ⇨99.]

[2. *Railroads* ⇨453.]

Under section 1511 of General Statutes, a railroad company is liable for property destroyed by fire, beyond its right of way, communicated by its locomotive engines or originating within the limits of its right of way in consequence of any act of an authorized agent, and this liability attaches without regard to the question of the company's negligence, or of proximate or remote cause.

[Ed. Note.—Cited in *Laney v. Chesterfield County*, 29 S. C. 146, 7 S. E. 56; *Gregory v. Layton*, 36 S. C. 100, 15 S. E. 352, 31 Am. St. Rep. 857; *McCauley v. Richmond & D. R. Co.*, 38 S. C. 113, 118, 16 S. E. 429, 18 L. R. A. 440; *Hunter v. Columbia, N. & L. R. Co.*, 41 S. C. 89, 19 S. E. 197; *Wragge v. South Carolina & G. R. Co.*, 47 S. C. 111, 25 S. E. 76, 33 L. R. A. 191, 58 Am. St. Rep. 870; *Dean v. Charleston & W. C. R. Co.*, 55 S. C. 506, 33 S. E. 579; *Wilson v. Southern Ry.*, 65 S. C. 426, 43 S. E. 964; *Hutto v. Seaboard Air Line Ry.*, 81 S. C. 571, 62 S. E. 835; *Brown v. Seaboard Air Line Ry.*, 83 S. C. 561, 65 S. E. 1102.

For other cases, see *Railroads*, Cent. Dig. § 1658; Dec. Dig. ⇨453.]

Before Wallace, J., Spartanburg, June, 1885.

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*This was an action by Jeff Thompson against the defendant company, to recover damages for furniture and other personal property burned at Duncan's, in Spartanburg County, on the line of the Atlanta and Charlotte Airline Railway Company, then operated by the defendant. The action was commenced August 15, 1883. The opinion states the case.

Messrs. Duncan & Sanders, for appellant.
Mr. Stanyarne Wilson, contra.

March 13, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. On November 24, 1882, the plaintiff had certain personal property destroyed by fire, in a house occupied by him as the tenant of one Greer, which was about one hundred and fifty yards from the railroad of the defendant, and outside the limits of its right of way; and this action was brought to recover damages for the destruction of said personal property under the allegation that the fire originated from the escape of sparks from defendant's engines.

It seems that some cotton on the platform of defendant's depot was also burned on the same day, and, against the objection of defendant, witnesses were allowed to testify that the defendant company had paid for said cotton—his honor, the Circuit Judge, ruling that "it may in one sense be that it is an admission of their liability. It may not be by word, but by acts." It appeared in evidence that this cotton had been delivered at the depot for shipment, and taken charge of by the defendant's agent, though no bill of lading had been given, it being the custom at that depot for shippers to call in the evening and get bills of lading for all cotton put in charge of defendant's agent during the day. At the close of the testimony as to the cotton defendant's counsel moved "that so far as the paying for this cotton could be construed to be an admission of defendant's liability, it be stricken out," to which his honor replied: "That is for the jury. I will charge the jury on the law with regard to it;" but so far as appears from the charge as set out in the record, this matter was not alluded to.

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*The Circuit Judge after reading to the jury section 1511 of the General Statutes (which will hereinafter be set out in full), in substance instructed the jury that if the plaintiff's property was destroyed by fire communicated by sparks from the locomotive engines of the defendant, or by fire originating within the limits of defendant's right of way, in consequence of the act of any of its authorized agents or employees, the defendant would be liable, the terms of the law above referred to having eliminated all inquiry into the question of negligence and into the question of proximate or remote cause.

The plaintiff having obtained judgment the defendant appealed on various grounds, which raise questions as to the admissibility of the testimony objected to, as affording any evidence of defendant's admission of liability to the plaintiff, and as to the proper construction of the above mentioned section of the general statutes, which will be considered without referring to the various grounds of appeal seriatim.

First, as to the question of evidence. We

think the testimony objected to was incompetent, and its admission, with the accompanying remarks of the judge, that: "It may, in one sense, be that it is an admission of their liability. It may not be by words, but by acts," was well calculated to prejudice the cause of the defendant, especially when he further said: "Here is a fire, in consequence of which this plaintiff claims that he has been injured. Now, we cannot conceive that every little fact and detail of the burning can be proved, but we must exercise our judgment and be allowed to infer from one fact another. It is asked whether, as a consequence of this fire cotton having been destroyed, the company did pay for it? Now, what if they did pay for it? *The inference is that it is an admission of liability.*"

It seems to us clear that the last sentence of these remarks, which we have italicised, only with the view to direct special attention to it, was well calculated to prejudice the defendant; in fact, virtually decided the case against the company. For, as we have seen, the judge withdrew from the jury any question as to the negligence of the defendant, and any question as to whether the fire originating on defendant's right of way was the proximate or remote cause of the de-

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struction of plaintiff's property, so *that, practically, the only question for the jury to determine was whether the fire was the consequence of the act of any authorized agent or employee of the defendant; and if the fact that defendant had paid for the cotton was evidence of defendant's admission of its liability to the plaintiff, it must necessarily have been an admission that the fire was the consequence of the act of some one of defendant's agents or employees.

But the test of defendant's liability for the cotton was very different from that of its liability for the property of plaintiff which had been destroyed. If, as seems to be the fact, the cotton had been delivered to the company as a common carrier, then its liability became that of an insurer, and it did not matter who caused its destruction unless it was by the act of God or the public enemy. Hence, if it had been proved to a demonstration that the fire did not originate from any act of the company, or any of its agents or servants, the company would still have been liable for the cotton, but not liable for the plaintiff's property. The fact that no bill of lading had been given for the cotton amounts to nothing, in view of the fact that the testimony showed that the cotton had been delivered to and received by the defendant's agent for shipment, and the giving of the bill of lading simply deferred for convenience until evening. The bill of lading would serve simply as evidence of the delivery for shipment; and if there is other evidence of that fact, the bill of lading would

be unnecessary. We are of opinion, therefore, that the fact that the company had paid for the cotton was no evidence whatever of its admission of liability for the destruction of plaintiff's property, and that it was error to receive the evidence objected to.

Next, as to the construction and effect of section 1511 of the General Statutes, which reads as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road in consequence of the act of any of its authorized agents or employees, except in case where property shall have been placed on the right of way of such corporation unlawfully or without its consent, and shall have an insurable interest in the property upon its route, for which it may

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*be so held responsible, and may procure insurance thereon in its own behalf." An analysis of the terms of this section will show that the legislature intended to make a railroad company liable for property destroyed by fire communicated by its locomotive engines, or by a fire which originated within the limits of its right of way in consequence of any act of an authorized agent, unless the property destroyed was placed on the right of way of the company unlawfully or without its consent.

Hence, in a case of this kind, the only questions would be whether the property was destroyed by fire communicated by its locomotive engines, or by fire which originated on its right of way in consequence of the act of some agent of the company, and the only defences would be either that the fire, though originating on the company's right of way, was not the result of any act of one of the company's agents or employees, or that the property destroyed had been placed on said right of way unlawfully or without the consent of the company. Nothing is said in the act about negligence, and the very fact of such omission shows that the object of the act was to eliminate any question of negligence, inasmuch as under the law as it previously stood the company would only be liable in case of negligence. We are, therefore, forced to conclude, that the purpose of the act was to dispense with any inquiry into that subject, for it declares the company liable for property destroyed by fire, originating on its right of way from any act of any of its agents, without any qualification whatsoever, either as to negligence or otherwise.

So, too, under the terms of the act, there can be no necessity for an inquiry as to whether the fire caused by the act of the company or its agents was the proximate or remote cause of the destruction of the property in question, as would have been the case

under the old law: for it declares in absolute terms, without any qualification, that the company shall be liable for the destruction of property by fire which originated within the limits of the right of way from some act of the company or its agent or employee, and this precludes any inquiry as to whether the fire so originating was the proximate or remote cause of the damage complained of. As the Circuit Judge well says, if the act had simply declared that the company should be liable to any person whose

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*property may be injured or destroyed by fire communicated by sparks from its locomotive engine and stopped there, it may be that then the question as to proximate or remote cause might have been a material inquiry, but the act goes on to declare that the company shall be liable for damage caused by fire which originated on the right of way. So that, if the fire originated there from the act of the company or its agents, it is liable, even though such fire may have been the remote and not the proximate cause of the damage complained of, as there is nothing in the act to qualify or restrain the general terms used.

Again, it is contended that the liability imposed by this act does not extend to property injured or destroyed outside of the limits of a railroad company's right of way, but is confined only to such property as may, lawfully and by the consent of the company, be placed on its right of way. It is not pretended that there is any such express limitation in the act, but it is argued that, construing all the different parts of the section together, such is the necessary inference. The latter part of the section, which exempts the company from liability for injury to property placed upon its right of way unlawfully or without its consent, and which gives to the company the right to take out insurance for its own benefit on property for the destruction of which it is made liable, is relied on for this purpose. The provision which exempts the company from the stringent rule of liability imposed by the act for property unlawfully, or without its consent, placed upon its right of way, cannot have the effect contended for, inasmuch as this provision simply exempts the company from this stringent rule of liability to mere trespassers; and, therefore, the only remaining inquiry is as to the effect of the provision authorizing the company to insure the property for injury to which it may be made responsible under the act.

It is argued that the intention was to limit the liability to such property as the company was given an insurable interest in, so that its liability should be co-extensive with the means of relief afforded the company by the act; and that as it was given an insurable interest only in the property which was on its right of way, its liability under the act could only extend to such property. It will be observed, however, that this argument is based

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*upon the assumption, unwarranted, as we think, by the terms of the act, that the company is given an insurable interest only in the property placed upon its right of way. In the previous parts of the section, whenever it was designed to speak of the "right of way," those terms were used. For example, in speaking of the origin of the fire, the language used is, "originating within the limits of the right of way of said road," &c., and in the exception, as to the liability of the company, the language is, "except in any case where property shall have been placed on the right of way of such corporation unlawfully or without its consent;" but when we reach the provision as to insurance, the phraseology is changed, and the language there used is, "and shall have an insurable interest in the property upon its route, for which it may be so held responsible."

This, it seems to us, indicates exactly the opposite of what has been assumed in appellant's argument, and that the intention was to give a railroad company an insurable interest in the property along its route, and not simply upon that within the limits of its right of way. Indeed, we suppose that, without the act, a railroad company would have an insurable interest in all property delivered to it for transportation as a common carrier, and it is property of this kind which is most usually placed upon its right of way, and hence the purpose of the act must have been to give a railroad company an insurable interest in any property upon its route, which, without the act, it could not have. We do not see, therefore, that the provisions of the section relied upon necessarily imply that the intention of the act was to limit the rule of liability established by the act to such property as might be within the limits of the right of way, especially when the act declares in general and comprehensive terms, that "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property," without any limitation as to the location or kind of property, "may be injured by fire," &c.

The judgment of the court is, that the judgment of the Circuit Court be reversed upon the first ground considered herein, and that the case be remanded to that court for a new trial.

24 S. C. *373

*WHITESIDES v. BARBER.

(November Term, 1885.)

[1. *Executors and Administrators* ⚭333.]

A Court of Probate has no jurisdiction to order the sale of lands of one deceased in aid of assets, until the will has been proved or letters of administration granted.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1372; Dec. Dig. ⚭333.]

[2. *Infants* ⚭89.]

An infant is incapable of making himself a party to an action by accepting service of a summons.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 266; Dec. Dig. ⚭89.]

[3. *Judgment* ⚭675.]

An infant (or other person) is not affected by a judgment or order in a cause to which he has not been made a party, although otherwise informed of the pendency of the proceedings.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1194; Dec. Dig. ⚭675.]

Before Fraser and Wallace, JJ., November, 1883, and April, 1885.

This action was instituted by B. T. Dunlap in October, 1882, to recover possession of his interest in a tract of land, and, after his death, was continued by his sole executor and devisee, Thomas W. Whitesides. The plaintiff claimed 65-144 of this land as heir at law of Thomas W. Whitesides and of certain other persons, deceased, and the defendant claimed the land as purchaser under a sale ordered by the Court of Probate. This sale was made under a decree rendered by the judge of probate in two proceedings, heard and decided together: (1) a petition by J. H. Clawson, a creditor of Thomas W. Whitesides, who owned two-thirds of the land, against the heirs at law of Thomas W. Whitesides; and (2) a petition by the widow of said Thomas W. against all the other parties in interest, praying partition and dower in her husband's portion. But it did not appear that any will of Thomas W. Whitesides had ever been proved, or any letters of administration ever granted. In the first proceeding, B. T. Dunlap was personally served, but in the second proceeding he was not, having accepted service and afterwards appeared by a guardian ad litem duly appointed.

After the sale of this land and its purchase by the defendant, B. T. Dunlap attained his majority. He then refused to receive his proportion of the proceeds of such sale, and afterwards instituted this action. The jury found for the plaintiff 65-144 of the land in dispute, and of \$1,750.04, the net rents and profits. Judge Fraser thereupon ordered the

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cause transferred to calen*dar 2, with leave to plaintiff to apply for judgment on this verdict, and with leave to defendant to amend his answer and to set up any equities that he might have. An appeal from this order was held to be premature. *Whitesides v. Barber*, 22 S. C., 47.

Defendant thereupon amended his answer, and claimed to be subrogated to the rights of certain creditors who had been paid out of the proceeds of the sale. Judge Wallace thereupon passed the following decree:

Upon reading and filing the special verdict of the jury in above stated case, and after hearing argument of counsel, on motion of Wilson & Wilson, plaintiff's attorneys, it is ordered, that the plaintiff, T. W. Whitesides,

have judgement against the defendant, Ferguson H. Barber, for the possession of sixty-five one-hundred and forty-fourth (65-144) part of the premises described in the complaint herein, in fee. And it is further ordered, that said plaintiff have judgment against the said defendant for the sum of seven hundred and thirty 92-100 dollars, and interest from November 14, 1883, the same being 65-144 of the net value of the rents and profits of said premises, as found by said special verdict, after deducting therefrom said plaintiff's proportionate share of money paid by the said defendant and applied to the debts of Thomas Whitesides, deceased.

Defendant appealed from this decree, and from the former order of Judge Fraser in the cause.

Messrs. Hart & Hart, for appellant.

Mr. W. B. Wilson, jr., contra.

March 13, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case are fully and clearly stated in the opinion delivered by Mr. Justice McGowan when the case was before this court on a previous occasion, as will be seen by reference to 22 S. C., 47, and, therefore, it will not be necessary to repeat them here, but only to state what has occurred since. In accordance with the judgment then rendered, the case was remanded to the Circuit Court, when the plaintiff, in accordance with the former order

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of Judge Fraser, applied for *and obtained from Judge Wallace a judgment for an undivided portion of the land in controversy, together with the sum of seven hundred and thirty 92-100 dollars, and interest from November 14, 1883, being his proportion of the net value of the rents and profits, after deducting therefrom the plaintiff's proportionate share of the amount paid by defendant and applied to the debts of Thomas Whitesides, deceased.

By this appeal the appellant seeks to review the alleged erroneous rulings of Judge Fraser, on the trial before him, upon the exceptions then taken, as well as the final judgment rendered by Judge Wallace. Without undertaking to set out in detail the various exceptions appearing in the record, we propose to consider the several questions made thereby. The fundamental inquiry is as to the validity of the sale, made by the order of the judge of probate, under which the appellant claims that he acquired title to the land in dispute.

First, as to the proceeding instituted by Clawson as a creditor of Thomas Whitesides, deceased. The object of that proceeding was to sell the real estate of Thomas Whitesides, deceased, in aid of the personalty, for the payment of debts, and to that proceeding the heirs of Thomas Whitesides seem to have been regularly made parties, but no administration having been granted upon his estate,

neither his executor nor administrator was, or could have been, made a party. The first inquiry, therefore, is, could the Court of Probate obtain jurisdiction in such a case? That being a court of limited and not of general jurisdiction, we must look to the law defining its jurisdiction to determine this question. Section 40 of the Code of Procedure confers jurisdiction upon the Court of Probate to order a sale of the real estate of a person deceased, for the payment of his debts, when it shall be made to appear that the personal estate is insufficient for that purpose, but this jurisdiction is conferred only upon the Probate Court of the county in which the will of such deceased person was proved, or in which administration of his estate was granted.

Hence, it would seem to follow, that until a will has been proved, or letters of administration have been granted, no Court of Probate can take jurisdiction of a proceeding to sell the real estate of a deceased person.

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This is not a mere question of defect of parties, as has been argued by the appellant, for, although it is undoubtedly true that in such a proceeding the executor or administrator, as the case may be, would be a necessary party, yet the defect here lies deeper, and is jurisdictional. No Court of Probate could take jurisdiction of a proceeding like the one in question until a will has been proved or administration granted, because such jurisdiction is conferred only upon the Court of Probate of the county where the will has been proved or administration granted. We think, therefore, that there was no error on the part of Judge Fraser in charging the jury that the proceeding by Clawson, assignee, to sell the land for the payment of the debts was void.

Next as to the partition proceedings; and the fundamental inquiry here is, whether B. T. Dunlap, who was then a minor, was properly made a party to such proceedings. The law prescribes explicitly the mode in which a minor may be made a party to an action, and unless the requirements of the statute are complied with, no court can obtain jurisdiction of the person of the minor, so as to enable it to render any judgment in such action which will be binding on the minor. It has been settled by the decisions of this court (*Finley v. Robertson*, 17 S. C., 435; *Riker v. Vaughan*, 23 S. C., 187; and *Genobles v. West*, *Ibid.*, 154) that an infant is incapable of making himself a party to an action by accepting service of a summons, so as to be bound by a judgment therein; and as it does not appear that there was any other legal evidence that the minor, B. T. Dunlap, had been served with the summons issued in the partition proceedings, he cannot be regarded as a party to such proceedings, and his rights cannot, therefore, be precluded by any order or judgment therein. The record only shows that he accepted service of the summons, which, as we have seen, was not

sufficient, and there is no such proof of service, as is required by section 159 of the Code.

It may be, as contended by appellant, that the minor, B. T. Dunlap, was cognizant of the proceedings for partition, and was aware of what was going on, but, as we have said in the case of Warren, Wallace & Co. v. Simon (16 S. C., 364), even in reference to an adult, that it would be a dangerous precedent to establish, that a party might be liable to have

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a judgment rendered *against him, or an order granted affecting his rights, in a cause to which he had not been made a party in the manner prescribed by law, simply because he was otherwise informed of the proceedings.

According to these views, it is quite clear that, so far as the interest of B. T. Dunlap in the land was concerned, the sale was void for want of jurisdiction, and hence the other points presented in the argument cannot arise, and need not, therefore, be considered.

From this, it follows that the plaintiff, as sole devisee of B. T. Dunlap, was entitled to recover his undivided interest in the land, subject to the equity set up by the appellant to be subrogated to the rights of the creditors of Thomas Whitesides, and this equity, as we understand it, has been properly allowed him in the judgment rendered by Judge Wallace, by deducting from the plaintiff's share of the rents and profits his proportion of the debts of Thomas Whitesides, which have been paid by the appellant.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 377

BRIGGS v. BRIGGS.

(November Term, 1885.)

[1. *Appeal and Error* ⇨1071; *Trial* ⇨394.]

The rule is wise and salutary that requires the Circuit Judge to state his findings of fact separately; but the appellant having suffered no prejudice from the judge's failure to state his findings of fact in this case, there is no ground for a new trial.

[Ed. Note.—Cited in Stepp v. National Life & Maturity Ass'n, 37 S. C. 435, 16 S. E. 134; Monaghan Bay Co. v. Dickson, 39 S. C. 149, 17 S. E. 696, 39 Am. St. Rep. 704.]

For other cases, see Appeal and Error, Cent. Dig. §§ 276-292, 4234-4239; Dec. Dig. ⇨1071; Trial, Cent. Dig. §§ 924-926; Dec. Dig. ⇨394.]

[2. *Husband and Wife* ⇨283.]

The Circuit Judge having decreed alimony to the plaintiff upon allegations of adultery, cruelty, and desertion, this court concurred with the judgment below upon the questions of cruelty and desertion.

[Ed. Note.—Cited in Wise v. Wise, 60 S. C. 431, 38 S. E. 794.]

For other cases, see Husband and Wife, Cent. Dig. § 1064; Dec. Dig. ⇨283.]

[3. *Husband and Wife* ⇨283.]

Is adultery on the part of the husband sufficient ground of itself for alimony?

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. ⇨283.]

[4. *Husband and Wife* ⇨283.]

Cruelty by the husband towards the wife, or the practice by him of obscene and revolting indecencies in the family circle, is good ground for a decree of alimony.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1064; Dec. Dig. ⇨283.]

[5. *Husband and Wife* ⇨283.]

A cold and formal proposition by the husband to give the wife mere house room and support, does not condone his past offences; to have such effect, it should be a cordial overture to her to return to her home and resume the proper place of a wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1067; Dec. Dig. ⇨283.]

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[6. *Husband and Wife* ⇨283.]

*The charge for alimony should be only for the joint lives of husband and wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1073; Dec. Dig. ⇨283.]

Before Cothran, J., York, November, 1884.

This was an action by Mary R. Briggs against her husband, Benjamin F. Briggs, for alimony. The opinion states the case.

Messrs. Hart & Hart, for appellant, contended that his first exception was well taken, inasmuch as the Circuit Judge had stated no findings of fact whatsoever, and thus left defendant ignorant of the ground upon which the decree was rested. 2 McCord Ch., 96; 4 S. C., 291. Upon the 2d and 3d exceptions counsel cited 10 Rich. Eq., 176; 1 McCord Ch., 207; Harp. Eq., 144; 4 Rand., 662; 4 DeSaus., 100.

Messrs. W. P. Good and C. E. Spencer, contra.

March 15, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for alimony, brought February 28, 1883, by the plaintiff against her husband, Benj. F. Briggs. The grounds alleged were cruelty, consisting not only of foul and obscene language uttered in presence of the plaintiff, but also of blows directed against her body, making life almost an intolerable burden, adultery with a woman of low character living in his house, and desertion. The defendant answered, stating that the plaintiff had previously brought an action against him for "divorce and alimony" which she had discontinued; that she had, without cause, wilfully abandoned the home provided for her; and that, notwithstanding her many past errors and infirmities of mind and disposition, he has at all times been ready to receive her back under his roof and to support and sustain her, &c.

A special referee was appointed to take the testimony, which was very voluminous, and being all printed in the brief need not be stated here. The Circuit Judge made no separate findings of fact, but adjudged and

decreed "that the plaintiff recover of the defendant the sum of two hundred dollars per annum during the time they shall live separate and apart, or until he shall agree to

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*cohabit with her and treat her as becomes a man to treat his wife, &c. And also that the defendant do pay the costs of this action, to be assessed by the clerk, as well as the sum of two hundred dollars reported by the referee to be a suitable fee for plaintiff's attorney for his services herein."

From this decree the defendant appeals on the grounds: "I. Because no facts are found or decided for or against appellant as the basis of said judgment. II. Because of error in not finding as matter of fact that the desertion was on the part of the plaintiff. III. Because of error in adjudging alimony against defendant until he should consent to take back plaintiff and treat her as a husband ought to treat his wife, he having made such offer bona fide in his answer as well as at other times previously, and the said offer having been rejected by plaintiff. IV. Because of error in requiring appellant to cohabit with respondent. V. Because of error in requiring defendant to pay to plaintiff the sum of two hundred dollars per annum during the time they shall live separate and apart or until he shall agree to cohabit with her and treat her as becomes a man to treat his wife. VI. For error in adjudging costs and counsel fees against defendant, it not appearing from any finding of fact that he has been in default. And upon said exceptions the appellant will move the Supreme Court to reverse the judgment and direct that the complaint be dismissed."

Pending the appeal the defendant died and the action was continued, by order, against Joseph F. Wallace as his executor. The sixth exception as to costs and counsel fees was not argued, and we suppose that it is not insisted on.

As to the first exception. We regard the provision of the Code (section 289) which requires that the decision of the court shall contain a statement of the facts and the conclusions of law separately, wise and salutary as tending to prevent confusion and to promote clearness. But it has been held that an omission in that regard is not ground for reversal unless it is made to appear that the appellant has suffered prejudice thereby, as it regards the merits of his case. We do not see that such prejudice has resulted in this case. *Joplin v. Carrier*, 11 S. C. 329;

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State *ex relatione Catheart v. Columbia*, 12 Id., 393; *Bouknight v. Brown*, 16 Id., 166.

The exceptions 3, 4, and 5 complain that on the merits a case for alimony was not made out; that, in truth, instead of the defendant deserting the plaintiff, she deserted him. That was a question of fact, and, after reading the testimony carefully, we can-

not say that the decision was unsupported by the evidence. Three grounds were alleged for alimony, viz., adultery, cruelty, and desertion; and if either of them was sustained by the proof, we cannot say that the decree was wrong. It is insisted that adultery on the part of the husband is not good ground for alimony. In States where divorces are authorized it is certain that adultery is generally given as one of the grounds, if not the principal ground, for granting it; but if as argued infidelity to the marriage vows alone is not sufficient ground for alimony, there is no doubt whatever that cruelty is, and will justify the wife in withdrawing from the presence of her husband and claiming against him a decree for alimony. "In pursuance of the decisions and the practice of the ecclesiastical and consistorial courts of England, in South Carolina alimony is granted for bodily injury inflicted or threatened and impending, amounting to the *saevitia* of the civil law, which may be defined to be personal violence actually inflicted or menaced, and affecting life or health." *Hair v. Hair*, 10 Rich. Eq., 173. And to this may be added as constituting *saevitia* of another kind: When the husband has not actually inflicted any bodily injury, yet practises such obscene and revolting indecencies in the family circle that a modest and pure-minded woman would find these grievances more intolerable to be borne than the most cruel afflictions upon her person.

There is in this case some conflict in the testimony, but, taking it all together, we think there was a preponderance of evidence of such *saevitia* of both kinds as to warrant the decree for alimony. In general terms it appeared with reasonable certainty that the parties had not lived happily together and there had been some differences on former occasions; but in March, 1873, when they were boarding with their son-in-law, Mr. L. D. Goore, in the "Thornwell House" in York-

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ville, the final separation took place. The plaintiff gave her account of the particulars of that occasion, in which, for the most part, she was corroborated by Mr. and Mrs. Goore. She said: "On the occasion of my separation from defendant he came to our boarding house late in the evening; he entered our bedroom and I went in after him; when I said good evening, he said 'Go to —.' I asked him if he would have his supper; he replied, 'Go to — with your supper.' After this he kept continually cursing and abusing me for an hour or more. He then advanced toward me in a striking attitude. When I attempted to escape from the room through the door, he caught hold of the door with his left hand and struck me with his right fist in the side, when I sunk down in a chair and screamed. Mr. L. D. Goore then pushed open the door while defendant was still holding it. I then left the room. When

defendant struck me he said, 'You are a——— ungrateful wretch.' * * * He left me on the occasion of separation before stated without making any kind of arrangement for my place of residence or subsistence, and has made none since to my knowledge. During the ten years since our separation I have received only fifty-five dollars from defendant—received through my son and daughter." &c. The defendant left the house immediately, and when in the act of leaving Mr. Goore invited him to return; he replied with an oath that he would not, saying significantly, "This winds up the show—this is my last trip." According to this account it would seem that the defendant deserted the plaintiff. But if it were as alleged, and the plaintiff, after such conduct on the part of the husband, had left his house, it would not have been legal desertion, and we do not see that the judge erred in so deciding.

Exception 3 complains that the Circuit Judge decreed that the defendant should pay alimony, although he had offered bona fide in his answer as well as at other times previously to take back his wife and treat her as a husband ought to treat a wife. It was not satisfactorily proved that he had ever made such an offer in plain and unequivocal terms. Sometimes he talked that way and at other times and repeatedly he said that he would never again live with his wife. Even the invitation in his answer was certainly very perfunctory, evidently made un-

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der pressure and in "limited and guarded terms. He says that he has "at all times been willing to provide plaintiff a home in his residence and to support and maintain her in such comfort as his condition and circumstances will justify." &c.

It does not strike us that the rule, which declares that an offer to take back should condone all past offences, is fully satisfied by a cold, formal proposition to give the wife of his youth and the mother of his children merely house room and supplies sufficient to appease hunger and support animal life. The heart of a true wife craves and is entitled to something more than that. As we understand it, the invitation back which the rule contemplates is a cordial overture by the husband to return to the bosom of his family, and there, as its head, to discharge her household duties and to be cherished and supported as a wife should be, and be treated with respect and conjugal love and tenderness. The invitation of Mr. Briggs after all that had occurred, after frequently declaring that he would never again live with the plaintiff, and especially in view of the fact that he was then living in adultery with a woman of bad character, was too apparently a mere affectation; and it is not at all surprising that the wife declined it as a hollow mockery of her rights as his wedded

wife, the mother of his children, and the rightful mistress of his house and heart. We cannot say that in this respect the judge erred in decreeing alimony.

The obligations of the marriage relation continue only during the joint lives of the parties, and of course the charge must cease at the time the defendant died.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, with qualification as to time herein stated.

24 S. C. 382

IZLAR v. HAITLEY.

(November Term, 1885.)

[1. Evidence ◯370.]

Where the defendant claims the land in dispute under a verbal gift from her father and ten years' adverse possession thereunder, a deed of this land to her father, produced by her under notice, may be introduced in evidence by the plaintiff without proof of its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1574; Dec. Dig. ◯370.]

[2. Ejectment ◯15.]

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*Plaintiff claimed as purchaser at sheriff's sale under judgments against A., and defendant claimed under a prior verbal gift from A. and ten years' adverse possession thereunder. *Held*, that A. being a common source of title, the plaintiff was not required to prove title beyond A., or even in him.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 59; Dec. Dig. ◯15.]

Before Pressley, J., Orangeburg, May, 1885.

This was an action by James F. Izlar against Sophronia Haitley and Robert Haitley for the recovery of a tract of land, commenced March 15, 1882. The opinion sufficiently states the case.

Mr. Samuel Dibble, for appellant.

Mr. M. I. Browning, contra.

March 15, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, appellant, bought a tract of land, situate in Orangeburg County, at sheriff's sale, as the property of one David J. Clayton. The action below was to recover this land from the defendants, who were in possession. The plaintiff relied upon the sheriff's deed; the defendants upon adverse possession in the answer, and in the evidence upon a gift of the land to the defendant Sophronia by David J. Clayton, her father. Sophronia had no deed from her father, but she relied upon a verbal gift made years before the sale by the sheriff, accompanied with continued and adverse possession, claiming the land as her own for more than ten years before said sale.

Before the trial, the plaintiff gave notice to defendants to produce certain papers, among them a deed from the sheriff to David

J. Clayton, conveying the land, and dated March 3, 1856. These papers were produced, but when this deed was offered in testimony, it was objected to by defendants, unless upon strict proof of its execution. The objection was sustained.

It was in evidence that plaintiff, when he bought, had full knowledge that defendants claimed the land, Sophronia having served notice upon the sheriff not to sell, and having also given notice at the sale.

His honor, Judge Pressley, before whom

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the case was tried, *among other propositions, charged the jury that, to entitle the plaintiff to recover, it was necessary for him to show that David J. Clayton had been in the possession of the land for ten years. The verdict was for the defendants. The appeal involves the two questions made below, to wit: 1st. The admissibility of the deed to David J. Clayton from the sheriff in 1856 without strict proof. 2d. The correctness of the charge of his honor as to the necessity of proof of ten years' possession in David J. Clayton under the facts of this case.

In general, all private writings offered in evidence must be proved to be genuine and duly executed, but there are several exceptions to this rule. One where the instrument is produced by the adverse party pursuant to notice, the party producing it claiming an interest under the instrument. In such case, says Mr. Greenleaf, "The party producing the instrument is not permitted to call on the other for proof of its execution, for by claiming an interest under the instrument, he has admitted its execution." 1 Greenl. Evid., § 571. Also: "The same principle is applied where both parties claim similar interests under the same deed, in which case the fact of such claim may be shown by parol."

Now, here the deed in question was produced by the defendants under notice. Did they claim an interest under it? The deed was one of the muniments of title in David J. Clayton. The defendants claimed, in one aspect of the case, through David J. They relied upon a gift from him, evidenced by a delivery of possession by the said David to Sophronia as a gift, and their long and uninterrupted possession thereunder, claiming as owner. In other words, they in substance contended that Sophronia had obtained title from David J. by a verbal gift and delivery of possession, which, by continued possession since then, had ripened by such possession into a perfect title. They, therefore, claimed in fact from David, and the deed in question being a link in her chain of title, they must be regarded as claiming an interest under it, which brings the question under the exception mentioned to the general rule above. Such being the case, we think the exclusion of the deed was error, because the exception and not the general rule should have been applied by his honor,

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*2d. As to the necessity of plaintiff showing ten years' possession in David J. It is well understood, that where both plaintiff and defendant claim from a common source, no proof of title beyond that source is necessary. In fact, it is not necessary to prove title even in the common source, because, in the very nature of the case, both parties are supposed to admit title there, and neither can dispute it. The question in all such cases, therefore, is, which of the two has the best title from the common source. His honor instructed the jury that, as a general rule, it was the plaintiff's duty to make out title in himself; that he could not rely on the weakness of his adversary's title. This, no doubt, was correct as a general rule. But he went further as to this case, and said: No paper title having been made out in David J. Clayton, the plaintiff could not recover unless he had shown by the evidence title in David J. by possession; thus requiring the plaintiff, in any and every aspect of the case, as condition of his recovery, to prove ten years' possession in the said David J.

He then laid down four legal propositions to the jury in reference to the possession of the defendant Sophronia. He said if she went in possession by the permission of her father, David J., with the understanding that she was to use it until demanded, then her possession was that of her father, and the ten years, which it was necessary for the plaintiff to show, had been shown. If, however, second, she entered under a verbal gift from her father, and held it for ten years herself and as her own, then her possession would not be the possession of her father, and the plaintiff had failed to show the ten years in David J. 3d. If she had been put in possession by her father, nothing being said as to the character of her possession, but was allowed to use it as her own, the law would presume that it was a gift after ten years, and, therefore, her possession would not be the possession of her father, operating to the advantage of the plaintiff. And, 4th. That if she went in by the consent and permission of her father as a "loan," and afterwards gave him to understand that she claimed it as her own, from that time her possession would cease to be his, and the plaintiff could not rely upon it as the possession of the father, so as to make out the ten years required. So, that, in any event, in this case, the plaintiff was

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required by the charge *to prove title in David J. by a possession of ten years before he could recover.

We think the legal propositions laid down by his honor, as applicable to the different conditions under which Sophronia may have entered and held, were in the main correct, but the prior proposition to these, to wit, in-

asmuch as the plaintiff had not shown any paper title in David J., he must fail to recover unless he had shown ten years' possession in him, was error. Because this was good law only in the event that the parties did not claim from a common source, to wit, from David J.; and the manner in which his honor laid down the proposition as to these ten years, excluded the jury from considering the question, whether or not both parties did claim from the said David J. as a common source—the jury being restricted by the charge to the questions, whether Sophronia was in possession by permission, and, therefore, holding for her father, or by gift, holding as her own, or against the will of her father, and, therefore, adversely to him and all others.

As to the first character of holding, to wit, by permission, there can be no objection even as applied to this case, because, if Sophronia was so holding, her possession being the possession of her father, the ten years required appeared. Nor was there error as to the third, because, if she held adversely in defiance of her father and all others for ten years, she did not rely on a common source, and the doctrine that the plaintiff should not be required to go beyond a common source, would not apply. But as to the second, where the gift is relied upon, proved, and sustained by ten years' possession under it, that would, as it seems to us, be a case where both of the parties claimed through a common source, and in that event the plaintiff would not be required to prove title in the common source either by papers or ten years' possession, as in such case neither party would be allowed to dispute the title of the common source.

We think the error of the charge was in holding the plaintiff to the proof of ten years' possession in David J., in that aspect of the case, in which the jury may have found a gift of the land to Sophronia; but we express no opinion upon the validity of the gift, if such there was, as compared to the plaintiff's title.

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*It is the judgment of this court, that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

24 S. C. 387

ROBERTSON, TAYLOR & CO. v. SEGLER.
(November Term, 1885.)

[1. Judgment \hookrightarrow §41.]

A rule was issued in supplementary proceedings requiring the defendant and a judgment debtor of his to show cause why the indebtedness of the latter should not be applied to plaintiffs' demand, and enjoining defendant meanwhile from assigning this judgment. This order was served on the next day one hour after defendant had assigned this judgment to another

creditor, in pursuance of a previous promise, defendant having no knowledge of the order, nor of facts sufficient to have put him upon the inquiry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1537; Dec. Dig. \hookrightarrow §41.]

[2. Judgment \hookrightarrow §50.]

Held, that the assignment was valid. The assignee being an innocent party, was entitled to hold on to the assignment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1562, 1563; Dec. Dig. \hookrightarrow §50.]

[3. Judgment \hookrightarrow §39.]

The assignment in this case held to have been delivered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1533, 1535; Dec. Dig. \hookrightarrow §39.]

Before Aldrich, J., Aiken, June, 1885.

On March 11, 1884, G. P. Segler confessed judgment to Dr. W. H. Timmerman for \$3,245.25. At April term, 1885, of the Court of Common Pleas for Aiken County, G. P. Segler obtained judgment against G. C. Coward and T. W. Coward for \$446.33; and at the same term, Robertson, Taylor & Co. obtained judgment against G. P. Segler for \$550.27. An execution upon this judgment having been returned unsatisfied, the plaintiffs obtained an order from Judge Aldrich, at Barnwell, on May 7, 1885, requiring the Cowards and Segler to show cause before him at Barnwell, on May 22, why the indebtedness of the former to the latter should not be applied to the judgment of plaintiffs against Segler, and, in the meantime, the Cowards were enjoined from paying their indebtedness to Segler to any other person than plaintiffs, and Segler was enjoined from assigning or otherwise disposing of his judgment. This order was served on Segler the next day, May 8, and also on the Cowards.

Defendant made return, that on May 8, before the order was served upon him, and

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in pursuance of an agreement had with *Dr. Timmerman before defendant obtained his judgment against the Cowards, he had assigned this judgment to Dr. Timmerman, and had no further interest in it.

From the oral testimony taken before the judge, and the affidavits submitted on the hearing of this return, it appeared that plaintiffs' attorney returned from Barnwell with the order of Judge Aldrich on the night of May 7; that on the morning of May 8 attorney for defendant saw plaintiffs' attorney in conversation with the sheriff, and from a remark afterwards made by one Moore and another by the sheriff, defendant's attorney surmised that the sheriff had some paper to be served on Segler, but he did not know what it was, nor was it on file in the clerk's office. This attorney thereupon got the assignment (which bore date May 7) and sent it off by a special messenger, who was instructed to beat Moore to Segler's house, and to tell Segler to sign it

at once and send it back. All this was done, and when Moore, the sheriff's deputy, arrived an hour later the paper had been signed, and Segler said to him, "You are beat; you are too late; or words to that effect." The assignment was brought back to defendant's attorney.

The judge, after hearing argument, remarked: "This is a race between creditors. Timmerman had a judgment and so did these plaintiffs here have their judgment, and the contest was to see who would get the money coming from the Cowards' judgment, but this man Segler had promised he would let Dr. Timmerman have that money before the judgment was obtained, and in the contest Timmerman is perfectly innocent. He had nothing to do with it. It was his attorneys trying to collect a debt which a man had promised to pay. There was nothing wrong in it. That was a contest, simply a race between creditors, and Timmerman got the start and kept it. I think he is entitled to the money. Besides, Mr. Segler had a right to prefer his creditors." And he thereupon passed the following order:

This was a rule to show cause served on the defendant and T. W. Coward, G. G. Coward, and M. T. Holley, sheriff, to show cause why the money due on a judgment obtained by the said G. P. Segler v. G. G. Coward and T. W. Coward should not be paid by said G. G. Coward and T. W. Coward over to the

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plaintiffs *on their judgment which they held against the defendant. After hearing the evidence herein and also after hearing argument in support of said rule by Messrs. Henderson Bros., and Messrs. Croft & Dunlap, and O. C. Jordan, contra, and after consideration I am of the opinion, as the case presents itself, that it was a race between two creditors as to who would realize the money coming from the Coward judgment. Timmerman held a valid and an honest judgment against Segler, and Segler had agreed that the Coward judgment as soon as obtained should be transferred to Timmerman in part payment (as far as he could realize thereon) of the judgment that he held against Segler. This Segler had a right to do having done so without notice of the rule herein. The assignment to Timmerman must stand.

It is therefore ordered and adjudged, that the rule herein be discharged with ten dollars cost to be paid by the plaintiffs, Robertson, Taylor & Co., and that the defendant have leave to enter up judgment therefor.

From this order the plaintiffs appealed and asked for a reversal upon the following grounds:

1. Because his honor erred in dismissing the rule to show cause and ordering the money paid to W. H. Timmerman, whereas he should have made the rule absolute and directed the money paid to the plaintiffs.

2. Because his honor should have held the Timmerman assignment void, because the testimony showed that Segler, the assignor, had notice sufficient to have put him upon inquiry of the injunction order when he signed the assignment, and because said assignment had not been delivered when the injunction order was served on Segler.

Messrs. Henderson Bros., for appellant, cited 55 Am. Dec., 718; 5 S. C., 177; 14 Id., 241, 312; Hill. Inj., 158; Hoff. Rem., 364; High Inj., § 853; 20 S. C., 141; 14 Wall., 69; 30 N. Y., 83.

Messrs. G. W. Croft and O. C. Jordan, contra, cited Bump Fr. Conv., 13, 15, 179, 182, 184; 1 Bail., 568; Rice Ch., 300; 12 S. C., 166; Voorh. Code, 472, a. b.

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*March 15, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. [Omitting the statement made of the above facts.] It will be observed that there was no question below as to the validity of the assignment, on the ground of its being a fraudulent preference, nor did the Circuit Judge make any ruling on that question. Nor is that question involved in the appeal. The judge regarded the matter as a race between creditors and he decided it upon the legal rights of the parties, the turning point being whether Segler, when he made the assignment, knew that the rule and injunction had been issued.

The issuance of the rule and injunction was upon an ex parte proceeding. It was dated on May 7, the same day on which the assignment was dated. Judge Aldrich has found as matter of fact that Segler did not know that the rule had been issued when he executed the assignment. It was not served until May 8, the day after it was signed by the judge and the day of the execution of the assignment. We think the evidence sustains the finding of the judge. In fact, this seems to be admitted in appellant's argument, and also in his ground of appeal; because the exception is not that Segler knew of the rule, but that he had notice sufficient to have put him upon the inquiry. So that the case before us is narrowed down to the point whether Segler did have sufficient notice to put him upon inquiry, and, if so, whether on that account the judgment below should be reversed. The first is a question of fact. The Circuit Judge does not seem to have found in terms on that point, nor does it clearly appear that it was made before him. He said (speaking of the assignment), "This Segler had the right to do, having done so without notice of the rule herein. The assignment to Timmerman must stand." But we suppose that he considered the whole question, both as to actual notice and also constructive. Be that as it may, however,

was there sufficient evidence of notice, such as should have put Segler upon the inquiry, and would the inquiry have disclosed to Segler the existence of the rule in advance of service upon him?

The whole matter up to the service of the rule seems to have been a contest between attorneys, each cautious as to the movement of the other. Segler's attorney, it is true, suspected something, but exactly what was

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being done he did not know, and *Segler himself was thirteen miles away in the country during all the preliminary proceedings and knew nothing about them. It is true it is not absolutely necessary for actual service of the rule and injunction to be made upon the party in order to make him amenable for its violation. If he obtains a knowledge of its contents, and of its having been granted, no matter how he gets his information, he is as much amenable as if the writ had been actually served upon him. See numerous cases cited in note to *Farnsworth v. Fowler* [1 Swan (Tenn.) 1] (55 Am. Dec., 722), and especially *Skip v. Harwood* (3 Atk., 564), in which Lord Hardwicke delivered the opinion, where he held that the attendance of a party in court when the injunction was ordered was sufficient notice. This doctrine was further enlarged by Lord Eldon in *Osborne v. Tennant* (14 Ves., 136), where he held that presence in court when the motion for the injunction was made, though the party was not present when the motion was granted and the order pronounced, was still sufficient notice, and this last seems to be the doctrine in this country. *Hull v. Thomas* (3 Edw. Ch. [N. Y.], 236). We do not think that the facts of the case before the court bring it under even the enlarged rule *supra*. That rule requires either actual notice by service or information derived in some other way of facts showing that the rule had been issued.

But assuming the law to be as contended for by appellant to wit: that notice of facts sufficient to put the party on the inquiry is as effectual as actual notice or knowledge, and that here there was such notice, would that have required the Circuit Judge to vacate the assignment and to order the Cowards to pay the plaintiff in this proceeding? It is said in *Farnsworth v. Fowler*, *supra*, a case relied on by appellant, that "an injunction writ is a writ in personam and renders it unlawful in the party to whom it is directed to do the thing therein prohibited," &c. The act being unlawful, it is deemed ineffectual and unavailable as to the purposes intended as though it had not been done. Or if that may not be, on account of the intervention of the rights of innocent persons, who had no knowledge or information of the injunction, the defendant is liable to make indemnity for his unlawful act to the party injured.

Now, the judge has found as matter of

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fact that the judgment *of Dr. Timmerman was a valid and honest judgment and that he at least was an innocent party, whatever may be the facts as to Segler. Segler, on account of his knowledge, if he had such knowledge, may possibly be in contempt and amenable to the court for such contempt. But the proceeding below was not in that direction; it was really a contest between Dr. Timmerman and the plaintiff. Dr. Timmerman held a paper which upon its face transferred the Coward judgment to him. On its face a legal title was conveyed. It was good until vacated, or at least it was *prima facie* good. The judge found no facts sufficient to set it aside. He therefore held that it should stand, and his discharge of the rule was the logical and legal result.

We think there was sufficient evidence of the delivery of the assignment.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 392

BACOT v. LOWNDES.

(November Term, 1885.)

[1. *Venue* ¶5.]

An action against executrix, devisees, and others, to subject real estate devised or descended to the payment of the debts of the ancestor, and to vacate deeds of transfer made by the devisees and heirs to third parties, is an action "for the recovery of real property, or of an estate or interest therein, or for the determination of such right or interest," and must be tried in the county where the lands are located; the Circuit Court of any other county is without jurisdiction.

[Ed. Note.—Cited in *Ex parte Ware Furniture Co.*, 49 S. C. 30, 27 S. E. 9; *Nixon & Danforth v. Piedmont Mut. Ins. Co.*, 74 S. C. 440, 54 S. E. 657; *Silcox & Co. v. Jones*, 80 S. C. 488, 61 S. E. 948.

For other cases, see *Venue*, Cent. Dig. § 6; Dec. Dig. ¶5.]

2. This case distinguished from *Jordan v. Moses*, 10 S. C. 431.

Before Fraser, J., Charleston, November, 1884.

The opinion states the case. The Circuit decree was as follows:

Under the ruling in the case of *Jordan v. Moses* (10 S. C., 431), an action may be brought in any county where the personal representatives of the deceased reside for an account, injunction, and to marshal the assets, and for this purpose a sale may be ordered of lands situated in any other county. In the case before the court, there would seem to be no doubt of the jurisdiction under

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these proceedings to sell these lands in Colleton and Greenville Counties, if there had been no conveyance or alienation by the devisees of these lands before action brought,

real estate having been made "liable to and chargeable with just debts," * * "and made assets for the satisfaction thereof," and "subject to like remedies, &c., * * as personal estates." Gen. Stat., § 1983; 5 Geo. 2, C. 7, and 3 and 4, W. & M., C. 14.

I am unwilling to extend the privilege of the heir or devisee to alien the real estates and put them beyond the reach of creditors further than warranted by the cases on this subject. *Warren v. Raymond*, 12 S. C., 9; *Smith v. Grant*, 15 Id., 136; *Stackhouse v. Wheeler*, 17 Id., 91. I infer from these cases, where the heir or devisee transfers his whole interest in fee in the land, even if in payment of his own debt, and with a knowledge on his part that the estate of the ancestor is insolvent, the rights of the creditor are transferred from the land to a personal claim on the heir or devisee, or perhaps to an equity to follow the fund which was produced by the sale. These are, perhaps some of the very questions the plaintiff desires to raise in these proceedings.

The complaint, however (and I can only look to the allegations there made), does not show any complete transfer of title of these lands to C. C. Pinckney. The conveyance to him does not seem to have been more than a life estate, as his heirs are not named. If his heirs had been named, the conveyance was only for a special purpose and a limited time, until out of the rents and profits certain debts were paid, and then he was to hold for the "benefit and behoof" of the devisees. This seems to be such a use as would be executed by the statute, and that, if the fee was out of them at all, it was only for an instant, as in the case of a conveyance of land and an immediate mortgage for the payment of the purchase money, and by which even the right of dower and the liens of existing judgments would be excluded. If this view of the legal estate is not correct, these parties have, under these deeds to Pinckney, an equitable interest in themselves carved out of the estate of the testator.

This interest, whether legal or equitable, has been subsequently mortgaged by the devisees to C. C. Pinckney, to secure other bonds for advances made to them; and there

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is no allegation that *the mortgagors are out of possession, or that title has been perfected under it in any way. *Warren v. Raymond*, supra. These devisees, therefore, still have in themselves the equity of redemption, in the view I have above taken of it: still a part of the estate of William Henry Lowndes, which has never been out of them, whatever view may be taken of the mortgages as alienations to the extent of the mortgage debts. The allegations, that the plaintiff has been misled as to the property of the estate, and other statements in the complaint, seem to call in question the bona fides of these transactions, and, on the whole, I am inclined

to the opinion, and hold, that there does not appear, by the statements in the complaint, to have been such an alienation of these lands as to deprive the creditors of the right to have some interest in them subjected to the payment of their demands.

It is therefore ordered and adjudged, that the demurrers be overruled, and that the parties demurring have until the first day of February next to file their answers and pay the costs of the demurrers. The motion to dissolve the injunction is refused and dismissed.

Messrs. Hayne & Ficken, for appellants.

Messrs. McCrady, Sons & Bacot, contra.

March 15, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The main question in this appeal is whether the action below was brought "for the recovery of real property, or of an estate or interest therein, or for the determination of certain rights and interests therein." If so, it is conceded that the appeal must be sustained, as the action is brought in Charleston County, when the real estate in question is located in Colleton County, such action not being permitted under the code except in the county where the land is located.

To see clearly the application of this provision of the code to the case, a short statement of the facts, as alleged in the complaint, must be stated. It appears that the late William Henry Lowndes was indebted in his life time to Charles E. Miller in a large amount, evidenced by bond dated in 1844,

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which was secured *by mortgage on certain real estate situate in Colleton County; that Miller assigned this bond and mortgage to the late Daniel Huger, who died in 1858, leaving a will, of which the plaintiff is executor; that William Henry Lowndes, who died in 1865, left a will, in which his wife, the defendant, Mary E. Lowndes, was appointed executrix (this will, however, was not set up and admitted to probate until 1883); that the plaintiff, as executor of Daniel Huger, deceased, in 1876, filed his complaint against Mary E. Lowndes, Harriet Minott and husband, John C. Minott and Mary A. Elliott and husband, Henry D. Elliott, and E. M. Speights, lessee, the former being heirs at law and distributees of the said W. H. Lowndes, for the foreclosure of said mortgage, which was accomplished by sale of the property, no judgment being asked for the deficiency on the bond. In that proceeding, the defendants, heirs at law, prayed that the balance due on said bond, after application of the proceeds of the land, be accurately ascertained, which was done, the amount being \$6,002.22, November, 1876. It was provided in the decree for foreclosure, and adjudged, that the said defendants "should be discharged from any liability for or by reason of the said bond of

the said W. H. Lowndes, deceased, set forth in the pleadings."

The complaint further alleged, that at the time of the said foreclosure action, and at the time of the decree therein, he was informed by the defendants (which information, it is alleged, subsequent events have shown to have been mistaken), that the estate of W. H. Lowndes was insolvent, and that there was no other property belonging to said estate: that on that account no administration was applied for, and also the portion of the decree discharging the defendants was incorporated: that plaintiff, however, since said decree had learned that W. H. Lowndes owned at his death lands located in Colleton and Greenville Counties, when the plaintiff notified the defendant, Mary E. Lowndes, that he would claim the balance due on his bond, and would claim to administer if she did not; that, thereupon, Mrs. Lowndes produced the will of her deceased husband and qualified as executrix: that soon thereafter, to wit, in 1884, the plaintiff brought action on said bond against the executrix: that since said action was commenced, the defendant, Mary

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E. Lowndes, executrix, had *allowed judgment to go against her by default in favor of the defendant, C. C. Pinckney, Jr., trustee, in the sum of \$6,000; that before said action was begun, to wit, in 1883, the defendants conveyed and aliened, or attempted to do so, four several tracts of land, situate, respectively, in Greenville and Colleton Counties, which, in the will of the said W. H. Lowndes, had been devised to them, of which they had been in the exclusive possession since the death of the said W. H. Lowndes, the conveyance being in trust to pay the said C. C. Pinckney certain debts due to him, and then to hold for the defendants, and afterwards certain mortgages were executed to the said Pinckney of the interests of the defendants, and that under these deeds, C. C. Pinckney, Jr., trustee, had been in possession, removing phosphate rock, digging, &c. And upon these alleged facts, the plaintiff demanded judgment, that creditors be called in; that C. C. Pinckney be enjoined from enforcing his judgment; that the conveyances, mortgages, &c., to him be set aside; that all parties be enjoined from digging phosphate rock, &c.; and that the real estate mentioned be sold, the proceeds to be applied to the debts of the deceased, &c.

To this complaint, the defendants demurred "on the ground that the action was for the recovery of real property, or of an estate or interest therein, and for the determination of certain rights and interests in said property, and for injuries to real property; and it appears upon the face of the complaint, that this court has no jurisdiction of the subject of the action, or any part thereof."

The demurrer was overruled by his honor, Judge Fraser, and the defendants now renew said demurrer by appeal.

The Circuit Judge, in overruling the demurrer, relied upon the case of *Jordan v. Moses* (10 S. C., 431). That case, however, differs from this in the fact, that there the title to the real estate sought to be sold was admitted to be in the deceased at his death, and no change had taken place since his death. That case was an ordinary case to marshal assets, and to sell real estate of the deceased to pay his debts. The real estate in question was located, it is true, in a different county from that in which the action was brought; but the action was not intended to

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recover *this real estate or any interest therein, or to determine any right or interest therein, of any party. It was understood to belong to the deceased, and the purpose was to sell it and apply the proceeds to the debts. The court, therefore, very properly held that the action in no aspect fell within the provisions of the section of the code referred to.

But, here the action, while its purpose, as expressed in the complaint, is to reach real estate alleged to have belonged to the decedent, yet facts are stated in said complaint which show that in order to accomplish this purpose, the rights and interests of other parties must be determined therein, and one of the main prayers is that certain deeds and papers under which C. C. Pinckney, jr., claims an interest, and by which he is in possession, digging and mining phosphate rock, shall be vacated and set aside. Besides, the action is nothing more than an action to subject real estate, descended or devised to heirs at law or devisees, to the payment of the debts of the ancestor, and before this can be done, the interest and rights of said heirs at law and devisees, in connection with their transfers to C. C. Pinckney, jr., must be determined and adjudicated. These are issues raised in the complaint, and they are questions which determine the jurisdiction of the court, and it will not do to hold in advance of the trial that these questions will be decided against the defendants, and, therefore, they have no right to demand that the action shall be brought in Colleton County, for the reason that they have the right, under the imperative terms of the code ("must be tried"), to have those questions tried in the county where the land lies, and no adjudication of them elsewhere is competent without their consent.

We think, therefore, that his honor was in error in overruling the demurrer. Several other questions have been discussed before us, for instance, whether the deeds and other papers to Pinckney should be vacated, and whether, if not, they constitute such an alienation by the heirs as would put the land beyond the reach of the plaintiff, and also, whether the former decree had not released the defendants; but these questions did not properly arise under the demurrer, and they are not now ripe for adjudication.

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*It is the judgment of this court, that the judgment of the Circuit Court be reversed, and that the complaint be dismissed.

24 S. C. 398

TURNER v. MALONE.

(November Term, 1885.)

[1. *Courts* ⇨198.]

The Court of Probate, though of limited jurisdiction, is a court of record with very large powers, and as to proceedings clearly within its jurisdiction, is not to be regarded as an inferior court in respect to the dignity of its records.

[Ed. Note.—Cited in *Hodge v. Fabian*, 31 S. C. 217, 9 S. E. 820, 17 Am. St. Rep. 25; *Hendrix v. Holden*, 58 S. C. 527, 36 S. E. 1010; *Clark v. Neves*, 76 S. C. 491, 57 S. E. 614, 12 L. R. A. (N. S.) 298.

For other cases, see *Courts*, Cent. Dig. § 472; Dec. Dig. ⇨198.]

[2. *Judgment* ⇨489.]

A judgment is void as to parties not within the jurisdiction of the court; and when the jurisdictional defect appears on the face of the record, the judgment may be disregarded as a nullity in any proceeding, direct or collateral.

[Ed. Note.—Cited in *Stanley v. Stanley*, 35 S. C. 97, 14 S. E. 675; *Woods v. Bryan*, 41 S. C. 80, 19 S. E. 218, 44 Am. St. Rep. 688; *Hunter v. Ruff*, 47 S. C. 552, 25 S. E. 65, 58 Am. St. Rep. 907.

For other cases, see *Judgment*, Cent. Dig. § 924; Dec. Dig. ⇨489.]

[3. *Judgment* ⇨499.]

But where it appears upon the face of the proceedings that the parties have, by proper service, been brought within the jurisdiction of the court, the judgment cannot be attacked collaterally or disproved by parol testimony, but can be avoided only by a direct proceeding instituted for that purpose by the party claiming not to have been served, in the court and in the case where the judgment was rendered.

[Ed. Note.—Cited in *Tederal v. Bouknight*, 25 S. C. 281; *Ex parte Crafts*, 28 S. C. 284, 5 S. E. 718; *Adams v. Richardson*, 30 S. C. 217, 9 S. E. 35; *Martin v. Bowie*, 37 S. C. 114, 15 S. E. 736; *Prince v. Dickson*, 39 S. C. 480, 18 S. E. 33; *Ruff v. Elkin*, 40 S. C. 78, 18 S. E. 220; *Parr v. Lindler*, 40 S. C. 198, 18 S. E. 636; *Hankinson v. Charlotte*, etc., R. Co., 41 S. C. 18, 19 S. E. 206; *Bailey v. Bailey*, 41 S. C. 338, 19 S. E. 669, 728, 44 Am. St. Rep. 713; *Ex parte Perry Stove Co.*, 43 S. C. 186, 20 S. E. 980; *Cothran v. Knight*, 47 S. C. 256, 25 S. E. 142; *Hunter v. Ruff*, 47 S. C. 554, 25 S. E. 65, 58 Am. St. Rep. 907; *State v. Nathans*, 49 S. C. 203, 27 S. E. 52; *Sanders v. Price*, 56 S. C. 4, 33 S. E. 731; *Hendrix v. Holden*, 58 S. C. 503, 36 S. E. 1010; *McClough v. Hicks*, 63 S. C. 547, 41 S. E. 761.

For other cases, see *Judgment*, Cent. Dig. § 940; Dec. Dig. ⇨499.]

[4. *Judgment* ⇨518.]

[Cited in *Connor v. McCoy*, 83 S. C. 170, 65 S. E. 257, to the point that a proceeding is collateral unless brought in the cause in which the judgment was rendered and for setting it aside.]

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 961, 962; Dec. Dig. ⇨518.]

[This case is also cited in *Crocker v. Allen*, 34 S. C. 461, 13 S. E. 650, 27 Am. St. Rep. 831, and *Hendrix v. Holden*, 58 S. C. 528, 36 S. E. 1010, without specific application.]

Before Cothran, J., Spartanburg, March, 1885.

The case is sufficiently stated in the opinion of this court.

Messrs. Bobo & Carlisle, and J. S. R. Thomson, for appellant.

Messrs. Bomar & Simpson, and Duncan & Sanders, contra.

March 17, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for the recovery of a tract of land, 347 acres. Both parties claimed under one Edmond Cooley, jr., who lived on the land until his death intestate, about ten years ago. He left as his heirs and distributees a widow, Emeline, and five children, viz., John S. B. Cooley, Caroline Kimbrell, Teresa Oliver, Martha Jane Kimbrell, and Jefferson D. Cooley. The plaintiff claimed that the ancestor, Edmond Cooley, about 1864, made a deed of gift of the land to his wife, Emeline, which was not at the time probated or recorded; but about 1874, without a new deed, the old

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one, as claimed, was re-delivered and recorded. The plaintiff then introduced a deed from Emeline Cooley to the plaintiff, George S. Turner, bearing date September 17, 1877. This deed is not in the "Brief," and, therefore, the consideration does not appear, but Mrs. Cooley, who was examined as a witness, testified that she received only \$15 for her share of the proceeds of sale. Plaintiff rested.

The defendant answered the case made by offering in evidence the full record of proceedings in the Probate Court of Spartanburg, in the case entitled Ralph K. Carson, as administrator of Edmond Cooley, deceased, v. Emeline Cooley, John S. B. Cooley, Caroline Kimbrell, Martha Jane Kimbrell, et al., which was a petition on the part of Carson, administrator of Edmond Cooley, deceased, to sell this tract of land as his intestate property for the payment of his debts, one of which for a small amount was in judgment.

The record on its face was entirely regular. It represented that there were debts of the intestate unpaid; that the personalty was insufficient to pay the debts; and prayed that the land might be sold in aid of the personalty. All the heirs were named as parties in the summons; one was a minor, and he had a guardian ad litem appointed. The summons was entered May 8, 1877, in the sheriff's office, and had upon it the affidavit of the deputy sheriff, C. W. Mitchell, "that he had served the summons and complaint in this action on the defendants by delivery to them personally, and leaving with them copies of the same, on the 14th and 15th May, A. D. 1877, and that he knows the persons so served to be the ones mentioned and described in the summons as Emeline, John S. B., and

Jefferson D. Cooley, M. J. and C. Kimbrell, and Teresa Oliver, the defendants therein." &c. All the parties made default, and, after the proper time, George N. Nichols, Esq., probate judge, on July 13, 1877, after stating in his judgment "that the persons named as defendants had been duly served and made default," ordered the land to be sold for the purposes aforesaid; and being offered for sale on October 1, 1877, was bid off by one William Bush for \$210, which was paid and applied to the debts of the intestate. The sheriff executed title to F. M. Trimmer and William Bush, who afterwards made a conveyance to the defendant, Alfred Malone.

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*In reply, the plaintiff proposed to show by the testimony of Martha Jane Kimbrell, one of the children of Edmond Cooley, that she was never personally served with summons in the aforesaid proceeding in the Probate Court, under which the land was sold. Objection was made that the record, regular in form, could not be contradicted in a collateral manner. The testimony was admitted, and Mrs. Kimbrell testified that, "so far as she could recollect, she was never served with any papers." The plaintiff, also against the protest of defendant, was allowed to offer in evidence the sheriff's book, which had opposite the name of Mrs. Kimbrell the word "left." The plaintiff was also allowed, in reply, to offer a deed to himself from M. J. Kimbrell and other children of Edmond Cooley, bearing date after the land was ordered to be sold by the probate judge, viz., September 17, 1877—to which defendant excepted.

Upon the charge of the judge, the jury found for "the plaintiff 2-15 of the land in dispute." The defendant appeals to this court on various grounds, which need not be set out here, for the reason that they are all substantially covered by the requests to charge, which were refused. The defendant made the following requests to charge:

I. "That the judgment record from the Probate Court is conclusive upon the parties and their privies of every fact therein adjudicated.

II. "That said record establishes conclusively that Edmond Cooley died seized and possessed of the said land.

III. "That the title of Mrs. Emeline Cooley and the children of Edmond Cooley was taken away by said decree and vested in the purchaser at the sale.

IV. "That Mrs. Emeline Cooley and the other parties in said probate record could not convey any right or title to said land to George Turner, after said judgment was rendered."

The judge charged the jury that the original deed of Edmond Cooley to his wife in 1864 was void under the law as it then stood. And as to the record of the judgment from the Probate Court in the case of Carson, administrator, v. Emeline Cooley et al., he charged that all the parties, who were legally

summoned in that proceeding, were bound by

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the judgment and sale under *it, and had not the right afterwards to sell and convey the land; that the record of that proceeding, regular in form, raised a presumption that all the defendants were legally summoned, and if so, although they made default, they were in effect before the court and bound by the judgment; that presumption was not, however, conclusive, but might be rebutted, and it was for them to say, under the proof, whether Mrs. Martha Jane Kimbrell was legally summoned, and if not, the judgment was not binding on her, and her deed afterwards made carried her interest as distributee in the land to the plaintiff.

There is really but one question in the case, and that is as to the force and effect of the judgment and order of sale in the Probate Court. If the judge was correct in his charge upon that subject, the verdict was right; if he was in error, there will have to be a new trial.

Although the Court of Probate is one of limited jurisdiction, the law has given it very large powers, and expressly made it "a court of record;" and we suppose that, in reference to proceedings clearly within the jurisdiction given, it is not to be considered as in the category of inferior courts, in respect to the dignity of its records. *Thomas v. Poole*, 19 S. C., 336.

There seems to be some want of clearness and uniformity in regard to the distinction between void and voidable judgments, and especially as to what is a collateral, as distinguished from a direct, impeachment. There is no doubt that a void judgment, order, or decree, in whatever tribunal it may be entered, is, in legal effect, nothing. "All acts performed under it, and all claims flowing out of it, are void. Hence, a sale based on such a judgment has no foundation in law." It is equally certain that judicial proceedings are void, when the court, in which they are taken, is acting without jurisdiction. If it has jurisdiction of the subject-matter, but not of the parties, the judgment quoad such parties is void.

It is not, however, always so clear how that want of jurisdiction should be made to appear. If the jurisdictional infirmity appears in the record itself, that is, no doubt, conclusive, and the judgment may be disregarded as a nullity whenever and wherever it is encountered, in any proceeding direct or

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collateral, as in the *cases of Hill v. Robertson*, 1 Strob., 1; *Bull v. Rowe*, 13 S. C., 355; and *Clark v. Melton*, 19 Id., 498. But when the record exhibits no such defect, but is regular on its face, showing all the elements of jurisdiction, and the alleged infirmity lies below the surface, and proof is necessary to disprove the record—when can that be done, between what parties, and how? As Mr.

Freeman says: "How and in what circumstances this fact may be made to appear, are questions to which diverse answers may be found in the authorities. Undoubtedly the records of the court may be inspected, and if they show the fact, they are competent evidence of their own invalidity." *Void Jud. Sales*, § 34.

If the alleged infirmity does not touch the jurisdiction of the court which rendered the judgment, we take it as clear that it is entirely exempt from impeachment by any persons who are strangers to the record, for the reason that in such case, the court having jurisdiction must be considered to have adjudged every question, including the service of parties, involved in the case. It is to all intents and purposes *res adjudicata*, and may not be again stirred. As Judge Campbell said, in the case of *Beauregard v. City of New Orleans*, 18 How., 503 [15 L. Ed. 469]: "This court has contributed its share to that stability which results from a respect for things adjudicated. It is the settled doctrine of this court, that when the proceedings of a court of justice are collaterally drawn in question, and it appears from the face of them that the subject-matter was within its jurisdiction, they cannot be impeached for error or irregularity; that if a court has jurisdiction, its decision upon all the questions that arise regularly in the case are binding upon all other courts until they are reversed." &c. But, it seems to us, this assumes that the court had jurisdiction. There can be no adjudication until there is a case, and there can be no case without parties.

So that the question recurs, what is to be done where the alleged hidden infirmity goes to the jurisdiction itself, as, for example, denying summons or notice by the parties in the judgment? If there is such hidden jurisdictional infirmity, doubtless it may be made to appear in some way. But by whom, and how can it be done? Is it allowable, in an action between third parties, to overthrow by parol proof a judgment apparently good

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and *valid, and under which, and upon faith in the court and its judgments, rights have been acquired? That is to say, can the record be contradicted in any suit where the judgment is offered in evidence as the foundation of rights? The books are full of declarations, that a judgment, regular in form and pronounced by a competent court having jurisdiction, is conclusive—an absolute verity. It would seem that a judgment should be considered as something more than an ordinary fact, liable to be overthrown by parol proof; that there is in its favor more than a presumption of correctness, which may be rebutted; that there is a legal presumption, conclusive in its character, which gives it immunity from impeachment in any collateral proceeding.

There is however great conflict of author-

ity upon the subject in the different States. Mr. Freeman states what he considers the most approved view, as follows: "It has often been said that a judgment is void whenever the court which pronounced it had not jurisdiction of the parties to the judgment or of the subject matter in controversy. This is undoubtedly true everywhere, provided the want of jurisdiction is not controverted or is manifest from an inspection of the record. It is also true in some of the States even though the jurisdictional facts are asserted in the record. The weight of adjudged cases, however, sustains the proposition that the judgment of a domestic court of general jurisdiction is not void except where the court has no jurisdiction over the subject matter of the suit; or where, having such jurisdiction over the subject matter, it is shown by the record to have had no jurisdiction over the judgment defendant. * * * The word 'void' can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect and whose infirmity cannot be made manifest. A judgment rendered without in fact bringing the defendants into court, unless the want of authority over them appears in the record, is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either case the judgment can be avoided and made *functus officio* by some appropriate proceeding insti-

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tuted for that purpose, but *if not so avoided must be respected and enforced." *Freem. Judg.*, § 116.

It seems that, in respect to impeachment, a judgment may be either "void" where the record shows the fatal defect without proof, or "voidable" where there is a hidden infirmity which can only be made to appear by proof, or "avoided" where such infirmity has been already properly established. In the case of a judgment merely "voidable," where proof is necessary, it seems that the infirmity cannot be shown in a collateral manner, but only in a direct proceeding instituted for that purpose; and until that is done the judgment must be respected as such. As we understand it what is meant by a direct proceeding is a proceeding by the party injured, claiming to have the judgment formally avoided by order in the court and in the case in which it was rendered. A collateral attack upon a judgment has been defined to be "one in an action other than that in which it was rendered." *Rap. & Law. Dict.*, title, "Collateral Impeachment." *Darby & Co. v. Shannon*, 19 S. C., 527.

Now apply these principles to this case. The Probate Court undoubtedly had jurisdiction of the subject matter, its proceedings were in due form, and its judgment and order of sale entirely regular. But it was al-

leged that, fair as they might be on their face, they covered a hidden jurisdictional infirmity as to one of the parties, which that party, notwithstanding acquiescence for years, had the right to show by testimony in contradiction of the record, and thereby then and there avoid the judgment and all that had been done under it, so far as that party was concerned. The action in which this testimony was offered was between strangers to the judgment. Neither of them were parties to it or had any connection with it, except that the defendant offered in evidence the record as the authority for the sale under which he claimed as an innocent purchaser at a judicial sale. When for the first time at the trial it was proposed to avoid that judgment as to one of the parties to it by parol proof tending to show, in contradiction of the statements in the record and the decree of the court, that such party was not legally summoned in the proceedings in which the decree was rendered, that certainly was an impeachment without notice of the judge.

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ment to that extent; and, *as it seems to us, it was collateral in its character and as such not allowable: that the judgment was not "void" for the reason that the record did not show it, nor had it been so declared in a proceeding between the proper parties instituted for that purpose, and even in the view that it was "voidable" should have been "respected and enforced."

It was urged, however, that the rule has been settled otherwise in this State, and that here "a void judgment may be attacked collaterally whenever it comes in issue before the court." This proposition as announced is true, when considered with reference to the distinction between "void" and "voidable." The whole record is always admissible in any proceeding, and if that discloses a jurisdictional infirmity, the judgment is absolutely "void"; but, as we understand it, where that infirmity can only be made to appear by proof contradicting the record, the judgment cannot be properly said to be "void," but is "voidable merely," and can only be impeached by a direct proceeding. We think the cases cited are reconcilable on this view.

Gregg v. Bigham, 1 Hill, 302 [26 Am. Dec. 181]. At first view this case might be taken as authority for the proposition that a judgment may be impeached whenever it may be introduced as a link in a chain of title even if it can only be done by parol proof. But we think when examined closely it will be found to be an authority on the other side. The action was trover for negroes. *Gregg* had judgments against his mother under which he had the negroes sold and purchased them himself. Afterwards, disregarding the purchase by *Gregg*, the negroes were sold under other judgments and purchased by *Bigham*. Thereupon *Gregg* sued *Bigham* for the negroes, and he, *Bigham*, offered to show that the judgments of *Gregg* under which he held

were fraudulent and void. The court held that he might do so, for the reason that he purchased under his own judgments, and he should not be allowed to take advantage of his own wrong or to reap the fruits of a fraud perpetrated through a judgment any more than if it had been a fraudulent deed from his mother. In delivering the opinion of the court, Judge O'Neill said: "It would seem to be clear that the judgments of the plaintiff against his mother, so far as he sets them up for the purpose of acquiring title to

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his mother's *slaves, may be shown by the defendant to be fraudulent and therefore, void." But he goes on immediately to add: "For all other purposes, such as a justification to the sheriff for a levy and sale under them, or as part of a stranger's title who purchased under them, they would be good. *Simms et al. v. Slacum*, 3 Cranch, 300 [2 L. Ed. 446]." Here is a distinct declaration which goes so far as to say that when a stranger purchases under a judgment his title cannot be defeated even by showing that the judgment under which he purchased was, as between the parties to it, fraudulent and void.

Lyles v. Bolles (8 S. C., 258) was not at all analogous to this case. That was an action on sheriff's bond for neglect in not taking bond in bail trover in the case of *Lyles v. Tully*. It appeared from the record that the judgment in the case was given by the judge at chambers, and therefore it was held to be void and the plaintiff was non-suited. No testimony was offered by the defendant, and the case clearly belongs to that class where the mere exhibition of the record disclosed the fatal infirmity which made the judgment void.

Finley v. Robertson (17 S. C., 438) was in some respects like this case, but in regard to the very point under consideration it was very different. In that case the judgment of the probate court was sustained as to the adults and only avoided as to the infants, for the reason that the record itself showed that they were made parties by acceptance of service, which it was held could not be done. In delivering the judgment of the court, Judge Hudson said: "The record of this inferior court fails to show that the law has been complied with in that action, either in making the infants parties or in the appointment of guardians ad litem; on the contrary, it shows that the proper steps were not taken." It is true, the judge went on to add something about the testimony of *Thomas R. Finley* which had been ruled out by the Circuit Judge, but that was merely supplementary. There was no proof offered which contradicted the record, and this case also may be considered as coming within the category of those where the mere exhibition of the record disclosed the fatal infirmity, and, to that extent, made the judgment void.

Bragg v. Thomson (19 S. C., 574) really

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did not involve the *point made here, although some expressions in the opinion of the court seem to look in that direction. The judgment offered in that case came from a trial justice court, and there being no record or presumption of jurisdiction in favor of an inferior court not of record, the plaintiff was allowed to prove by parol that, at the time the suit was brought by the trial justice, two of the parties named as defendants were actually dead. In that there was no contradiction of a record of a judgment regularly obtained in a court of record against persons then living.

Feeling the importance of having a settled and clear rule upon a subject which seems to us to be somewhat obscure, and as to which the cases are certainly not in accord, we have taken the occasion to review the authorities upon the subject in the hope of contributing something to that end.

The judgment of this court is, that the judgment of the Circuit Court be reversed and the cause remanded for such further proceedings as the parties may be advised.

24 S. C. 407

McLAURIN v. RION.

(November Term, 1885.)

[*Executors and Administrators* ⚭344.]

An administratrix filed her petition in the Court of Probate to sell the lands of her intestate in aid of assets, making the brothers of intestate, his heirs at law, defendants. They answered, denying title of this intestate and claiming title in their father, who was also deceased. Upon this issue the cause by consent was transferred to the docket of the Circuit Court, and judgment rendered for the plaintiff and the land ordered to be sold, which was accordingly done and to plaintiff's attorney. On appeal afterwards heard, this judgment was reversed and the claim of defendants sustained. Subsequently, this attorney conveyed to the plaintiff in that cause, and she to the plaintiff here, and afterwards the land was sold under executions against the executor of the father and purchased by defendant here, who took possession. In action to recover this land, *held*: Under its jurisdiction in matters of administration the Court of Probate could have sold only the interest of the intestate in this land, its decree operating in the nature of a proceeding in rem and not transferring the rights of the parties before it as heirs of another party; and the proceedings had in the Court of Common Pleas, upon the trans-

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fer of the cause, being a continuation of *those in the Probate Court—only in which aspect, under the allegations in this case, a Court of Equity would have had jurisdiction of the action—the sale under the order of the Circuit Court was in the nature of a probate sale, and passed the title only of the brother, which has proved to be no title at all.

[Ed. Note.—Cited in *Jefferies v. Allen*, 33 S. C. 272, 11 S. E. 764.

For other cases, see *Executors and Administrators*, Cent. Dig. § 1443; Dec. Dig. ⚭344.]

Before Wallace, J., Kershaw, February, 1885.

The opinion states the case.

Messrs. Trautman & Winkler, and J. T. Hay, for appellant.

Messrs. J. D. Kennedy and W. H. R. Workman, contra.

March 17, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This action was for the recovery of a plantation, "Buck Hill." Both parties claim under deeds from the sheriff of Kershaw County. Abram D. Jones and James G. Jones were father and son. The plaintiff claims the land as derived from James G., the son, and the defendant from Abram D., the father.

Plaintiff's claim. James G. Jones died intestate without wife or children. Mary E. Shaw, his administratrix, instituted proceedings in the probate court to sell "Buck Hill" in aid of the personalty to enable her to pay the debts of the estate. In that proceeding the heirs at law of the intestate (brothers and sisters) were of course made parties, and they, being also heirs at law of Abram D., the father then dead, claimed that the father's deed to "Buck Hill" was never delivered to the son, and that as heirs of the father they had title to the land. Upon this claim of title being made the case was transferred to the Court of Common Pleas by consent. The issue there was, whether the deed conveying Buck Hill had ever been delivered by the father to the son. Judge Carpenter (1876) decided that the deed had been delivered, and went on and ordered the land sold as the property of James G. An appeal was taken and he made a supplemental order that pending the appeal the sale might be stayed by giving bond, &c. It happened that this bond was not tendered within the time prescribed and on salesday in January, 1877, the sheriff offered the land for sale and it

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was bid off for \$500, greatly below *its value, by W. L. DePass, the attorney of the plaintiff, Mrs. Shaw. He took sheriff's title and subsequently executed to Mrs. Shaw a deed of three-fourths of the land, retaining the other fourth for his fee. This deed, however, DePass left with his wife not to be delivered until after his death, and it was delivered in the spring of 1882 to Mrs. Shaw. She executed a deed June 9, 1882, to the plaintiff, McLaurin, and he brought this action for the land.

Defendant's claim. Notwithstanding the aforesaid sale by the sheriff to DePass the appeal from Judge Carpenter's order of sale was prosecuted and the Supreme Court, March 1, 1878, reversed the decree and ordered an issue to try the question as to the delivery of the deed. See *Shaw v. Cunningham*, 9 S. C., 273. Upon that issue it was de-

cided that the deed never was delivered and James G. never had title, and Judge Mackey ordered restitution of the land sold as aforesaid pending the appeal. On May 7, 1882, this judgment was affirmed by the Supreme Court. See 16 S. C., 631. The land was afterwards sold under judgments against the executor of Abram D. Jones and purchased by the defendant, James H. Rion, attorney, who took sheriff's title for the same.

It was referred to the master to report his conclusions of law and fact, and he reported that the plaintiff is not entitled to the possession of Buck Hill plantation, not being the legal owner of the same or any part thereof. The cause was heard by Judge Wallace who confirmed the report and dismissed the complaint. The plaintiff appeals upon the grounds: "I. Because his honor erred in overruling plaintiff's exceptions to the master's report and in sustaining said report upon the ground that only the interest of James G. Jones was sold by the sheriff under the decree of Judge Carpenter. II. Because his honor erred in that he did not decide that the entire title to the land in dispute passed at said sale."

There has been much discussion in the courts as to what acts done under a judgment appealed from and afterwards reversed will be held good notwithstanding the reversal, and especially as to what persons such acts will not be sustained; but we do not think it necessary in this case to enter upon

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that subject. A controversy existed as to whether the plantation Buck Hill belonged to Abram D. Jones, the father, or to his son, James G., under deed from his father. This controversy was finally ended on May 7, 1882, when it was decided by the court of last resort that the deed was never delivered by the father to the son, and that the latter, James G., never owned the plantation. Both father and son were dead at that time, but the plantation was sold under judgment against the executor of Abram D., the true owner, and purchased by the defendant, James H. Rion, who took sheriff's title for the same, and is the legal owner thereof unless the title of the testator, Abram, had previously passed to the plaintiff or those under whom he holds.

It is claimed for the plaintiff that the title of Abram D. did pass by the force and effect of the sale of Buck Hill ordered by Judge Carpenter in the case of Shaw v. Cunningham, although that order was afterwards reversed and restitution of the land ordered—in the view that pending the appeal from the order of sale and before reversal that order, regular on its face and not stayed, was valid and effective to the extent of not only carrying the supposed title of James G., but also the real title of Abram D.; on the principle that as a rule a judgment is binding upon all the interests of all parties to the record, and

the heirs of Abram D. were before the court in that case. Whether that principle is properly applicable to this case must depend to a large extent upon the true character of the order of sale made by Judge Carpenter. Under the constitution the probate court has jurisdiction "in all matters testamentary and of administration." Power has been conferred by statute upon that court to order the sale of real estate of a deceased person whose personal property is not sufficient to pay his debts. The case of Shaw v. Cunningham was originally filed in the probate court by Mrs. Shaw as the administratrix of James G. Jones to sell Buck Hill plantation as the property of her intestate, James G., for the purpose of paying his debts. That proceeding was purely a matter of administration, under the statute, in probate. McNamee v. Waterbury, 4 S. C., 168. It suggested no difficulty about the title to Buck Hill, but it was necessary to make the heirs of her intestate parties, and it so happened that these

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persons were also heirs of Abram D. Jones. They claimed that the land belonged to their father and never was the property of their brother, James G. Jones.

Now, if the judge of probate had then decided the matter, and ordered the land sold as the property of James G. to pay his debts, we suppose that, although the defendants were also the heirs of Abram D., the purchaser at that sale would have taken no more than the title that James G. had, which as it turned out was nothing. Upon what principle? Simply for the reason that it was a probate proceeding under the statute to sell a particular tract of land of a particular person to pay his debts, which is in the nature of a proceeding in rem where there is, in the ordinary sense, no adverse parties litigant, but the rights of these persons previously interested in the property are transferred from the property to the fund produced by the sale. The power of the court is over the property or thing before it without regard to the parties who may have an interest in it. All the world are parties and the estate passes by operation of law. In such case the order operates not on the person of the heirs, but on the title of the decedent, on which the debts, so to speak, operate as an implied lien. Under such an order the sale of land not the property of the decedent simply conveys nothing. Rorer Jud. Sales, §§ 222, 260; Beauregard v. New Orleans, 18 How., 497 [15 L. Ed. 469]; Florentine v. Barton, 2 Wall., 216 [17 L. Ed. 783]. In the last case cited, Judge Grier said: "The petition of the administrator, setting forth that the personal property of the deceased is insufficient to pay such debts, and praying the court for an order of sale, brought the case fully within the jurisdiction of the court. It became a case of judicial cognizance, and the proceedings are ju-

judicial. The court has power over the subject matter and the parties. It is true, in such proceedings there are no adversary parties, because the proceeding is in the nature of a proceeding in rem, in which the estate is represented by the administrator, and, as in a proceeding in rem in admiralty, all the world are parties."

But it is said that the sale was not ordered by the judge of probate; that when the question of title was raised in the probate court the proceedings of *Shaw v. Cunningham*,

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ham, were, by consent, transferred to the Court of Common Pleas; that the whole character of the proceedings was then changed; and that Judge Carpenter's order of sale was made in the exercise of the general equity jurisdiction of that court. It would seem strange if the character of an order made for precisely the same purposes could be essentially changed simply because it was made in a different court. We think that cannot be the result here. The proceedings in the Court of Common Pleas must be considered as a continuation of those in the probate court. That was the view taken by Judge Carpenter in his original judgment (1876). He said that "the petition was originally brought in the probate court, but by consent transferred to the calendar of this court." In the first opinion of the Supreme Court (1878) Judge McIver carefully made the same statement, and it was repeated in the last opinion (1882).

The truth is, the proceedings in the Court of Common Pleas could only be sustained on that ground, in connection with the issue as to title, which went of necessity to that court. As an original proceeding on the equity side of the Court of Common Pleas it was not, as we think, within the jurisdiction of that court. The paper filed in that court when the transfer was made was in the nature of a complaint by Mary E. Shaw, as administratrix of the estate of James G. Jones, stating that her intestate was largely indebted principally to herself as administratrix of her deceased husband; that the personal estate was insufficient to pay the debts, but that at the time of his death he was the owner of the Buck Hill plantation, which was in the possession of the defendants; and praying that they be required to deliver up the possession of the said plantation, and that it may be sold and the proceeds applied to the payment of his debts "in a due course of administration." This could not surely be considered a creditors' bill asking the court to take charge of an insolvent estate, to sell the lands, call in creditors, and marshal the assets. Some general reference was made to "other creditors," but none of them were named or made parties, and it was not expressly suggested that the estate was insolvent, "even were that sufficient." *Eno v.*

Calder, 14 Rich. Eq., 158. It seems to us that the petition was substantially a repeti-

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tion of that in the probate court; a petition in probate of the administratrix to have certain lands of her intestate sold to enable her to pay the debts "in due course of administration." If it was not that, it could be no more than an equitable action for the recovery of lands. Considered as an original proceeding on the equity side of the Court of Common Pleas, it was not properly within the jurisdiction of that court, and Judge Carpenter's order of sale was ab initio void. But if as heretofore we are to regard it as a continuance of or as auxiliary to those first instituted in the probate court, then we concur with the master and Circuit Judge, that the sale under the order of Judge Carpenter was in the nature of a probate sale and passed only the title of James G. Jones, deceased.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 413

WHEELER v. FLOYD.

(November Term, 1885.)

[1. *Descent and Distribution* Ⓒ138.]

The heir is liable for the debts of the ancestor to the extent of lands descended, but such land, when in the exclusive possession of the heir, cannot be sold under judgment against the administrator, to which the heir was not a party. In such case, the land if not alienated, can be reached only by direct action and judgment against the heir, and sale of the land thereunder.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 495; Dec. Dig. Ⓒ138.]

[2. *Adverse Possession* Ⓒ62.]

An heir cannot claim lands descended by adverse possession against the debts of the ancestor, though he may thus divest the lien of a judgment obtained against the administrator.

[Ed. Note.—Cited in *Brook v. Kirkpatrick*, 69 S. C. 236, 48 S. E. 72.

For other cases, see *Adverse Possession*, Cent. Dig. § 325; Dec. Dig. Ⓒ62.]

[3. *Executors and Administrators* Ⓒ324.]

Where creditors of an intestate gave to the administrator a paper, whereby they transferred, assigned, and set over to the administrator all their rights and interests in and to all the notes and accounts of the intestate; and bound themselves on final settlement of the estate to receipt in full for all that they might be entitled to from the notes and accounts "hereby transferred and assigned"—such paper was an assignment of all their interest in the personal assets of intestate, and not a release of the administrator. And after crediting to the claims of these creditors the amount collectible from the personal estate, they were entitled to look for the balance to the lands of intestate in the possession of his heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1337; Dec. Dig. Ⓒ324.]

4. This case distinguished from *Gilliland and Howell v. Caldwell*, 1 S. C., 498.

[5. *Descent and Distribution* ⇨ 143.]

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*Action brought by specialty creditors of an intestate, within twenty years of the maturity of their obligations, to subject to their demands the lands of intestate, which for sixteen years had been in the possession of his heirs, is not barred, the facts of the case showing no laches on the part of these creditors.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 503; Dec. Dig. ⇨ 143.]

Before Wallace, J., York, March, 1885.

The facts of the case and the decretal order of Judge Fraser are sufficiently stated in the opinion of the court. The decree of Judge Wallace was as follows:

Hugh Nichols died intestate, leaving real and personal estate, and Andrew G. Floyd was duly appointed administrator. This action was commenced to subject lands which were of Nichols in his life-time, and now in the possession of his heirs as such, to the payment of intestate's debts. The heirs set up independent title to the lands. This issue was heard and decided by Judge Fraser, who held that the land in controversy was the property of Hugh Nichols at the time of his death. At that hearing, it was developed that the creditors of Hugh Nichols had executed some sort of an instrument to his administrator, in relation to the personal assets, and in his decree, after deciding the question as to the title to the land, as stated above, Judge Fraser allowed the defendants to amend their answer, and set up this instrument; and then referred all undetermined issues to a referee.

The referee has taken much testimony, and made an elaborate and interesting report. The present issues between the parties relate to and arise out of the instrument above referred to, and which is as follows:

"South Carolina.—York County. We, the undersigned creditors of Hugh Nichols, late of York County, deceased, holding sealed obligations as evidences of our debts, for value received, hereby transfer, assign, and set over to Andrew G. Floyd, administrator of all and singular the goods and chattels, rights and credits, which were of the estate of the said Hugh Nichols, deceased, all our rights, titles, and interests of, in, and to all and singular the notes and accounts due and payable to the said Hugh Nichols, or payable to the said A. G. Floyd, administrator as aforesaid, which are now in the hands of the said A. G. Floyd. And we hereby bind ourselves to receipt the said A. G. Floyd, administrator as aforesaid, on final settlement

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of said estate before *the judge of probate of York County, in full of all we may be entitled to, arising from and by virtue of said notes and accounts, which we have hereby transferred and assigned. Given under our hands and seals, this the 15th April, 1869,

(Signed) Francis Nichols, H. F. Adickes, B. T. Wheeler."

It is insisted by the defendants that the instrument is a release, operating as a discharge of the administrator, so far as the personal assets were concerned, and that from that date the trusteeship of the administrator ended, and the statute of limitations began to run in his favor, and that the claim of plaintiff is now barred, more than six years having elapsed between the date of the instrument and the commencement of this action; and that as the claims are barred as against the administrator, they are also barred as against the defendants as heirs.

Whether that instrument would bind those who signed it, need not be considered, as they do not seek to escape from its terms. It is obvious, from an inspection of the instrument, that it is not in terms a release. It is, upon its face, an assignment for value to the administrator individually, or as administrator, of all the interest in the personal assets of Hugh Nichols' estate. It was not a discharge of the estate, and whatever the amount of the interest may have been, the heirs are entitled to have it ratably applied to the demands of the assignors, in reduction of their liabilities as holders of land descended. The personal assets were wholly insufficient to pay and discharge the debts of the assignors, as will appear from the evidence. The assignment for value of their interest in the notes and accounts, was only payment *pro tanto*. They still held their demands, and afterwards received from the administrator a dividend of eight per cent.—all going to show that it was not the understanding of any of the parties to the transaction that the administrator had renounced his trust.

I am of the opinion, therefore, that the statute of limitations has not commenced to run in favor of the estate, by any renunciation of the trust by the administrator. The notes set up here were all sealed instruments, and were not barred by presumption of payment from lapse of twenty years' time from their date to the commencement of this action.

The finding of the referee as to the amount

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of personal estate *in the hands of the administrator is confirmed. The amount must be credited ratably upon the demands set up in this action. The plaintiff here, however, is not entitled to receive any portion of that, but has agreed, for value, to receipt for it. I am inclined to think that this assignment was intended for the benefit of the administrator, and that he is entitled to retain the *pro rata* share of the fund in his hands of the creditors who assigned their interests to him.

Judge Fraser having already decided that

the land in the possession of the heirs of Hugh Nichols, which they hold by descent, is liable for the debts of the ancestor, I have nothing to do with that question. It is manifest that the personal assets are insufficient to pay the debts of the estate, and the land, therefore, must be sold and the proceeds applied to their payment.

I do not see why the administrator should pay his own costs. The referee does not hold him to blame for not collecting any more of the notes, and was satisfied that due diligence was used by him, and in this he is supported by the testimony. The funds in the hands of the administrator were not paid out, because he held them as his own by assignment. So far as I see, his duties were performed.

It is therefore adjudged, that the land be sold upon such terms as may be set out in an order hereafter made at the foot of this decree, and the proceeds applied to the payment of debts standing against the estate of Hugh Nichols, according to their legal rank and priority, and that the costs of this action be first paid from the proceeds of said sale.

From this decree the defendants, Mrs. Curry and Hugh Nichols, appealed upon the following exceptions:

I. To the interlocutory order: Because of error in adjudging that the possessory title of the defendants, Curry and Nichols, who had jointly occupied and used the real estate in question for sixteen years prior to action brought, could not be sustained because one of them (Mrs. Curry) had allowed proceedings to set apart a homestead to be instituted in her name.

II. To the decree: 1. Because of error in failing to adjudge that the plaintiff (the only creditor proving a debt) was barred of his action against the heirs for real estate de-

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scended, by reason *of the fact that he executed a release to the administrator "of all interest in the personal assets of Hugh Nichols" (the intestate's) estate" more than six years prior to the commencement of this action.

2. Because of error in holding, in effect, that inasmuch as the release to the administrator by the plaintiff and other creditors was not competent to discharge him generally as to his trusteeship of the estate, it was not a bar to the plaintiff and the other creditors who had executed it.

3. Because it was error on the part of the Circuit Judge to set aside the conclusion of the referee (to whom all the issues had been referred) that "this release was such a renunciation of the trusteeship by the administrator as would set the statute to running from its date, against those who were privy to it"—no exception having been taken to such conclusion; and it was error to hold the heirs bound for the same debt, after the

bar was complete in favor of the administrator of the estate.

4. Because of error in holding that the administrator could retain the balance of the personal estate in his hands, transferred to him by creditors, and the lands be sold and the whole proceeds applied to the plaintiff's debt.

5. Because the decrees should, in any event, have found the value of the assets descended at the time of intestate's death, and directed payment by the heirs of such sum, less the amount in the administrator's hands, as shown by the accounting herein; and a sale of the lands should only have been ordered as an alternative of non-payment.

Messrs. Hart & Hart, for appellants.

Mr. C. E. Spencer, contra.

March 18, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. One Hugh Nichols, late of York County, the husband of the defendant, Mrs. Emma F. Faulkner (now Curry), and the father of Hugh Nichols, departed this life intestate in 1866. At the time of his death, he was indebted to the plaintiff in the several notes mentioned in

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the *complaint. The defendant Floyd administered on his estate, and the tract of land sought to be sold descended to his widow and son above named, who have been in possession ever since, a period of sixteen years before the action below was commenced. It is alleged in the complaint, that the personal estate in the hands of the administrator was insignificant and did not amount to the excess of plaintiff's sealed demands over one thousand dollars. Wherefore plaintiff demanded judgment, that the real estate in possession of the heirs at law, defendants, be sold; that creditors be called in; that the administrator be required to account, &c., and in the event that the land may not be sold, that plaintiff have judgment against the heirs at law for the sum of \$1,000, and costs, the value of said land, &c.

The defendants answered separately. The administrator plead full administration of the estate, a release from further accounting by the creditors, including the plaintiff, in April, 1869, and the statute of limitations as a bar to any further accounting. The other defendants plead title to the land by their long possession, and denied title in the deceased; also, that the demand of plaintiff was stale, and that they were in no way liable therefor by reason of assets descended; also, as to Hugh Nichols, that he was under age; and finally, that the plaintiff had released the administrator from liability in 1869, notwithstanding he had personal assets sufficient to pay the debts, which, they contended, estopped the plaintiff from subjecting the real estate to his claims, specially

pleading the lapse of six years since said release as a bar to this action against them as heirs at law.

The case was heard first by his honor, Judge Fraser, upon the pleadings and evidence taken before him, upon which evidence he held that title to the land was in the intestate at his death, and that the defendants, his heirs at law, could not dispute that title, especially as the widow had claimed a homestead in the land after the death of her husband as against his debts; and he adjudged the land liable for the debts of the deceased. But before ordering sale, he thought the administrator should account for the personal assets, with leave to the defendants to set up the release mentioned, and the statute of limitations, &c.; and to this end he ordered the case to a special referee, who

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reported the amount due the plaintiff, upon such of his notes as were not presumed paid by the lapse of twenty years, also the amount of personal assets in the hands of the administrator, &c.

This report was heard by his honor, Judge Wallace, who, construing the paper mentioned and set up as a release to be more in the nature of an assignment by the creditors of their pro rata share in said assets to the administrator, and not a discharge of the estate or a satisfaction of their claims, adjudged that it could not avail the defendants, except so far as the claims of the creditors should be credited with their respective pro rata shares in said assets, the administrator, however, being entitled to hold said pro rata shares to himself under said assignment; also finding that the personal assets, when thus applied as a credit upon the claims of creditors, were manifestly insufficient to pay said claims. And inasmuch as Judge Fraser had decreed title to the land to have been in the intestate at his death, and liable for the debts of the ancestor in the hands of the heirs, he further adjudged and ordered the same to be sold, the proceeds to be applied to the payment of the claims established, exonerating the administrator from any liability, the funds in his hands being his own under the assignment.

The main question involved in the appeal of defendants is the doctrine of liability of heirs for the debt of the ancestor on account of lands descended or devised. Under the English statute of George II., that doctrine, as established in this State, succinctly stated, seems to be as follows: While it is true that the heir is generally liable for the debts of the ancestor, sealed or unsealed, to the extent of lands descended or devised, yet the land so descended or devised cannot be sold under a judgment obtained against the administrator or executor, obtained in an action to which the heir is not a party, if at the time of such judgment the heir is in the exclusive possession of the land asserting the

right of possession and enjoying its rents and profits. In such case, the heir can only be made liable by direct action against him or them, in which, if judgment is obtained, the land can be levied upon, provided it has not been transferred before action brought. See the case of *Bird v. Houze, Speers Eq.*, 252, and the cases there cited; and *Jones v.*

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Wightman, 2 Hill, 579. It is further the law, that the heir cannot acquire title to the land descended as against the debts of the ancestor, by a claim of adverse possession, as against the title descended; though it may be, that where the heir claims in his own right, and his possession may be considered adverse, that such possession, if thus continued for ten years, would divest the lien of a judgment obtained against the ancestor in his life-time. *Drayton v. Marshall, Rice Eq.*, 374 [33 Am. Dec. 84]; *McRae v. Smith*, 2 Bay, 339; *Cholet v. Hart*, 2 Bay, 156.

Now, in the case before the court, the title to the land in question was adjudged below to have descended to the defendants, widow and son of the deceased, as heirs at law, and we think the evidence sustains that finding. We must regard that question, therefore, as settled. The important question left then for our consideration is, has the plaintiff established a claim against these heirs on account of a debt of the ancestor? Several of the notes set up by the plaintiff, being past due for over twenty years, were properly excluded under the presumption of payment arising from the lapse of time. Several of the other notes, however, have been established, as the presumption could not be applied to them, twenty years not having intervened since they became due.

But the defendants have relied upon the paper from the creditors to the administrator, given in 1869, which they contend was a release of the estate, and, therefore, a release to them also. And that six years having intervened since its execution, that the statute of limitations is a bar. This, we think, would be a good and perfect defence, if the paper in question was a release. But his honor, Judge Wallace, has construed it to be no release. He has held it, in effect, to be an assignment of the creditors' pro rata share in the personal assets to the administrator himself, and it operated as a credit upon the claims of the assigning creditors to the extent of their said pro rata share, leaving the balance unpaid, and still a debt against the ancestor. Was this a proper construction? The paper will be found in the "Case," and we think there is no doubt that the construction of his honor is correct. In fact, the terms of the instrument are so pointed and plain, that we cannot see how any other interpretation than that given by his honor could be suggested.

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We understand the decree of Judge Wallace

to be, that the debt of the plaintiff, as established, must first be credited with the plaintiff's pro rata share of the assets in the hands of the administrator, and that the heirs are liable only for the balance of the debt, and that the duty of the administrator had been performed, and, therefore, no costs should be taxed against him. We understand, further, that the exceptions involving the administrator have been abandoned.

This case is different from the case of *Gilliland and Howell v. Caldwell*, 1 S. C., 198. In that case, the claim of the creditor was upon a promissory note, and although it had been established against the administrator, or at least against the estate in a creditor's bill in 1817, and received its pro rata of the personal assets, yet the heirs who were in possession of the real estate, and remained in possession until 1863, when the creditor exhibited his bill against them to subject the real estate to the payment of so much of the debt as remained unpaid, was allowed to plead the statute, and it was held that the bill was barred by the statute. The heirs not being bound by the establishment of the debt previously, and the note upon which the debt was founded being a promissory note, the heirs, when they were sued, had the right to meet it by the statute. Such would be the law here if the notes of the plaintiff were promissory notes, but they are sealed notes, and twenty years have not elapsed, giving rise to the presumption of payment.

The case of *Mobley v. Cureton* (2 S. C., 140) is more like this. There, a creditor attempted to subject lands in the possession of the heirs to his debt represented by sealed note of the ancestor. The administrator had been sued on this note and judgment obtained in 1860. Thirteen years afterwards, the heirs being in possession all this time, the proceeding to subject this land to the payment of his debt was instituted; held, that the plaintiff was barred by his laches of his remedy in equity, and the bill was dismissed without prejudice to plaintiff's right to pursue the heirs at law. The decision, however, was based principally upon the ground that the creditor, by his laches, had not exhausted the personal assets, which the court held was the primary fund for the payment of the debts, and which, by the delay of the creditor, has been lost in the hands of the administrator. Here, the credi-

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*tor has, by the decree of Judge Wallace, been ordered to accept as a credit on his notes his pro rata of the assets in the administrator's hands. It was further held in that case, that the statute of limitations being inapplicable to an action at law against the heirs of an intestate to recover a specialty debt of the intestate, it cannot be pleaded to a bill in equity against the heirs to subject real estate descended to the pay-

ment of a debt due on a sealed note. If, however, the plaintiff in such a bill has been guilty of laches, the court may refuse him its aid, and bar the equitable remedy at a period short of that which would raise the presumption of payment.

In the case of *Cleveland v. Mills* (9 S. C., 130), the court held that the statute of limitations applies to an action against heirs to subject real estate in their possession to the payment of the debts of the ancestor. That was a case, however, of a suit on a guaranty, and four years not having elapsed when the ancestor died, and the creditor having commenced his action within the four years, deducting the nine months allowed the executor, it was held not barred.

The complaint below seems to have been regarded by his honor, Judge Fraser, as framed in a double aspect, to wit, both at law and in equity. Admitting this to be so, still it cannot avail the defendants, heirs at law. In the law aspect, we find the notes sued on sealed notes, and within the twenty years necessary to presume payment; and, on the equity side, the Circuit Judge has not found such laches on the part of the creditor as would bar his equity under the cases supra.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 422

DARBY v. STRIBLING,

(November Term, 1885.)

[*Guardian and Ward* 58.]

Where a guardian used his own Confederate money—not the funds of his ward, nor raised by him for the special purpose from collections of his own ante bellum assets or otherwise—in paying a judgment against his ward's estate, he can, on accounting with his wards, claim

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credit for *so much only as Confederate money was worth at the time of his payment.

[*Ed. Note.*—For other cases, see *Guardian and Ward*, Cent. Dig. § 282; Dec. Dig. 58.]

Before Pressley, J., Abbeville, April, 1885.

In this case, Mr. Justice McGowan having been of counsel, did not sit. These were three actions heard together—*E. J. Darby* against *J. V. Stribling*, as administrator of *James C. Willard*, deceased; *M. A. Murphy* against the same, and *N. J. Wiley* against the same. The opinion states the case.

Mr. S. C. Cason, for appellant, cited 14 S. C., 274.

Messrs. Parker & McGowan, contra, cited 1 Story Eq., § 322; *Hill Trust*, *802; *Perry Trusts*, §§ 427-429; 11 S. C., 152; 16 Id., 620.

March 18, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs, who were wards of the defendant's in-

testate, one J. C. Willard, guardian, sought an accounting for their estate in the hands of said guardian. The estate consisted of a note for \$900. In 1874 the guardian received \$300 on this note in full, the note having been given in the purchase of slaves, and the Circuit Court having scaled the note to that amount. On appeal this court held that the guardian should account for the full amount of the note under the facts, and the master was required to state the accounts. See 22 S. C., 243.

Upon this accounting it appeared that the guardian had paid off a judgment against his wards amounting to \$138.89, \$46.29 for each of his three wards. This payment was made in 1863 with Confederate money, not collected on the note but out of the guardian's own Confederate money. On the accounting the defendant claimed that he should have a credit for the full sum paid as above with interest, which was allowed by the master. Upon exception to the Circuit Court, his honor Judge Pressley presiding, sustained the exception and recommitted the report with instructions that the payment

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"be scaled to the true value of lawful money with interest." The appeal here involves the correctness of this ruling of the Circuit Judge.

It is a well established principle that a trustee cannot make profit or advantage to himself in the management of a trust estate. Here it is admitted that the guardian did not make the payment in question with money which he had collected on the note of his wards, Confederate or otherwise, for he had collected none; but he made it with Confederate money of his own with no evidence or claim that this money was raised by the guardian by collection of ante-war notes belonging to him; or in any way except at its depreciated value, still holding the note in full. Such being the fact, to allow him a credit for the face of the payment as against the wards, with the right to reimburse himself out of the note for that amount in lawful currency, would be a clear violation of the principle above referred to. There was no error, therefore, in the decree of the Circuit Judge, under the facts of the case, ordering a reaccounting with instructions that the payment made be scaled to the value of the Confederate money used.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 424

CANTRELL v. FOWLER.

(November Term, 1885.)

[1. *Appeal and Error* ⇨ 926.]

In the absence of evidence to the contrary, there is a presumption that public officers have

done their duty; therefore, when a trial justice had acquired jurisdiction of the subject-matter and the person, a jury may presume that the account sued on in the case before that officer was properly proved.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3735; Dec. Dig. ⇨ 926.]

[2. *Partnership* ⇨ 219.]

A person summoned to answer a claim of one person cannot be bound by a judgment, rendered upon such summons, in favor of another, especially in cases of default; and the firm of A. & B. is a different person in law from the firm of A., B. & Co.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 430; Dec. Dig. ⇨ 219.]

[3. *Homestead* ⇨ 128.]

A judgment constitutes no lien upon the land of the debtor exempt from levy and sale, in the possession either of such debtor or of another person to whom the debtor has conveyed it, whether such land has been admeasured and set off as a homestead or not.

Mr. Justice McGowan, dissenting.

[Ed. Note.—Cited in *Ketchin v. McCarley*, 23 S. C. 1, S. 9, 13, 19, 11 S. E. 1099, 4 Am. St. Rep. 674; *Ross v. Bradford*, 28 S. C. 72, 5 S. E. 84; *Wood v. Timmerman*, 29 S. C. 179, 7 S. E. 74; *Martin v. Bowie*, 37 S. C. 118, 15 S. E. 736; *Bradford v. Buchanan*, 39 S. C. 245, 17 S. E. 501; *Craig v. Miller*, 41 S. C. 47, 19 S. E. 192; *Haynes v. Hoffman*, 46 S. C. 168, 24 S. E. 103; *McClanaghan v. McEachers*, 47 S. C. 448, 25 S. E. 296; *Wagener v. Parrott*, 51 S. C. 493, 29 S. E. 240, 64 Am. St. Rep. 695; *Finley v. Cartwright*, 55 S. C. 201, 33 S. E. 359; *Sloan v. Hunter*, 65 S. C. 240, 43 S. E. 788; *M. S. Bailey & Sons v. Wood*, 71 S. C. 48, 50 S. E. 631; *Ex parte Miley*, 73 S. C. 329, 53 S. E. 535.

For other cases, see *Homestead*, Cent. Dig. § 228; Dec. Dig. ⇨ 128.]

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*Before Cothran, J., Spartanburg, March, 1885.

This was an action by I. H. Cantrell against William Fowler and S. T. McCravy, for the recovery of a lot of land, commenced September 15, 1883. The opinion sufficiently states the case.

Mr. J. S. R. Thomson, for appellant, upon the first points considered by this court, cited Code, § 88, ¶ 8; Chev., 6; Pen. (N. J.), 106; 3 Id., 621; 13 Wend., 85; 29 Barb., 524; 2 Wait Prac., 373, 563; 3 Ibid., 563; Freem. Judg., 160, 338; 20 S. C., 460; 21 Id., 26; 2 Cold., 298; 33 Cal., 322; 14 S. C., 166. Upon the question of the lien of the judgment upon lands exempt from levy and sale, counsel cited Code, § 310; Const., Art. II., § 32; 27 Miss., 481; 15 S. C., 30; Murf. Sher., §§ 485, 600; Freem. Exec., §§ 138, 218, 249, 250, 355; Thomp. Hom., § 733; 20 Amer. Rep., 150; 39 Ibid., 1; 5 S. C., 75; 20 Id., 523; 16 Conn., 147; 19 S. C., 244; 21 Ill., 104; 15 Ala., 828; 2 B. Mon., 19; 3 Strob., 193; 4 Id., 364.

Messrs. Boho & Carlisle, contra, upon the question of the validity of the trial justice's judgment, cited Freem. Judg., §§ 487, 524, 531; 20 Johns., 208; 1 Bail., 457; 19 S. C., 575; 18 Id., 327; 21 Id., 83; 15 Id., 66. The land was

not exempt from levy and sale as a homestead, 19 S. C., 242; 20 Id., 248; 21 Id., 137.

March 20, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action to recover possession of a house and lot in the city of Spartanburg, both parties claiming from a common source of title, W. B. Ravan—the plaintiff, claiming under a deed from said Ravan bearing date November 30, 1882, and the defendants claiming as purchasers at sheriff's sale under an alleged judgment and execution against said Ravan. There was evidence introduced to the effect that the property in question was exempt under the homestead laws of this State from levy and sale under execution, the same being the family residence of Ravan, who was the head of a family and not worth more than three hundred dollars.

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*The judgment under which the defendants claimed was recovered in a trial justice's court on December 22, 1881, and a transcript thereof filed in the Court of Common Pleas on October 31, 1882, on an account for \$32.50 in favor of Fowler, Robison & Co. against W. B. Ravan, and the summons was issued in the name of that firm and personally served on said Ravan, who failing to appear, judgment by default was rendered against him "in favor of the plaintiffs," but the transcript filed in the Court of Common Pleas was of a judgment in favor of Fowler & Robison, and not Fowler, Robison & Co., against said W. B. Ravan. How the case became converted from one in favor of Fowler, Robison & Co. to one in favor of Fowler & Robison does not appear, though it does appear that there were two firms, one composed of Fowler, Sr., Wm. Fowler, and R. A. Robison, which was styled Fowler, Robison & Co., and the other composed of Wm. Fowler and R. A. Robison and styled Fowler & Robison. The property in question was levied on under said judgment on June 16, 1883, and sold by the sheriff on September 3, 1883, to the defendants, who received a sheriff's title therefor. It did not appear on the record or in the evidence that any proof of the account sued on was offered before the trial justice.

The Circuit Judge charged the jury in substance that the trial justice having jurisdiction of the subject-matter, and having obtained jurisdiction of the person of the defendants, they might presume that there was evidence offered at the trial to prove the account sued upon and to show that the same was really due to Fowler & Robison instead of to Fowler, Robison & Co. upon the principle that public officers, in the absence of evidence to the contrary, are presumed to have done their duty. He also instructed the jury that the question of homestead had nothing to do with the case, and when requested to charge the following propositions: "1. That if the

real estate in question was such property as, under the law, was not liable to levy and sale for Ravan's debts, then the judgment created no lien upon said property and a purchaser from Ravan could not be disturbed by this judgment. 2. Under our act no property is liable to levy and sale which the defendant could lawfully claim as exempt, whether such exempted property was set off to him or not

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under "legal proceedings," his reply was: "Those are true, Mr Foreman, but they have no application to this case." The jury having rendered a verdict for the defendants, and judgment having been entered thereon, the plaintiff appeals upon numerous grounds, which, from the view we take of the case, need not be considered seriatim.

We agree with the Circuit Judge that when it appeared that the trial justice had acquired jurisdiction there is a presumption, upon the principle stated by him, that, in the absence of evidence to the contrary, everything else was regular and proper, and hence the jury might presume that the account sued on was properly proved as required by law even though such proof may not appear upon the record. But we cannot agree that there was any presumption that the account which the defendant was called upon to answer was properly proved to have been really due to Fowler & Robison and not to Fowler, Robison & Co., so as to authorize a judgment in favor of the former. In the eye of the law those two firms were distinct and different persons, and although it may have appeared that W. B. Ravan had been made a party to an action brought by one person in law (Fowler, Robison & Co.), there was nothing whatever to show that he had ever been made a party to an action brought by another person in law (Fowler & Robison); and this being a jurisdictional fact cannot be presumed, but must appear on the proceedings in the trial justice's court. *Barron v. Dent*, 17 S. C., 80, and cases there cited.

Where a person is summoned before a trial justice to answer the complaint of one person and makes default, no judgment can be rendered against him in favor of another person, for he cannot be said to be a party to an action in favor of such person. For all that we know, Ravan might have had no defence to an action brought by Fowler, Robison & Co., and hence when summoned to answer a complaint made by them he made default; but he may have had a defence by counterclaim or otherwise to an action brought by Fowler & Robison, and if he had been required to answer a complaint made by them, he would have had the opportunity to appear and make his defence. Be that as it may, however, we think it clear that a person sum-

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moned to answer a claim *of A. cannot be bound by a judgment upon such summons rendered in favor of B., especially when such judgment is rendered by default; to be bound

he must be made a party to the action in which the judgment was rendered. This view renders it unnecessary to consider the various other objections made to the judgment, and, being fatal to the judgment under which defendants claim, is also fatal to their title.

The remaining inquiry is as to the effect of the homestead laws. Under the code, as originally adopted, final judgments were not a lien on real estate until levied, and when by the act of November 25, 1873, the code was amended by making them a lien for a limited period, it was expressly provided: "That this section shall not be so construed as to make final judgments in any case a lien on the real property of the judgment debtor exempt from attachment, levy, and sale under the constitution." It seems to us clear that, under this express provision of the statute law, the judgment under which defendants claim, even if valid, could have had no lien upon any property of the judgment debtor which was exempt from levy and sale under the homestead laws; and if, as the evidence tended to show, the property here in question was so exempt, the judgment was no lien upon it, and there could be no valid levy or sale of it under execution.

Now, if the judgment was no lien upon this property while it was in the possession of Ravan, because it was exempt under the homestead laws, and if, as has been held, a judgment debtor can sell or mortgage his homestead, then it follows that the judgment never could be a lien upon the property in dispute, for as soon as it was conveyed to the plaintiff it became his property, and as such of course not subject to the lien of a judgment against another person; for if, as we have seen, there was no lien upon it at the time of the sale to the plaintiff, then, of course, the plaintiff took his title free from any lien. The fact that the homestead had not been admeasured and set off, is a matter of no consequence. That is intended merely to designate what is exempt, and does not affect the right of exemption, which is guaranteed by the constitution and laws passed in pursuance thereof. Any other view would render the right of a debtor to sell his homestead absolutely valueless and have the effect

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of tying him down to one particular spot; for if his creditors can follow the property exempted while in his hands after it gets into the hands of a purchaser, it is not likely that he would ever be able to find a purchaser. These views are fully supported by the principles established by the case of *Elliot v. Mackorell*, 19 S. C., 238, and the cases therein cited.

We are of opinion, therefore, that the Circuit Judge erred in refusing to charge the jury as requested in reference to the effect of the provisions of the homestead laws.

The judgment of this court is, that the judgment of the Circuit Court be reversed,

and that the case be remanded to that court for a new trial.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice McGOWAN. I concur except as to what is said upon the subject of homestead, but as to that I dissent. From press of engagements I cannot now give fully my reasons, but I hope to do so at some future time.

It seems to me that the law does not compel any one to claim homestead or impress upon his land the character of homestead without any agency of his, merely upon his general right to claim it; that it is optional with the debtor, and until he claims it and has set it off and located he may sell it unincumbered with the vague general right. But when he claims it, and it is set off on a particular piece of land, that identical land is then dedicated as homestead; which, as I understand it, is a habitation, a home for the family, necessarily fixed, and may not be sold by the creditors nor by the debtor himself except in the manner provided by the law, which under certain circumstances allows a sale for the purpose of exchange. See Gen. Stat., § 1994.

The homestead provision does not contemplate a mere money benefit to the debtor, but a local, fixed shelter for the family. This is implied in the very use of the word "homestead." This is the only ground upon which the law of homestead is defensible; for it would not, upon any principle, be allowable to take money from the creditor and make a donation of it to the debtor. If the debtor at his pleasure has the right to sell the homestead set apart for his family, I do not

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clearly see why he could not contract other debts, purchase other land, and claim homestead a second or third time. The view contended for, as it seems to me, is contrary to the spirit of the constitution, the proper construction of the acts upon the subject, tends to endless confusion, and practically defeats the very purpose of homestead; for by turning the exemption into a mere money donation to the debtor, the family is certainly turned out of doors.

24 S. C. 430

CRANE, BOYLSTON & CO. v. LIPSCOMB.

(November Term, 1885.)

[1. *Pleading* ⚡336.]

Where an answer was served on the twenty-first day (Saturday) and returned on the following Monday, because served too late, the Circuit Judge committed no error in ruling that the answer had not been served in time.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1017; Dec. Dig. ⚡336.]

[2. *Pleading* ⚡85.]

Where defendant fails to answer in time, the order of the Circuit Judge afterwards made,

admitting the answer, may impose terms—as, for instance, of trial before the call of the cause in regular order, and of paying certain disbursements of the plaintiff incurred in resisting defendant's motion for leave to answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 177; Dec. Dig. ⚡55.]

[3. *Appeal and Error* ⚡552.]

The date of every proceeding which this court is asked to review, should be stated in the "Case." Errors alleged, but not clearly apparent by reason of the absence of dates, not considered, as it is incumbent on appellant to show the error complained of.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2458; Dec. Dig. ⚡552.]

[4. *Trial* ⚡139.]

There being some evidence as to a part of the demand sued on, a nonsuit could not be granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⚡139.]

[5. *Trial* ⚡328.]

Where three complaints are consolidated, they should properly be attached together, and a general verdict written thereon; but writing a separate verdict on each complaint is not error of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 773; Dec. Dig. ⚡328.]

[6. *Appeal and Error* ⚡223.]

If the clerk committed error in entering up three several judgments, defendant's remedy is by motion in the Circuit Court and not by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1340; Dec. Dig. ⚡223.]

[7. *Appeal and Error* ⚡221.]

The right to recover ten per cent. collection fees, according to the terms of the contract, not being raised by defendant during the trial, the Circuit Judge did not err in refusing a new trial because such fees were included in the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1354; Dec. Dig. ⚡221.]

[8. *Pleading* ⚡248.]

Where the complaint alleged that defendant had made his note for a sum stated to be paid on a day named, and was indebted to plaintiff for said sum, "with interest at 10 per cent., and 10 per cent. as attorney's fees" (a mere conclusion of law), the Circuit Judge erred in permitting plaintiff to amend at the trial by making the note sued on, wherein these stipulations as to interest and fees appeared, a part of the complaint, and refusing time to defendant to answer further.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 703; Dec. Dig. ⚡248.]

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*Before Cothran, J., Spartanburg, March, 1885.

This was an action by A. Z. Demarest, Henry Boylston, and A. J. Haltiwanger, constituting the firm of Crane, Boylston & Co., of Atlanta, against M. C. Lipscomb. The opinion fully states the case.

Mr. J. S. R. Thomson, for appellant.

Messrs. C. P. Barrett and S. W. Melton, contra.

March 20, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. On December 13, 1884, the plaintiffs commenced three separate actions on three notes under seal against the defendant, the complaints in all the cases being identical in form except as to the amounts and time of maturity of the several notes, and, therefore, it will be sufficient for the purposes of this case to set out the allegations in the first complaint. The complaints were served on December 13, 1884, but the answers were not served until January 3, 1885, when they were returned as being served too late. "They were, however, again received by the plaintiffs' attorney on said January 3, and were after that again returned on January 5."

The allegation in the complaint was that the defendant "made his promissory note in writing, bearing date the 12th day of June, one thousand eight hundred and eighty-four, whereby he promised to pay, ninety days thereafter, to the plaintiffs, * * the sum of (\$500) five hundred dollars; and although the said note became due and payable before the commencement of this action, to wit, Sept. 10, 1884, yet the defendant has not paid the same. And the plaintiffs further say that they are now the lawful owners and holders of the said note, and that the defendant is justly indebted to them thereupon in the sum of (\$500) five hundred dollars principal, together with interest thereon, from date, at the rate of 10 per cent. per annum, together with 10 per cent. on the principal and interest as attorney's fees." Wherefore judgment was demanded for the said principal sum and interest, together with 10 per cent. thereon as attorney's fees, and the costs of the action.

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*The defendant in his answers says: "I, That formerly he gave a note to one Crane, Boylston & Co., but of the exact date of said note, and terms thereof, this defendant is unable to say and does not know, and demands strict proof thereof. II. Denies each and every allegation of the complaint not herein expressly admitted."

The cases were docketed by plaintiffs' attorney on calendar 3, whereupon defendant's attorney served notice of a motion for an order adjudging that the answers were served duly, and, failing in that, for leave to answer; and also gave notice of a motion to consolidate the several actions. Thereupon the plaintiffs obtained an ex parte order from the Circuit Judge, requiring the defendant to appear before a referee and make an affidavit to be used in opposing defendant's motion; and the defendant gave notice of a motion to rescind said order. The dates of these notices and the said order do not appear, but it is stated in the "Case" that "the whole matter was brought before the court on March 23, 1885, and his honor thereupon made the following order," the date of which is not given. The order was to the effect, "that the several causes above entitled be, and are hereby, con-

solidated into one action in this court, and that the several statements of the causes of actions in the respective complaints stand as the consolidated complaint in said consolidated action;" and, further, it was ordered "that the answers served on January 3, on plaintiffs' attorney, which were not served within the time required by law, stand as the consolidated answer of defendant, and that the case should stand for trial out of its order during that week, in conformity with order signed March 31, 1885."

From this last provision, it would seem that the above order must have been granted on or after March 31, 1885, and yet in the next paragraph of the "Case" it is stated, "the case was called for trial on March 27, 1885." Further on in the "Case," we find an order bearing date March 31, 1885, to the effect, "that the defendant have leave to answer herein, and that the answer heretofore, to wit, January 3, 1885, served on the plaintiffs' attorney, be deemed his answer herein, and that the cause be tried on March 26, 1885, at 6 o'clock p. m." This much of the order is recited to be on the motion of defendant's at-

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torney, though the *whole order is represented to have been presented by the plaintiffs' attorney. The order then proceeds, on motion of the plaintiffs' attorney, to provide "that the costs of this motion be not allowed to either party, but it appearing that plaintiffs having disbursed the sum of (\$1.80) one and 80-100 dollars in resisting this motion, to wit, by having the sheriff to serve papers, ordered, further, that the plaintiffs recover said sum of the defendant, to be included in their judgment obtained against the defendant at this term."

We have been thus particular in making the foregoing statement, because it is contended by respondents in argument here, that the provision requiring the defendant to pay the sheriff's costs above referred to, was, in fact, announced by the court as one of the conditions upon which defendant was allowed to answer before the trial, though not formally incorporated in the written order until after the trial, to wit, on March 31, 1885, and this is stoutly contested by the appellant. It is very manifest that, owing to the absence of some dates and the confusion in others, it is not clear what was the exact order of the several motions and orders in the court below, and hence we take occasion again to impress upon the bar the importance of giving in the "Case," as prepared for argument here, the dates of the several steps in any proceeding which they desire this court to review.

At the trial the plaintiffs offered evidence to prove their partnership, and of the execution of the several notes sued upon by the defendant, which are in the following form: "\$220. Thickety, S. C., June 12, 1881. Thirty days after date I promise to pay to the order of Crane, Boylston & Co., two

hundred and twenty dollars, at Spartanburg bank, Spartanburg, S. C., with exchange and collection charges, including ten per cent. attorney's fees, value received, with interest at rate of 10 per cent. per annum after maturity. Given under my hand and seal. (Signed) M. C. Lipscomb, [L. S.]; and closed their case. The defendant moved for a nonsuit on the ground of variance between the allegations in the complaint and the proof, there being no sufficient allegation as to the ten per cent. attorney's fees. This motion was refused, but the court suggested to the plaintiffs' attorney that he might amend by adding copies of the notes in the allegations

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of *the complaint. To this, defendant's attorney objected upon the ground that his client was not present, and that he could not answer the complaint, as thus amended, instantly. The court ruled that the amendment should be allowed, and that it was not necessary for the defendant to be allowed to answer, as he must be presumed to be familiar with the contents of the notes. To this ruling the defendant duly excepted.

The defendant offering no testimony, the jury were directed to find a verdict for the amount of each note "upon the several complaints." The jury thereupon rendered three several verdicts, for the several amounts stated in the "Case." Thereupon the defendant moved for a new trial upon the following grounds: "I. That the verdict is excessive, and more than is asked for in the pleadings. II. Because the ten per cent. counsel fees should not be allowed on either the principal or interest of the debt. III. Because there was no testimony that the attorneys' fees herein amounted to ten per cent. IV. Defendant also moved for costs of this motion, and for such other and further relief as may be just."

It appearing to the court that an error had been committed in computing the amount due on the notes of eleven 17-100 dollars, it was ordered that a new trial be granted unless a remittitur for said sum be entered on the record, in which event the new trial was refused. The remittitur as directed was immediately entered on one of the complaints. Thereupon, and against the objection of defendant, duly made before the clerk, the plaintiffs entered three several judgments against the defendant, upon the several verdicts as found by the jury.

The defendant appeals, alleging error as follows: "I. In requiring defendant to go to trial before the cause was regularly reached on the docket. II. In not ruling that defendant's answer was properly put in, or that he should be allowed to answer without terms. III. In not granting a non-suit. IV. In allowing plaintiffs to amend their consolidated complaint, and not allowing defendant to answer the same. V. In instructing the jury to find for the plaintiffs the amounts they

did find, and instructing them to find a verdict for each amount upon the several complaints. VI. In refusing a new trial. VII.

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In not granting a new trial *except in case the ten per cent. attorney's fees were not remitted. VIII. In ruling that the said ten per cent. should be allowed upon interest of the notes as well as the principal. IX. In giving costs against defendant in the matter of plaintiffs' attempt to procure the affidavit of defendant. X. Because the plaintiffs had no right to enter up three separate judgments. XI. Because, under the order of the court, two of said verdicts were set aside, and no judgments could be entered thereon."

The first, second, and ninth grounds of appeal, imputing error in the order granting leave to defendant to answer upon the terms imposed, will be considered together. There is no doubt of the fact that the answers were not served within the time required, and hence it was discretionary with the judge whether he should allow them to come in at all, and if so, upon what terms. The statement made in the "Case," that, after the answers were first served and immediately returned as being served too late, they were again "received by plaintiffs' attorney on said January 3, and were after that again returned on January 5," is not very clear. Whether the word "received" was used in the sense of accepted, or simply to indicate that the answers were again sent to the plaintiffs' attorney on the same day, we have no means of ascertaining; but, at all events, they were practically returned the very next day, inasmuch as the 4th was Sunday—dies non—and we cannot see that there was any error on the part of the Circuit Judge in ruling that the answers were not served in time, and if so, then it followed necessarily that he had a right to impose such terms, as conditions of being allowed to answer, as he might think just.

It is insisted by appellant's attorney, that the payment of the costs incurred by plaintiffs in their effort to resist defendant's motion to be allowed to answer was not one of the terms imposed, while plaintiffs' attorney insist that it was. As will be seen from the statement which we have attempted to make of this case, it is not very clear what was the precise order of the several proceedings in the Circuit Court, owing to the absence of some dates and the confusion in others; and as it is incumbent upon the appellant to show the error which he alleges, and as we can very well understand that the payment

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of these costs might have been *a very proper condition to impose, we cannot assume that there was any error in this respect on the part of the Circuit Judge.

As to the third ground, we see no error in refusing the non-suit, for the plaintiffs certainly offered evidence to establish a

part, at least, of their claim, and even granting that there were no sufficient allegations in the complaint as to another part of their claim, that would constitute no ground for a non-suit.

As to the fifth ground, which embraces two separate and distinct matters—first, alleging error in instructing the jury to find for the plaintiffs the amounts they did find; second, in instructing the jury to find a verdict for each amount upon the several complaints. As to the first matter, it is entirely too indefinite to enable us to determine exactly what was the particular error designed to be alleged. The instruction was not given exactly in the form stated. The notes having been proved, and no defence offered, and no request made for any instructions, and the plaintiffs' attorneys having "made a calculation of the different amounts due on the notes," his honor simply directed the jury to verify the calculations and find accordingly. In this we see no error. If, however, the purpose of this branch of this assignment of error was to raise the question as to the right of the plaintiffs to recover the ten per cent. attorney's fees, then there should have been a request to charge as to this matter, which was not done.

As to the second branch of the fifth ground of appeal, it seems to us to present more a mere matter of form rather than of substance. While, perhaps, after the cases had been consolidated, and it had been ordered "that the several statements of the causes of actions in the respective complaints stand as the complaint in said consolidated action," it would have been more regular to have attached the three complaints together as one complaint, and have had the verdict for the whole amount of the three notes written on the complaint so consolidated, we cannot say that there was any error of law in pursuing the course which was adopted.

The sixth, seventh, and eighth grounds will be considered together, as they all seem to relate to the claim of ten per cent. attorney's fees. As we have said, there was no request to instruct the jury as to this claim on the part of the plaintiffs, and no question raised as to it, except in regard to the

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amendment *allowed, until the motion for a new trial, and even then no distinct point made as to the charge of this per cent. on the interest, as contradistinguished from the principal. Assuming for the present that the amendment was properly allowed (which, however, will hereinafter be considered), then the Circuit Judge had nothing before him but the fact that the defendant had promised to pay the ten per cent. attorney's fees, about which no question had been made during the trial, and there was nothing, therefore, to show that he had committed any error on the trial which rendered it necessary for him to grant a new trial. While, therefore,

we are not to be understood as determining anything, either one way or the other, as to the important and interesting questions as to the validity or effect of such stipulations in a note, we do not think these grounds of appeal well taken in this particular case.

The tenth ground of appeal imputes no error to the Circuit Court, but only to the clerk of that court, and if error there be in his action, the proper mode of rectifying it is by application to the court of which he is the clerk, and not directly to this court.

The eleventh ground is so manifestly untenable as to require no discussion, for it is too plain for argument that the order of the Circuit Court cannot bear the construction sought to be placed upon it by this ground.

The only remaining inquiry is that presented by the fourth ground. It will be observed that the amendment allowed the introduction of two additional contracts, and two additional and different causes of action, to the contract which it was alleged in the original complaint the defendant had made. For in the original complaint the only promise which it was alleged the defendant had made, was a promise to pay a specific sum of money at a specified period, while the purpose and effect of the amendment allowed was to incorporate allegations that the defendant had made two additional and different promises—one to pay interest on said specified sum at the rate of ten per cent. per annum, and the other to pay 10 per cent. attorney's fees. The statement made in the complaint, "that the defendant is justly indebted to them thereupon (that is, upon the promise evidenced by the note previously alleged) in the sum of (\$500) five hundred

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dollars, *principal, together with interest thereon from date at the rate of 10 per cent. per annum, together with 10 per cent. on the principal and interest as attorney's fees," is rather a conclusion of law, and an incorrect one, too, than an allegation of fact; for, without a promise in writing to that effect, the rate of interest, as matter of law, would not be ten, but seven, per cent., and certainly there is no conclusion of law, from a promise to pay a given sum at a given time, that the promisor agrees to pay ten or any other per cent. for collection fees.

It seems to us clear, therefore, that the purpose and effect of the amendment, which was allowed, was to permit the plaintiffs, not merely to state more definitely, or put in proper shape, the contract or promise which they alleged defendant had made, but to incorporate into the complaint two additional, distinct, and different promises or contracts, which defendant had no opportunity to plead to, and as to which he was precluded from raising by his pleading any issue of law or fact. Whether such an amendment is allowable at all under the code, is not made a

question by this appeal, and is not, therefore, considered or determined, but certainly the defendant was entitled to the usual time allowed for answering the amendment. *Cleveland v. Cohrs*, 13 S. C., 397; *Coleman v. Heller*, 13 S. C., 491.

The case now under consideration differs from the case of *S. C. R. R. Co. v. Barrett* (12 S. C., 173), for there the majority of the court manifestly regarded the amendment allowed as not incorporating a new and additional contract, but as simply a different statement of the same contract originally sued on; indeed, they held that no amendment was really necessary. We do not see how the fact, that, in the case now under consideration, the notes were received in evidence without objection, which was relied upon in *Barrett's* case as an important circumstance, can affect the question, for the notes here could not be objected to, as they were undoubtedly competent evidence to prove the promise which was alleged in the complaint; while in *Barrett's* case the bond which was offered in evidence was not competent evidence of the promise alleged in the complaint in that case.

So, in *Tarrant v. Gittelson* (16 S. C., 231), the amendment allowed did not really incor-

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porate any new or additional promise. *for both had relation to the same thing, the only change being from an implied to an express promise; a change in form merely and not in substance. In addition to this, it is said in that case that it did not appear that time to answer was asked for when the amendment was allowed, as was done in *Coleman v. Heller*, supra, and, we add, as was done here. We think, therefore, that there was error in refusing to allow the defendant time to plead to the complaint as amended, and upon this ground the case must go back.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

24 S. C. 439

STATE v. BUNDY.

(November Term, 1885.)

[1. *Criminal Law* §570.]

In order to make out the defence of insanity to the charge of murder, there must be sufficient proof to overcome by the preponderance of evidence, the presumption of sanity and any other proof by the State upon this issue, so as to show a want of sanity with reasonable certainty; this degree of evidence on the part of the defendant satisfies the requirement that the State must establish every element of the crime charged "beyond a reasonable doubt."

[Ed. Note.—Cited in *State v. Nance*, 25 S. C. 174; *State v. Welsh*, 29 S. C. 7, 6 S. E. 894; *State v. Alexander*, 30 S. C. 83, 8 S. E. 440, 14 Am. St. Rep. 879; *State v. Bodie*, 33 S. C. 133, 11 S. E. 624; *State v. McIntosh*, 39 S. C. 108, 17 S. E. 446; *State v. Anderson*, 59

S. C. 231, 232, 37 S. E. 820; State v. Bethune, 88 S. C. 410, 71 S. E. 29; State v. Long, 93 S. C. 515, 77 S. E. 61.

For other cases, see Criminal Law, Cent. Dig. § 1286; Dec. Dig. ⚭570.]

[2. *Criminal Law* ⚭53.]

The evidence in this case does not prove that the defendant was in a state of temporary intoxication when he committed the crime; but if it did, this would not be a defence, as voluntary drunkenness of whatever degree is no excuse for crime committed under its influence.

[Ed. Note.—Cited in State v. Morgan, 40 S. C. 348, 18 S. E. 937.

For other cases, see Criminal Law, Cent. Dig. § 65; Dec. Dig. ⚭53.]

[3. *Homicide* ⚭294.]

The difficulty is great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not uncontrollable. But there was nothing in this case requiring the Circuit Judge to enter upon this subject.

[Ed. Note.—Cited in State v. Levell, 34 S. C. 131, 13 S. E. 349, 27 Am. St. Rep. 799.

For other cases, see Homicide, Cent. Dig. § 605; Dec. Dig. ⚭294.]

[4. *Criminal Law* ⚭46.]

The Circuit Judge correctly charged the jury as follows: "In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, the prisoner must show that he was under a mental delusion by reason of mental disease and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other. Because, notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all."

[Ed. Note.—Cited in State v. Alexander, 30 S. C. 84, 8 S. E. 440, 14 Am. St. Rep. 879; State v. Malloy, 79 S. C. 77, 60 S. E. 228; State v. Jackson, 87 S. C. 415, 69 S. E. 883; State v. Bethune, 88 S. C. 410, 71 S. E. 29; State v. Hyde, 90 S. C. 297, 300, 73 S. E. 180; State v. Lemaeks, 98 S. C. 508, 82 S. E. 882.

For other cases, see Criminal Law, Cent. Dig. § 56; Dec. Dig. ⚭46.]

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*Before Wallace, J., Spartanburg, June, 1885.

The opinion fully states the case.

Mr. Stanyarne Wilson, for appellant.

Mr. Solicitor Duncan, contra.

March 23, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant, Edward Bundy, was indicted for the murder of Annie Heckman, at Spartanburg, on March 5, 1885. The facts do not appear in the brief, but we infer from the charge of the judge, which is reported in full, and from the exceptions, that no question was made as to the fact of killing, and that the only defence was that the defendant, when he committed the act, was non compos mentis and not criminally responsible. It is stated that there was evidence that the defendant had some liquor on the evening of the homi-

cide, which occurred about half-past 8 o'clock at night, but there was no evidence whatever of any previous habit of gross intemperance of the defendant or consequences affecting his health or mind resulting therefrom. It is also stated that soon after the killing the defendant made efforts to take his own life.

The jury rendered a verdict of guilty and the defendant was sentenced to be executed August 7, 1886. From this sentence the defendant appeals, on the following grounds:

Because his honor erred in charging:

1. "That the presumption that a man is sane is a presumption of the truth of the fact beyond a reasonable doubt.

2. "That in order for a defendant to relieve himself from responsibility for a criminal act by reason of mental unsoundness, he must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other.

3. "That when a man is charged with crime, the fact that he was drunk at the time of its commission does not discharge him from the responsibility of a sober man.

4. "That if by insulting words or abusive

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epithets a man is *thrown into a tumult of excitement, and sudden heat and passion induced by such a cause, and human life is taken, that is not manslaughter; that is murder.

5. "That the law requires a defendant to establish that he was insane by the preponderance of the testimony."

Because his honor refused the defendant's requests to charge:

6. "That if upon the whole evidence the jury believe that the accused at the time of the act was under the influence of a mind diseased, either intellectually or morally, and was unconscious that he was committing a crime, he should be acquitted.

7. "That if the jury are satisfied from the evidence that at the time of the act the prisoner was laboring under mental derangement, whether partial or general, of a degree sufficient to have controlled his will and to have taken from him freedom of action, the verdict of the jury should be 'not guilty.'

8. "That if by reason of mental derangement at the time of the act the prisoner had not power to control the disposition or impulse to commit the deed, he should be acquitted.

9. "That if the jury believe that there was an attempt of the defendant to kill himself soon after the commission of the act, this is a fact that should be considered in weighing the evidence as to insanity.

10. "That intoxication can be looked to in

determining whether the killing was done with premeditation and deliberation. If the jury believe that at the time of the act he was by reason of intoxication or any other cause in such a condition as to render him incapable of a deliberate and premeditated purpose, they should find him guilty of manslaughter.

11. "That drunkenness is not an excuse for crime: but as in all cases where a jury find a defendant guilty of homicide, it becomes necessary for them to inquire as to the state of mind under which he acted, and in the prosecution of such an inquiry his condition, as drunk or sober, is proper to be considered. The degree of the offence depends entirely upon the question whether the killing was wilful, deliberate, and premeditated: and upon that question it is proper for the jury to consider evidence of intoxication, if such there be, not upon the ground that drunkenness renders a criminal

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act less criminal or can be received in extenuation or excuse, but upon the ground that the condition of the defendant's mind at the time the act was committed must be inquired after in order to justly determine the question as to whether his mind was capable of that deliberation or premeditation which, according as they were present or absent, determine whether the killing was murder or manslaughter.

12. "That if the jury believe that the purpose to take life had its inception and was carried into effect while the defendant was in a state of mental confusion, whether from drink or other cause, which rendered him incapable of calm reflection or of forming a deliberate design to take life, the offence committed cannot be murder."

Exceptions 1 and 5 allege that the judge committed error in charging that the presumption that a man is sane is a presumption of the truth of the fact beyond all reasonable doubt, and the law requires a defendant to establish that he was insane by the preponderance of testimony. It is argued that when the prisoner's sanity is questioned and put "in issue" by him, the State must establish sanity, like any other fact, "beyond all reasonable doubt." When crime is charged, it must of course be proved, for the double reason that every man is presumed to be innocent and he who alleges must prove. In criminal proceedings, which touch the life or liberty of the citizen, this rule is so exacting as to require the proof to be clear "beyond a reasonable doubt," otherwise it is considered better that the accused should escape. There is no doubt that an indictment for murder substantially alleges not only the fact of homicide, but also a criminal intent, which pre-supposes reason.

But as the usual condition of men is that of sanity, there is a presumption that the ac-

cused is sane, which certainly in the first instance affords proof of the fact. *State v. Coleman*, 20 S. C., 454. If the killing and nothing more appears, this presumption, without other proof upon the point of sanity, is sufficient to support a conviction, and, as the State must prove every element of the crime charged "beyond a reasonable doubt," it follows that this presumption affords such proof. This presumption, however, may be overthrown. It may be shown on the part of the accused that the criminal intent did

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not exist at the time the act was committed. This being exceptional is a defence, and, like other defences, must be made out by the party claiming the benefit of it. "The positive existence of that degree and kind of insanity that shall work a dispensation to the prisoner in a case of established homicide, is a fact to be proved as it is affirmed by him." *State v. Stark*, 1 Strobl., 506.

What, then, is necessary to make out this defence? It surely cannot be sufficient merely to allege insanity to put his sanity "in issue." That is merely a pleading, a denial, and ineffectual without proof. In order to make out such defence, as it seems to us, sufficient proof must be shown to overcome in the first place the presumption of sanity and then any other proof that may be offered. This need not be done "beyond a reasonable doubt," for that would be a misapplication of the rule, which only applies to the evidence to sustain the charge on the part of the State, but by "the preponderance of evidence," showing want of sanity with reasonable certainty: this degree of evidence on the part of the defendant answering to and satisfying the requirement that the State must establish every element of the crime charged "beyond a reasonable doubt." "Where the State fully proves a *prima facie* case, and a special defence, such as insanity, alibi, &c., is interposed, it must be established only by such a preponderance of evidence as will satisfy the jury that the charge is not sustained 'beyond all reasonable doubt.'" *State v. Paulk*, 18 S. C., 515; *Lawson's Insanity*, 418.

Exceptions 3, 10, 11, and 12 complain that it was error in the judge to charge that voluntary drunkenness is no excuse for crime in the sense that the jury, in considering the question of malice, may not look to the unnaturally excited condition of the mind produced by temporary intoxication. We do not see that the facts of this case as stated can be considered as properly raising the question as to the effect of drunkenness in one who commits a homicide under its influence. There was no effort to prove any permanent disease of the mind resulting from long habits of gross intemperance, nor even a temporary fit of drunkenness at the time the act was committed. The only proof upon the subject, as stated, being that the prisoner

had "some liquor" during the evening before the homicide was committed.

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*But if that meagre proof is regarded as sufficient to raise the question, and the prisoner must be assumed to have been in a state of temporary intoxication when he committed the homicide, that would not excuse the crime. We do not think that our case of *State v. McCants* (1 Speers, 336) holds peculiar doctrines on this subject. Some cases may be found which suggest limitations of the rule, especially as to reducing murder to manslaughter by the indulgence extended to the natural weakness of "sudden heat and passion." But we think that the broad current of modern opinion holds the wise old doctrine that voluntary drunkenness of whatever degree is no excuse for crime committed under its influence. Any other principle would be destructive to the peace and order of society. Every murderer would soak himself in liquor for the double purpose of nerving himself for the act and of sheltering his intended crime. Sir Matthew Hale, in his "History of the Pleas of the Crown," says: "The third kind of dementia is that which is dementia affectata, namely, drunkenness. This vice doth deprive men of the use of reason, and puts many more into a perfect but temporary phrenzy. But by the laws of England such a person shall have no privilege by his voluntarily contracted madness."

Exceptions 2, 6, 7, and 8 complain that the judge erred in not charging that, as insanity is a disease of the intellectual or moral faculties, one or both, the test of criminality was not whether the party had knowledge of right and wrong, but whether he had the power to refrain from doing what was known to be wrong. As was said in the case of *State v. Stark*, *supra*, the subject of the mind and its influence upon the body is very difficult and obscure even to the most learned. The books of medical jurisprudence contain much controversy as to what infirmities of the mind should exempt from criminality. Since the famous cases of Haffield, who under an insane delusion shot at the king, and of McNaghten for killing Mr. Drummond by mistake for Sir Robert Peel, these discussions for the most part have been directed towards what has been called insane delusion, moral insanity, or uncontrollable impulse. (See chapter 19 of Sir James Stephen's *History of the Criminal Law*.) On a subject so intangible and of which so little can be clearly known we would not, in the

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*spirit of dogmatism, undertake to say that there was no moral as distinguished from intellectual insanity. It seems to us, however, that in the view suggested the difficulty would be great, if not insuperable, of establishing by satisfactory proof whether an impulse was or was not "uncontrollable."

But we see nothing in this case which required the Circuit Judge to enter upon the subject. As he stated, he was not called upon to charge abstract propositions that the evidence did not make necessary. "It is only proper that I should charge you in regard to such legal principles as arise out of the evidence." As applicable to the facts of the case, he instructed the jury as follows: "In order to relieve himself from responsibility for a criminal act by reason of mental unsoundness, he (the prisoner) must show that he was under a mental delusion by reason of mental disease, and that at the time of the act he did not know that the act he committed was wrong, or criminal, or punishable, either the one or the other. Because, notwithstanding his mind may be diseased, if he is still capable of forming a correct judgment as to the nature of the act, as to its being morally or legally wrong, he is still responsible for his act and punishable as if no mental disease existed at all."

We cannot say that this was error of law. The test here given to the jury was, as we understand it, the ordinary test in such cases; the test authorized by the opinion of all the judges of England in answer to the questions of the House of Lords growing out of McNaghten's Case; the test applied in the case of the United States v. Guiteau [1 Mackey (D. C.) 498, 47 Am. Rep. 247] for shooting President Garfield, and in many other cases in most of the States. See Lawson on Insanity as a Defence to Crime, 270, and following pages.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, and that the case be remanded to the Circuit Court for the purpose of enabling that court to assign a new day for the execution of the sentence before imposed.

24 S. C. *446

*MARTIN v. MARTIN.

(November Term, 1885.)

[1. *Appeal and Error* ⇨1022.]

Findings of fact by the master, concurred in by the Circuit Judge, approved.

[Ed. Note.—Cited in *Wheeler v. Alderman*, 34 S. C. 538, 13 S. E. 673, 27 Am. St. Rep. 842.

For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⇨1022.]

[2. *Mortgages* ⇨504.]

A grantee of land, with general warranty, has a right in equity to restrain his grantor and covenantor from selling this land under a prior mortgage held by him; and his assignee, who acquired the mortgage subsequent to the conveyance, has no higher rights than the assignor. This case distinguished from *Wilson v. Hyatt*, *McBurney & Co.*, 4 S. C. 369.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1490; Dec. Dig. ⇨504.]

[3. *Subrogation* ⇨17.]

Nor could this assignee claim to be subrogated to the rights of one who held another

mortgage upon this land, given by the grantor before his conveyance to plaintiff, and which had been paid out of the proceeds of sale of other land covered by the mortgage of this assignee.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 44; Dec. Dig. [§17](#).]

[4. *Jury* [§28](#).]

Where a defendant in her answer claims title to the land in question, and the issues are referred to the master for determination, by consent of defendant (as must be assumed), it is too late for her afterwards to object to a trial of this issue by the court without a jury.

[Ed. Note.—Cited in *Trenholm v. Morgan*, 28 S. C. 277, 5 S. E. 721.

For other cases, see *Jury*, Cent. Dig. § 188; Dec. Dig. [§28](#).]

Before Pressley, J., Abbeville, April, 1885.
The opinion fully states the case.

Mr. Eugene B. Gary, for appellant.

Mr. M. P. DeBruhl, contra.

March 24, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Sometime in the year 1866, Mary A. Martin executed a mortgage to J. C. Martin and W. B. Martin on a tract of land containing 1,900 acres, and on March 9, 1876, J. C. Martin and W. B. Martin executed a mortgage to James Evans on 300 acres of said tract, and on March 5, 1877, W. B. Martin executed a mortgage to T. A. Hudgens on his half of the 1,900 acre tract. On June 4, 1877, J. C. Martin and W. B. Martin conveyed to the plaintiff 315 acres of the 1,900 acre tract, and on June 28, 1880, Mary A. Martin executed a conveyance of the same 315 acres to the plaintiff. On January 23, 1883, J. C. Martin conveyed his half interest in the 1,900 acre tract to his wife, the defendant, Ina H. Martin, and on the same day assigned to her his half interest in the mort-

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gage given by Mary *A. Martin to J. C. Martin and W. B. Martin; but exactly how the said J. C. Martin and W. B. Martin acquired title to the 1,900 acre tract, does not appear in the "Case."

On January 25, 1883, the said Ina H. Martin commenced an action against Mary A. Martin and W. B. Martin to foreclose the mortgage on said 1,900 acre tract, and to adjust matters between herself as assignee of J. C. Martin and the defendant, W. B. Martin, the co-owner of said mortgage. In that action, an order was granted for the sale of the mortgaged premises "in the following parcels or plantations, to wit: 1st. The home tract, containing twelve hundred acres, more or less, bounded, &c. 2d. The mill tract, containing four hundred acres, more or less, bounded, &c. 3d. The Stark Martin tract, containing three hundred acres, more or less, bounded," &c. The Stark Martin tract is understood to be the 315 acres conveyed to the plaintiff, as above stated. The order of sale directed that the master should "satisfy

out of the share belonging to Ina H. Martin any judgments or liens upon or against the share of J. Campbell Martin prior to his assignment of his interest or share to his wife, Ina H. Martin."

The mortgaged premises having been advertised for sale, in accordance with said order, this action was commenced by the plaintiff to enjoin the sale of the 315 acre tract conveyed to her, as above stated, "until it is ascertained whether the residue of the said 1,900 acres of land is sufficient to pay all debts secured by liens on said land prior to the conveyance to this plaintiff," and "that the mortgages of James Evans and Thomas A. Hudgens be paid by the master out of the proceeds of the residue of the said 1,900 acres of land, and the title of this plaintiff be relieved from said liens." The defendants, Evans and Hudgens, consented that the prayer of the complaint be granted, but the defendant, Ina H. Martin, put in an answer setting up defences, which will be hereinafter stated. A temporary restraining order was granted in conformity to the prayer of the complaint, and the residue of the 1,900 acre tract was sold, and out of the proceeds the mortgage debts of Evans and Hudgens, who had, in the meantime, recovered judgments of foreclosure, have been fully paid and satisfied.

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*The defendant, Ina H. Martin, in her answer, contests generally the claim of the plaintiff, and, as a further defence, alleges that the conveyance of the 315 acres to the plaintiff by J. C. Martin and W. B. Martin was made in pursuance of an agreement that the plaintiff would pay certain notes of one J. T. Hill against them; that the plaintiff failed to pay said notes, and in consequence thereof she "surrendered to J. C. Martin all her right, title, interest, and possession of 200 acres of said land, bounded * *, in payment, satisfaction, and discharge of J. C. Martin's claim against her for failure to perform her part of the first mentioned agreement. That for several years J. C. Martin has been in possession of 200 acres of said land from the time of said second agreement, and so remained until he sold his interest in said 1,900 acres of land to his wife, Ina H. Martin, who is now the rightful owner and possessor of said 200 acres of land."

All the issues of law and fact were referred to the master to hear and determine the same, and at the reference the plaintiff offered testimony to meet the special defence above set out in regard to the 200 acres of land, tending to show that the true nature of the agreement between J. C. Martin and the plaintiff, through Stark Martin, her husband and agent, was that the 200 acres were rented to J. C. Martin, and that the rents and profits received by him were more than sufficient to pay the notes to J. T. Hill. It was also argued before the master that the Evans

mortgage having been paid out of the proceeds of the sale of the land of Mrs. Ina H. Martin, which was not covered by the lien of said mortgage, she was entitled to be subrogated to the rights of Evans against the 315 acres which, it was alleged, was covered by his mortgage. This position was not sustained by the master, because, as he says, "In the first place, this Evans debt was a debt of Mrs. Ina H. Martin's alienor before the alienation, and in the second place, there is no evidence before me that the mortgage of Evans covered only the 315 acres of land; on the contrary, that mortgage is on 300 acres of land, and the boundaries therein described do not tally with those of the 315 acres." This is quite true, as appears from the descriptions of the two parcels, as set out in the "Case," which seem to be entirely different; but the plaintiff alleged in her complaint that she "is informed

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*and believes that the said mortgage given to James Evans covers the land conveyed to her by the said J. Campbell Martin and William B. Martin," and this allegation is admitted in Mrs. Ina H. Martin's answer. So that it must be assumed that the Evans mortgage covered the 315 acres, though it may, possibly, be true also that it covers more of the 1,900 acre tract than that conveyed to plaintiff. Under the view, however, which we take of the case, this will not be material.

The master found as matter of fact: "I. That the land, to wit, the 200 acres, has been paid for by the rents and profits thereof, under the agreement of J. Campbell Martin and Stark Martin. II. That the proceeds of the sale of the residue of the land were sufficient to pay the claims mentioned in the complaint, and that they have been paid therefrom." And as conclusions of law he found: "I. That plaintiff is entitled to have the injunction made perpetual. II. That plaintiff is entitled to the possession of the land. III. That Ina H. Martin is not subrogated to the rights of James Evans in the mortgage debt."

To this report the defendant, Ina H. Martin, filed the following exceptions: "I. Because said master erred in findings of fact, as to the agreement with J. C. Martin. II. Because said master erred in his finding of fact, as to the payments made by Stark and Julia A. Martin. III. Because said master erred in his finding of fact, that the Evans debt was a debt of Ina H. Martin. IV. Because said master erred in his finding of fact, that the Evans mortgage did not cover the 315 acres of land known as the Stark Martin tract. V. Because said master erred in his finding of fact, that the land, to wit, the 200 acres, has been paid for by the rents and profits thereof, under the agreement of J. C. Martin and Stark Martin. VI. Because said master erred in his conclusion of law, that the plaintiff is entitled to have the injunction made perpetual. VII. Because said master erred in his conclusion

of law, that plaintiff is entitled to the possession of the land. VIII. Because said master erred in his conclusion of law, that Ina H. Martin is not subrogated to the rights of James Evans in the mortgage debt."

The Circuit Judge overruled these exceptions, and ordered that the report be confirmed and the injunction made perpetual.

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*From this judgment the defendant, Ina H. Martin, appeals upon precisely the same grounds as those taken in the exceptions to the master's report, though the appellant has, in strict conformity to the rule of this court, repeated the exceptions in her grounds of appeal.

The first, second, and fifth exceptions, relating to the same subject, will be considered together. They raise questions of fact only, and having been determined adversely to the appellant by both the master and the Circuit Judge, their finding must be regarded, under the well settled rule, as conclusive, unless the appellant has been able to show that they are without any evidence to support them, or are manifestly against the weight of the evidence. There certainly is evidence to support these findings in the testimony of Stark Martin, supported by that of Martin Thomas, and the only evidence to the contrary is that derived from the declarations of the plaintiff, that she had paid J. C. Martin nothing. This was strictly true, and may be reconciled with the testimony on the part of the plaintiff, for she had not, in fact, made any payments, but still J. C. Martin may have been reimbursed by being allowed to retain the rents and profits of the 200 acres for several years. But in addition to this, she denies having said what was attributed to her, and it is not for us to weigh the testimony critically and determine which of the witnesses have given the correct version of a transaction. At all events, we certainly cannot say that the conclusion reached by the master was manifestly against the weight of the evidence, and, on the contrary, we think his conclusion may well be supported under the testimony.

The third exception is taken under a misapprehension. We are unable to discover where the master found that the Evans debt was a debt of Ina H. Martin. On the contrary, he says distinctly that "this Evans debt was a debt of Mrs. Ina H. Martin's alienor before the alienation"—not the debt of Mrs. Martin; and this is strictly true.

So, too, the fourth exception does not correctly represent the master. We do not see that he made any distinct finding as to the matter therein referred to. He does state in the body of his report that "there is no evi-

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dence before me that the mortgage of *Evans covered only the 315 acres." But, as we have said, we do not regard this as material, and will assume that the Evans mortgage did cover the 315 acres.

The sixth exception is somewhat general

in its terms, but, as we understand it, the point intended to be raised is that the plaintiff has shown no equity to which she is entitled, calling for the remedy by injunction. It must be borne in mind that the defendant, Ina H. Martin, as assignee of J. C. Martin, can claim only such rights as her assignor could, and after it has been determined that the plaintiff has bought from J. C. Martin the land in question, and paid for the same, and has received, as she has, his warranty title, it must be manifest that a Court of Equity could not allow him to sell the same land under his mortgage; for if he did so, she would then, under his warranty, have immediate recourse upon him, and this circuity of action a Court of Equity would avoid, and, having all parties interested before it, would render such decree as would settle all the rights of the parties in the one action; and certainly J. C. Martin would not be allowed to sell land under his mortgage to pay a debt due to himself, after he had sold and conveyed the same land to a third person with warranty and received the purchase money. If this be so, then he could transfer to his assignee, Ina H. Martin, no higher or better rights than he himself had, and the plaintiff has a plain equity to restrain the defendant, Ina H. Martin, as his assignee, from selling this land to pay a debt due to plaintiff's grantor and warrantor, even though the mortgage does cover the land.

The case of *Wilson v. Hyatt, McBurney & Co.* (4 S. C., 369), relied on by appellant, was very different from this. There the plaintiff sought to enjoin a judgment creditor of a third person from selling her land, upon the ground that the judgment had no lien upon the land proposed to be sold, and presented a controversy purely as to strict legal right, involving no feature of equitable cognizance. If, as the plaintiff claimed, the judgment was not a lien on the land, its sale under such judgment could do no harm, as the purchaser at such sale would get nothing, and there was, therefore, no reason why the extraordinary power of the Court of Equity should have been invoked for the protection of the plaintiff in that case, as she needed no such

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protection. Here, *however, the land in question was undoubtedly covered by the lien of the mortgage, and, therefore, unquestionably liable to sale under it, but for the equities growing out of the other transactions between the plaintiff in this case and the assignor of the defendant, Ina H. Martin.

In connection with this, we will consider next the eighth exception, as to the claim of the appellant to be subrogated to the rights of Evans, whose mortgage, as we have assumed, does cover the land in question. Here, too, we must bear in mind that the appellant, as assignee of J. C. Martin, can only claim the rights of her assignor, and certainly he could not throw the payment of his own debt

to Evans upon land which he had sold and conveyed with warranty to the plaintiff, before he had assigned the mortgage to appellant. What rights Evans may have had, it is not important to consider, as he raises no question, and in fact has consented that the prayer of the plaintiff in her complaint should be granted.

The only remaining exception is the seventh, which, it seems to us, comes too late. After the appellant has in her answer tendered the issue of title to, and right to, the possession of the land in question, and after all the issues of law and fact raised in the case have been referred to the master for determination, by the consent of the appellant, as we are obliged to assume, we think it is now too late to raise the question as to the right of the court without a jury to determine such a question, which seems to be the point made on this exception in the argument. And it is very clear from the findings of fact by the master, concurred in by the Circuit Judge, that the plaintiff has a right to the possession of the land.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 452

BOWEN v. HUMPHREYS.

(November Term, 1885.)

[1. *Trusts* ⇨257.]

Where land is devised to trustees to divide the same equally and deliver possession to four children of testator, the trust is not executed until these duties are performed; and even after division, until delivery of *possession is actually made. The trustees alone, therefore, are the proper plaintiffs in an action to recover a part of the land so devised.

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[Ed. Note.—Cited in *Ayer v. Ritter*, 29 S. C. 136, 7 S. E. 53; *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82.

For other cases, see *Trusts*, Cent. Dig. § 366; Dec. Dig. ⇨257.]

[2. *Evidence* ⇨408.]

A receipt is always open to explanation, and the acknowledgment in writing made by one of these children that she had received from the trustees the possession of a lot of land, did not prevent the contrary from being shown.

[Ed. Note.—Cited in *Park v. Southern Ry.*, 78 S. C. 306, 58 S. E. 931.

For other cases, see *Evidence*, Cent. Dig. § 1829; Dec. Dig. ⇨408.]

Before Pressley, J., Greenville, April, 1885.

This was an action by R. E. Bowen and Jane E. Cauble, as trustees, under the will of Henry A. Cauble, of the four children of said Henry, against Harriet M. Humphreys, to recover the possession of a lot of land in the city of Greenville. The case came to this court from an order of non-suit, and upon the following exceptions:

I. Because the action having been brought in the name of the trustees, and they having

proved that the legal title to the property in dispute was vested in them, the presiding judge should not have granted a non-suit.

II. Because the presiding judge erred in granting a non-suit after it was shown by the testimony in the case that the cestui que trust, who is in being, had no legal title to the property in dispute.

III. Because the presiding judge erred in granting a non-suit, for if the cestui que trust did have a naked right to the possession of the property under the proof, she had no legal title and had never been put in actual possession of the property.

IV. Because the presiding judge erred in granting a non-suit in this case, for if the cestui que trust did have a naked right of possession, if she had been joined with the plaintiff in this action, there would have been a mis-joinder of parties.

V. Because the presiding judge erred in granting a non-suit in this case, for if the action had been brought in the name of the cestui que trust, she not having the legal title in her, the same would have failed, and therefore the action was properly brought.

VI. Because the plaintiffs being trustees of an express trust could maintain the action in their own names, and the presiding judge therefore erred in granting a non-suit in the case.

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*Mr. M. F. Ansel, for appellants.
Messrs. Blythe & Mayfield, contra.

March 24, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiffs bring this action to recover possession of a certain lot of land in the city of Greenville, now in the possession of the defendant, the plaintiffs claiming title under the will of Henry A. Cauble. The entire will is not set out in the "Case," but only the eighth and ninth clauses thereof, which read as follows:

"Item VIII. I will and devise all the rest and residue of my real estate, wherever situated, unto my friend, Col. Robert E. Bowen, and my beloved wife, Jane E. Cauble, in trust for the sole and separate use of my four children, Bettie A. Gibson, Mattie L. Gilreath, James Oliver Cauble, and William H. Cauble, for and during the term of their natural lives, and after their death to such child or children as they may have living at the time of their death, their heirs and assigns forever.

"Item IX. I will and devise that my executor and executrix herein named, as soon after my death as they may think best, do have the said real estate mentioned and devised in item VIII. of this my will, divided into four equal shares, delivering possession of one share to each of my said children, except the storehouses and lots on the corner of Main and Coffee streets and now known as the Cauble block, the same being brick

stores and running as far up Coffee street as Laurens, which storehouses and lots I desire to be kept together and not divided; the rents and profits therefrom, however, to be equally divided between my said four children. I also desire that my tanyard be run by my executor and executrix herein named until all the bark on hand at my death may be used up."

It seems that the persons appointed trustees as above were the same persons as those named as executor and executrix in the will, and that soon after the death of the testator they had the real estate appraised and divided as directed by the will, and that certain portions thereof designated in the "Case" were assigned to Mrs. Mattie L. Gilreath as her share, which includes the lot in controversy in this case, and that she gave to the plaintiffs a receipt as follows: "Received, Greenville, S. C., January 2, 1883, of R. E. Bowen, executor, and Jane E. Cauble, ex-

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ecutrix, *of the estate of Henry A. Cauble, deceased, the possession of the following described real estate," &c., going on to describe the property so assigned to her, but in fact she never did receive possession of the lot in controversy, the same being withheld by the defendant under a claim of title thereto.

At the close of the testimony the Circuit Judge granted a non-suit upon the ground, as seems to be assumed in the argument here, both on the part of the appellants and respondent, that the trustees having executed their trust they could not maintain the action, the legal title having passed to Mrs. Gilreath by virtue of the statute of uses. The only question, therefore, raised by this appeal is whether there was error in granting the non-suit upon that ground.

There is no doubt that the statute will not execute the use as long as there is anything remaining for the trustee to do, which renders it necessary that he should retain the legal title in order fully to perform the duties imposed upon him by the trust. *Bristow v. McCall*, 16 S. C., 545, and the cases therein cited. So that the practical inquiry in this case is, whether there was any duty remaining for the trustees to perform in order fully to carry into effect the objects of the trust. The first object of the trust was to hold the property, the legal title to which was directly devised to the trustees for the sole and separate use of the four children of the testator, two of whom appear to be married women, for and during the term of their natural lives and after their death to such child or children as they may have living at the time of their death; the next was to divide all the real estate devised to them except the brick stores known as the Cauble block into four equal shares, delivering possession of one share to each of said children, and the next to divide the rents

and profits of the Cauble block equally amongst the four children.

Whether it was necessary for the legal title to remain in the trustees in order to effect the first object of the trust since the change in the law with respect to the separate property of a married woman, and whether the remainders to the children were vested or contingent, and if the latter whether it was necessary for the legal title to remain in the trustees to preserve such remainders, since the passage of the act of De-

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cember 22, 1883 *(18 Stat., 430), are questions which were not raised in the case, and will not be considered here. But it certainly was necessary that the trustees should retain the legal title in order to effect the second object of the trust—to divide the property and deliver possession of the several shares to the several children. It is true that a portion of this object seems to have been accomplished in part at least by the appraisalment of the property and apportionment made by the appraisers called in for that purpose, but what was equally necessary to be done in order fully to carry into effect the object of the trust—the delivery of possession—was certainly not done, for a portion of the property assigned to one of the children was then and is yet in the possession of the defendant claiming title thereto and refusing to surrender possession thereof. Until, therefore, this controversy is determined, it is manifest not only that the trustees have not but cannot fully perform the duties imposed upon them by the trust; and the object of this action is to enable them to perform those duties.

The fact that Mrs. Gilreath has, by her receipt above mentioned, acknowledged that she has received possession of the lot in question, amounts to nothing; for it is well settled that a receipt is always open to explanation, and it is conceded in this case that she never did in fact receive possession of said lot, because the defendant is now and was at the time of the division in possession and refused to surrender the same. Indeed, until the title to the lot here in controversy is finally determined, it may well be doubted whether the trustees could properly make any division of the property. The terms of the trust require that the property shall be divided equally, and if it should turn out that the defendant in this action shall be able to establish a superior title to the testator so far as this lot is concerned, then the division which the trustees have attempted to make would not be an equal division, and the terms of the trust would not have been performed.

It seems to us clear, therefore, that there was error in granting the non-suit upon the ground that the trust being fully executed the title and the right to possession passed

to Mrs. Gilreath by virtue of the statute of uses, and therefore that the action could not be maintained by the trustees. On the con-

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trary, we think *that the purpose and object of this action was to effect such a result as would be necessary to enable the trustees to perform fully the duties of the trust, and hence that the action is maintainable in their names.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

24 S. C. 457

CURETON v. WESTFIELD,

SAME v. STOKES.

(November Term, 1885.)

[1. *Costs* ⇨201.]

Notice of taxation of costs may be given by the clerk of court as well as by the attorneys of the prevailing party.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 766; Dec. Dig. ⇨201.]

[2. *Costs* ⇨205.]

Costs of clerk and sheriff when not paid by the attorneys are not strictly speaking disbursements, and being charged as due to the several officers, they need not be verified by affidavit nor certified to by the officers claiming.

[Ed. Note.—Cited in *Bryan v. Ream*, 59 S. C. 341, 37 S. E. 921; *Mitchell v. Barris*, 64 S. C. 200, 41 S. E. 962.

For other cases, see *Costs*, Cent. Dig. § 775; Dec. Dig. ⇨205.]

[3. *Costs* ⇨169.]

Disbursements proper—as necessary express charges—should not be allowed unless verified.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 652, 653, 657, 658, 663, 759; Dec. Dig. ⇨169.]

[4. *Appeal and Error* ⇨273.]

Exception in these words: "Because the taxation of costs by the clerk was in excess of the amounts allowed by law, for instance in charge for reference on costs and others, as will appear on inspection of notice of taxation of costs"—is too general, and cannot be considered except as to the specific error mentioned.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1629; Dec. Dig. ⇨273.]

[5. *Costs* ⇨153.]

The adjustment of costs by the clerk is not a reference, and no charge for it as such can be allowed.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 581; Dec. Dig. ⇨153.]

Before Pressley, J., Greenville, April, 1885.
The opinion states the cases.

Mr. E. F. Stokes, for appellants.
Messrs. Wells & Orr, contra.

March 24, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, involving similar questions, were heard and

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will be considered together. On *February 18, 1885, the attorney for the defendants in each of above cases was served with a notice signed by the clerk, and not by the attorneys for the plaintiff, that the costs in said cases would be adjusted at his office on February 20, 1885, "in accordance with the taxation herein made;" and each notice was accompanied with an itemized bill of costs due to plaintiff's attorneys, clerk, and sheriff, together with an affidavit in each case of one of the attorneys for the plaintiff that he had paid the sums therein specified for printing arguments for the Supreme Court. On the same day defendants' attorney served the clerk and the attorneys for the plaintiff with the following exceptions: "1st. Because the proposed taxation of costs herein is excessive in amount. 2d. Because the costs are not itemized and sworn to in accordance with the provisions of the code of procedure. 3d. Because the notice of taxation of costs is irregular and not according to law, and the defendants will move the Circuit Court to set aside the same." The defendants' attorney, however, failed to appear at the clerk's office at the time appointed and no further objection being made, other than the exceptions above set out, the clerk adjusted the costs in the one case at the sum of \$141.30 and in the other at \$145.05.

After hearing argument of counsel the Circuit Judge granted an order affirming the taxation of costs as made by the clerk, "except the two items of ten dollars (one in each case) inserted by the clerk for motion for judgment." From this order defendants appeal, upon the following grounds: "I. Because the presiding judge ruled that the notice of taxation before the clerk was sufficient. II. Because the presiding judge ruled that costs and disbursements need not to have been more particularly itemized or verified than appeared in the notice served on defendants' attorneys. III. Because the taxation of costs by the clerk, affirmed by the presiding judge, was in excess of the amounts allowed by law; for instance, in charge for reference on costs, and others, as will appear on inspection of notice of taxation of costs. IV. Because the clerk's and sheriff's costs are not even certified to by these officers respectively."

The first ground is based upon the idea that the notice of the adjustment of costs should have been given by the attorneys and

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*not by the clerk. Section 326 of the Code simply requires that the notice shall be given, but does not specify by whom; and in the absence of any such provision in the statute we cannot say that there was any error in the clerk signing the notice. The object designed was attained, as is shown by the fact that the defendants' attorney filed exceptions on the day appointed by the notice,

although he did not see proper to appear and support his exceptions.

The second and fourth grounds may be considered together. From an inspection of the bills of costs as set out in the "Case," it appears that nothing was charged therein as disbursements, strictly speaking, except the amount paid for printing argument for Supreme Court, which was verified by the oath of the attorney who paid the same, and the amount (twenty-five cents) paid express charge on settlement of case, which does not seem to have been verified. All the other items appear to be items of costs, due to the several officers of court, fixed by law, and which could not be properly charged as disbursements unless paid out by plaintiff, and which could not be verified as such. When charged as due to the several officers there can be no necessity for any verification, as the amounts are fixed by law, and their correctness can better be determined by a comparison of the record with the items as fixed by the statute than by an affidavit which could only state the facts as there found.

It is true that the theory of the law is that the fees of the clerk and sheriff are paid by the party who calls their services into requisition at the time the services are performed, and when that is done the fact of such payment should be verified by affidavit, as these fees then become disbursements, strictly speaking. But when this is not done, as is very often the case, then the fact of such payment could not be verified, and these fees cannot properly be classed as disbursements, but may be taxed as costs due to the several officers. *Lewis v. Brown*, 16 S. C., 58. Nor do we see any necessity in such a case that these fees should be "certified to" by these officers, and we know of no law requiring such certificate. There is nothing, therefore, in either of these grounds except as to the

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small item of twenty-five cents above *referred to, which could not be allowed as a disbursement without verification and which must, therefore, be disallowed.

The only remaining ground is the third, which is of such a general character, except in one particular, that it cannot be considered. The province of this court is simply to consider such errors of law as are specified in exceptions properly taken. It will be observed that both in the exceptions filed with the clerk and in the grounds of appeal there is a singular absence of any specifications of error except in the single instance of the charge for reference on costs. Respondent has a right to be advertised of the specific errors alleged by appellant in order that he may come prepared to meet them, and unless this is done this court cannot undertake to consider them. A mere general charge that the taxation of costs "was in excess of the amounts allowed by law" is certainly insufficient, for that indi-

cates no specific error and would involve the necessity of going over the bill of costs, item by item, to ascertain whether the charge was well founded. The fact that counsel for appellant has, in his argument, undertaken to supply this defect in his exceptions cannot avail him, for the argument, as we have had occasion frequently to say, can only be based upon the record as prepared for argument here. As we have said, however, there is one specification of error in the third ground of appeal which is properly before us for consideration, and that is as to the charge for a reference on costs. This charge cannot be allowed. The adjustment of costs by the clerk is not a reference, and no charge for it as such can be allowed.

The judgment of this court is, that the order appealed from, except as herein modified, by disallowing the charge of twenty-five cents for express charges on settlement of the case in the second case, and the charge for reference on costs in both of the cases, be affirmed.

24 S. C. *461

*HABENICHT v. RAWLS.

(November Term, 1885.)

[1. *Husband and Wife* ⇨152.]

Under the power given by statute to a married woman, "to contract and be contracted with as to her separate property in the same manner as if she were unmarried," she can make only such contracts as at the time they are made, relate to or concern her separate property.

[Ed. Note.—Cited in *Kuker v. Carter*, 42 S. C. 85, 20 S. E. 22.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 596-602; Dec. Dig. ⇨152.]

[2. *Husband and Wife* ⇨159.]

A married woman signed merely as a surety the promissory note of her husband. *Held*, that she was not liable, and would not have been, even if she had in express terms declared her intention thereby to bind her separate estate.

[Ed. Note.—Cited in *Gwynn v. Gwynn*, 27 S. C. 537, 4 S. E. 229; *Aultman & Taylor Co. v. Gibert*, 28 S. C. 310, 5 S. E. 806.

For other cases, see *Husband and Wife*, Cent. Dig. § 622; Dec. Dig. ⇨159.]

[3. *Husband and Wife* ⇨152.]

Before a married woman can be made liable for the breach of a contract alleged to have been made by her, it must be made to appear from the inherent nature of the contract, or otherwise, that the contract was made in relation to, or concerned, her separate property.

[Ed. Note.—Cited in *Aultman & Taylor Co. v. Rush*, 26 S. C. 521, 528, 2 S. E. 402; *Brown Bros. v. Prevost*, 28 S. C. 125, 5 S. E. 274; *Aultman & Co. v. Gibert*, 28 S. C. 312, 5 S. E. 806; *Booker v. Wingo*, 29 S. C. 123, 7 S. E. 49; *Taylor v. Barker*, 30 S. C. 242, 9 S. E. 115; *Brown v. Thomson*, 31 S. C. 442, 10 S. E. 95, 17 Am. St. Rep. 40; *Earley v. Law*, 42 S. C. 539, 20 S. E. 136; *Singleton v. Singleton*, 40 S. C. 229, 38 S. E. 462.

For other cases, see *Husband and Wife*, Cent. Dig. §§ 596-602; Dec. Dig. ⇨152.]

Before Hudson, J., Richland, October, 1885.

This was an action commenced in March,

1885, by C. C. Habenicht against Rawls & Wilhalf, John Agnew, jr., and Jennie Agnew, upon three promissory notes bearing date January 24, 1883, given to plaintiff by Rawls & Wilhalf (a mercantile firm composed of J. S. Rawls, C. H. Wilhalf, and John Agnew, jr.), and endorsed by said John Agnew, jr., and Jennie Agnew, his wife. Mrs. Agnew was at that time, and at the time of the trial, possessed of a separate estate.

Mrs. Agnew answered, alleging, among other defences, that she was a mere surety, and that at the time she signed the note she was a married woman, and still was such. The evidence showed the facts stated in this answer to be true.

The plaintiff requested the judge to charge the jury:

1. That a married woman has a capacity to contract debts as if unmarried, restricted only to their collection from her separate property.

2. If the foregoing be refused, we would ask the court to charge: That it is a matter of evidence whether Mrs. Agnew intended to charge her separate estate with the payment of the notes, although she did not, in express terms, so charge it; and that it is for the jury to determine, from the evidence and the circumstances, whether she so intended.

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*The judge charged the jury as follows:

The principal question in this case is as to the power of a married woman to bind her separate estate by her contracts, and as to that my instructions to you will probably determine this case: for, as you are the judges of the facts, I am the sole judge of the law, and you are bound to take it as I give it to you. If I commit error, there is a tribunal in which these gentlemen can have me corrected.

A married woman can make no contract, except such as is expressly authorized by law, and she cannot bind herself except in one manner, and that is declared by the statute. She may "contract and be contracted with as to her separate property." The contract must be as to her separate property, must have reference to her separate property, must concern her separate property. A married woman who undertakes to enter into a contract of endorsement or suretyship, or to make a joint note with others, cannot bind herself thereby unless it is expressed upon the face of the instrument that she intends to bind her separate property, or the inherent nature of the contract must show that it concerned her separate property, or it must be proved aliunde that her intention was to bind her separate property. The simply endorsement of a promissory note, the joint making of a note, or other contract of suretyship, and nothing more, cannot bind a married woman.

As to the point whether John Agnew, jr., and Mrs. Jennie Agnew are endorsers of these notes, or joint makers with Rawls & Wilhaff, I am bound to charge you that when one signs his name across the back of a promissory note, payable to the order of a third party, and before the signature or endorsement by said third party, and no proof going to show to the contrary, he is bound with the principal as an original promisor and maker of the note.

His honor, the presiding judge, here read the plaintiff's requests to charge, and then proceeded: The first of these requests I refuse, gentlemen. The second is correct, with the modification that there must be some evidence besides the fact of signing, some evidence aliunde to show her intention to bind her separate property, and in this case, gentlemen, there is none.

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*The form of your verdict should be: "We find for the defendant, Jennie Agnew;" and if you should find for the plaintiff, against the other defendants, you should so state, with the amount of your verdict written out.

The jury found the following verdict: We find for the defendant, Jennie Agnew, and we find for the plaintiff, as against Rawls & Wilhaff and John Agnew, jr., three hundred and ten dollars and forty-six cents.

The plaintiff appealed upon the following exceptions:

I. Because his honor charged the jury that "a married woman, who undertakes to enter into a contract of endorsement or suretyship, or to make a joint note with others, cannot bind herself thereby, unless it is expressed upon the face of the instrument that she intends to bind her separate property, or the inherent nature of the contract must show that it concerned her separate property, or it must be proved aliunde that her intention was to bind her separate property. The simple endorsement of a promissory note, or other contract of suretyship, and nothing more, cannot bind a married woman."

II. Because his honor charged the jury that there was no evidence in this case of an intention on the part of Mrs. Jennie Agnew to contract as to her separate estate.

III. Because his honor refused plaintiff's first request to charge.

IV. Because his honor refused plaintiff's second request to charge without modification.

V. Because his honor charged the jury, in effect, that they must find for the defendant, Mrs. Agnew.

Messrs. John T. Sloan, jr., and W. H. Lyles, for appellant, cited 12 Am. Rep., 481; 1 Bish. Mar. Wom., §§ 604, 848-858, 864-879; 47 Mo., 504; 34 Ala., 535; 13 B. Mon., 384; 17 Ark., 189; 4 Beav., 319; 1 Bro. C. C., 201; 1 Ark., 189; 26 Ala., 332; 3 Green Ch., 512; 23 Mo., 457; 19 Ala., 180; 20 Ohio

St., 371; 17 Cent. L. J., 1; 16 Id., 244; 3 De Sans., 417; 2 Bish. Mar. Wom., §§ 570, 371, 237; 16 S. C., 256; 18 N. Y., 265; 1 Strob. Eq., 27; 58 N. Y., 84; Gen. Stat., §§ 2036, 2037.

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*Mr. John Bauskett, contra.

March 25, 1886. The opinion of the court was delivered by

Mr. Justice MELVER. On January 24, 1883, the defendants, Rawls & Wilhaff, made the notes sued on payable to the plaintiff, and before their delivery to him they were endorsed by the other two defendants, Jennie Agnew then and now being a married woman. The notes were given in discharge of a lien held by the plaintiff on the stock of goods belonging to Rawls & Wilhaff. Mrs. Agnew had no interest in the stock of goods, and received no consideration for her endorsement. She was, therefore, practically, a mere surety for the debt of another; and the sole question raised by this appeal is whether she, being a married woman, was capable of making such a contract.

At common law, there is no doubt that she had no such capacity, and, therefore, the inquiry is whether she has, by statute, been endowed with the power to make such a contract. That the act of 1870, incorporated in chapter C. of the General Statutes of 1872, page 482, section 3, did confer upon a married woman the power to make any contract which a feme sole could make, even to the extent of becoming surety for her husband, was settled by the cases of Pelzer, Rodgers & Co. v. Campbell, 15 S. C., 581 [40 Am. Rep. 705], and Clinkscales v. Hall, 15 S. C., 602. But at the very next session of the general assembly, which convened only a very few days after the decisions in the cases just recited were rendered, the law which had been thus construed in those cases was altered so as to limit the power of a married woman to contract, and the question is as to the extent and effect of that limitation.

By the law, as it formerly stood, it was declared that "a married woman shall have the right * * to contract and be contracted with in the same manner as if she were unmarried"; but by the law as it stood at the date of the alleged contract here in question, and still stands, it is declared that "a married woman shall have the right * * to contract and be contracted with, *as to her separate property*, in the same manner as if she were unmarried"; the five words italicized having been inserted as an amendment to the law as it formerly stood; so that the question raised by this appeal is narrowed

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down to the inquiry as to the effect of those five words. It seems to us that the most natural and the proper construction of the terms of this act, as amended, is that adopted by the Circuit Judge: that the contract

which a married woman is therein authorized to make is "as to her separate property, must have reference to her separate property, must concern her separate property."

It will be observed that the question is as to what contracts a married woman may make, and not as to their effect after they have been made. If a given contract is one that the law authorizes a married woman to make, then its effect is, and must necessarily be, the same as that of a contract of a person not laboring under any disability. It is very clear that the legislature intended to make some alteration in the law as it formerly stood, and we think it equally clear that the intention was to limit the power of a married woman as to the kind of contracts which she was permitted to make, viz., to those in relation to her separate property. As we have seen, prior to the amendment a married woman could make any kind of contract which a person *sui juris* could make, and the intention undoubtedly was to alter this, and hence her general power to contract was qualified by the words constituting the amendment, so that, while formerly she had the unlimited power to contract, now she can only make contracts "as to her separate property."

We are unable to discover anything in the act which indicates that the intention of the legislature was simply to confine her liability on any contract, which she might choose to make, to her separate estate, as is contended for by appellant. There is nothing in the act which shows that the attention of the legislature was directed to the kind of property which could be held liable for the performance of a married woman's contract; and, on the contrary, the language used shows that the legislative mind was directed to the kind of contract which she was to be permitted to make, and not to the kind of property which could be resorted to in case of a breach of the contract. Very recently, before the law was amended, it had been determined, as we have seen, although there was no little contrariety of opinion upon the subject, as is well known, that a married woman had the same capacity to make any kind of contract as any other person, and the

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irresistible inference is that it was this that the legislature intended to alter, so as to confine the contracting power of a married woman to a certain class of contracts, to wit, those which were made as to her separate estate.

We are not aware that any controversy had arisen or any adjudication had been made as to the kind of property which could be made liable for the breach of a married woman's contract, and, therefore, no occasion had arisen for an alteration of the law in that respect. Indeed, we do not see how such a controversy could have arisen, for the old code, as well as the code of 1882, ex-

pressly provided that damages recovered against a married woman could only be collected out of her separate estate. Section 298 of the old Code, which is in this respect the same as section 296 of the amended Code, provides that "in an action brought by or against a married woman, judgment may be given against her as well for costs as for damages, or both for such costs and for such damages, in the same manner as against other persons, to be levied and collected of her separate estate, and not otherwise." And in section 310 of the old Code, the provision was that "an execution may issue against a married woman, and it shall direct the levy and collection of the amount of the judgment against her from her separate estate and not otherwise;" and the same provision is found in section 307 of the present Code. So that it is very clear that the construction contended for by the appellant, to wit, that the amendment now under consideration was simply designed to limit the liability of a married woman on her contracts to her separate estate, cannot be the correct one; for such a construction would make the amendment in question wholly unnecessary, as that was the law before.

We are therefore of opinion that the object of the amendment was not to indicate the kind of property which could be made liable for the breach of a married woman's contract, but to limit her right to contract, so that she could only make such contracts as, at the time they were made, related to or concerned her separate property. Hence, before a married woman can be made liable for the breach of a contract alleged to have been made by her, it must be made to appear, either from the inherent nature of the contract or otherwise, that the contract was made

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in relation to or concerned her separate property. Even if she declares in express terms her intention to bind her separate estate, that alone will not be sufficient to render the contract valid, for the question is as to her power, which is to be determined by the nature of the contract itself, and not as to her intention to bind her separate property. If, therefore a wife should sign a note as surety for her husband, or indeed for any other person, and should declare in the note in express terms her intention to bind her separate estate, that would not make the contract valid as to her unless it was made to appear that the contract, though executed by her as surety, was designed to benefit her separate property or in some other way related to or concerned such property.

We have not deemed it necessary to go into a consideration of the very numerous cases elsewhere upon questions similar to the one now before us; for while the statutes of the various States are somewhat like our own, yet they differ sometimes very materially in their phraseology, and in the very

great conflict of authority abroad we have thought it more likely that we would reach a correct solution of the question by confining our attention to the terms of our own statutes, viewed in the light of our own past legislation and adjudications.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred.

Mr Justice MCGOWAN. I concur in the result. As the purpose of the act manifestly was to confer upon a married woman powers beyond what she possessed before, I cannot suppose that by the insertion of the words, "as to her separate estate," it was intended to defeat that object entirely as to contracts. The same act, in conformity to the constitution, confers the powers "to bequeath, devise, and convey her separate estate in the same manner and to the same extent as if she were unmarried," and in order to harmonize the different provisions I incline to think that the intention of the amendment was to limit the power of a married woman to such contracts as express an intention to

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bind *her separate property—such as are made with express reference to—that is to say, "as to her separate property."

Judgment affirmed.

24 S. C. 468

Ex parte KURZ.

(November Term, 1885.)

[1. *Homestead* ⚭150.]

It is not necessary that exceptions to the right of homestead, in order to be considered, should be filed within the time designated in the master's published notice, or, indeed, before the return of the appraisers.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 299; Dec. Dig. ⚭150.]

[2. *Homestead* ⚭81.]

A person in possession of land under a contract to purchase, is entitled, after the payment in full of the purchase money, to claim his homestead therein, even though he may not have acquired a formal legal title.

[Ed. Note.—Cited in *Ex parte Allison*, 45 S. C. 343, 23 S. E. 62.

For other cases, see *Homestead*, Cent. Dig. § 116; Dec. Dig. ⚭81.]

[3. *Executors and Administrators* ⚭271.]

Where a creditor has a judgment against his debtor under a contract to purchase, for the sale of so much of the land as may be sufficient to pay the debt "with due regard to the interests of the parties concerned," and the land is a single tract, all of which, outside of enough to make a homestead, is sold, under another proceeding, for a sum sufficient to pay said debt, other judgment creditors with no lien on this land cannot require the vendor first to exhaust this homestead so that the proceeds of sale of

the part not assigned may be applied to their judgments.

[Ed. Note.—Cited in *Ex parte Carraway*, 28 S. C. 233, 237, 5 S. E. 591; *Craig v. Miller*, 41 S. C. 37, 49, 19 S. E. 192; *Hallman v. George*, 70 S. C. 408, 50 S. E. 24.

For other cases, see *Executors and Administrators*, Cent. Dig. § 832; Dec. Dig. ⚭274.]

4. This case distinguished from *Savings Bank v. Harbin*, 18 S. C., 425.

[This case is also cited in *Shell v. Young*, 32 S. C. 472, 11 S. E. 299, without specific application.]

Before Cothran, J., Abbeville, June, 1885. The opinion sufficiently states the case.

Messrs. Parker & McGowan, for appellants. Mr. Samuel C. Cason, contra.

March 25, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. In December, 1874, one Jacob Kurz, under a contract to purchase from one Joel S. Perrin, went into possession of a lot of land, containing twenty acres, more or less, known as the Westfield lot. The purchase money not having been paid, the administrator of Perrin, who in the

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meantime had *died, on July 29, 1878, commenced an action against Kurz to enforce compliance with the terms of said contract or for a sale of the premises, and on September 13, 1878, obtained judgment for the amount due on the purchase money, and "that the premises described in the complaint, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount reported to be due to the plaintiff for principal, interest, and costs, be sold with due regard to the interests of the parties concerned." No steps appear to have been taken to enforce this judgment, for the reason probably that payments were made from time to time thereon, leaving a balance due thereon of eight hundred dollars, on March 14, 1882, when the said judgment was assigned to Wm. H. Parker and W. C. McGowan.

On January 31, 1885, Jacob Kurz died intestate, leaving a widow, the appellant herein, and an infant son living with her in the dwelling house on said lot of land. On March 2, 1885, the widow filed her petition before the master praying that a homestead be assigned to her out of said lot, as well as the exemption provided by law out of the personal property of which intestate died possessed. On the same day the master published the usual notice to creditors and others interested of this application for homestead, and on March 18, 1885, W. H. Parker and W. C. McGowan filed with the master a notice of the judgment which had been assigned to them as above stated, in which they "insist that homestead in the said real estate be not set off to C. E. Kurz, petitioner, absolutely, but subject to the rights under the decree in the above stated cause of the undersigned

creditors in the event that there be not sufficient proceeds from said property, outside of the homestead, to pay the balance of said decree and costs." On April 4, 1885, the master granted an order appointing appraisers to lay off the homestead subject to the rights of said Parker and McGowan, in which, amongst other things, he recites that no objection to the same was filed in his office except the notice of Parker and McGowan above referred to.

On April 4, 1885, the appraisers made their return, allotting to the petitioner out of said Westfield lot as her homestead "the dwelling house in which she resides and in which Jacob Kurz resided at his death," together with

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the land on which it stood *and adjoined, supposed to contain not exceeding one and one-half acres, describing the same by metes and bounds; and also set off to her personal property to the amount of five hundred dollars. On April 16, 1885, exceptions to the assignment of the homestead proper were filed by two judgment creditors of the intestate, Jacob Kurz, one of the judgments having been entered on September 6, 1878, and the other on June 6, 1879, substantially upon the grounds: 1st. That the petitioner is not entitled to homestead in the premises. 2d. That if she is, the same is first liable to the judgment of Parker and McGowan before any portion of the land outside of that assigned to her as homestead can be applied to said judgment.

On April 14, 1885, the administrator of Jacob Kurz filed a creditors' bill, to which the widow and her infant son as well as the judgment and other creditors of Jacob Kurz are parties, in which, amongst other things, the administrator asked that all of the real estate of said Kurz except that assigned to the widow as homestead be sold to pay debts in aid of the personality, and an order of sale was granted as prayed for; and it is admitted that since the hearing of the exceptions to the assignment of homestead all of the real estate except that portion assigned to the widow as her homestead has been sold by the master, under said order, for an amount more than sufficient to pay the balance due on the judgment held by Parker and McGowan.

The case was heard by Judge Cothran, who rendered a decree holding that the general creditors had an equity to force the holders of the judgment for the unpaid purchase money first to exhaust the homestead before they could go upon the land outside of it, and that the objection urged by the petitioner, that the creditors should have filed their exceptions before the master to the issuing of the order appointing appraisers to lay off the homestead, and this not having been done the Circuit Court had no jurisdiction except to order a new appraisement, could not be sustained. He therefore rendered judgment confirming the return of the appraisers so far as the exemption of personal property was

concerned, no objection having been made thereto, but set aside so much as assigned the homestead in the real estate, and dismissed the petition with costs.

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*From this judgment the petitioner appealed upon the several grounds set out in the "Case," which, however, need not be set out here as they make substantially but four questions: 1st. As to the jurisdiction of the Circuit Court to determine the right to homestead in the absence of any exceptions before the master within the period designated for publication of the notice of the application. 2d. Whether the petitioner is entitled to homestead in the premises in question as against the general creditors. 3d. Whether the general creditors can compel the holders of the judgment for the unpaid purchase money first to exhaust the homestead. 4th. Whether there was error in dismissing the petition with costs.

As to the first question raised by the appeal, we agree with the Circuit Judge. The act (Gen. Stat., § 2002) does not provide for or require the filing of any exceptions until after the return of the appraisers appointed to lay off the homestead, and the exceptions having been filed in due time after such return was made, we see no reason why the Circuit Court could not proceed to adjudge the questions raised by the exceptions.

As to the second question, we think it is determined by the recent decision of this court in the case of *Munro v. Jeter*, ante, p. 29. While a homestead in a case like this cannot be claimed in land held under a contract to purchase until the purchase money has been fully paid, yet after it has been paid there is no obstacle in the way of such claim, even though the judgment debtor may not have acquired a formal legal title.

As to the third question, we cannot agree with the Circuit Judge in his application to this case of the well settled principle that where "there are two creditors of a common debtor, one of whom has access to two funds or sources of payment and the other has access to only one, the latter has an equity to require the former first to exhaust the fund which is not common to both of them." On the contrary, we do not think this was a case of two funds or sources of payment. Laying out of view the personal property, as to which there is no question in this case, there was but one fund or source of payment—the Westfield lot—to no part of which could the general creditors resort for payment of their claims until after the purchase money was

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fully paid. *They had no lien upon it and could not subject it to the payment of their debts by any proceeding until the judgment for the purchase money was fully satisfied, for until then it could not be known with any certainty whether the whole or a part only would be necessary for that purpose. It was an undivided lot, and by the very terms of

the judgment for the purchase money only so much thereof was directed to be sold "as may be sufficient to raise the amount reported to be due to the plaintiff for principal, interest, and costs, * * * with due regard to the interests of the parties concerned." These latter words were doubtless inserted for the express purpose of preserving the dwelling house for the family of the debtor.

The general creditors having no lien upon this lot, and no means of subjecting it to the payment of their debts until after the purchase money was paid, and the judgment for the purchase money containing in effect a direction that the portion of the lot outside of what might be claimed as a homestead should be first sold, we do not see how it can be said that this was a case where there were two funds or sources of payment, to both of which the purchase money creditors could resort for payment of their debts, while the general creditors could only resort to one; for, even assuming for the sake of argument that there were two funds, the general creditors, as we have seen, could resort to neither until the purchase money creditors were satisfied and were out of the way—in which event one of the conditions of the rule invoked by the Circuit Judge would be absent, and the rule could not be applied.

This case differs materially from the case of *Savings Bank v. Harbin* (18 S. C., 425), relied on by the Circuit Judge. There the debtor had two separate and distinct pieces of property, one called the Bolt tract and the other the home tract, and were so treated by him in his dealings with his creditors. The senior mortgage covered both tracts, the next mortgage covered the Bolt tract only, then followed an intermediate judgment, which of course was a general lien on all his real estate liable to levy and sale, subject though to the liens of the antecedent mortgages, then there was a mortgage on both of said tracts, and finally there was another judgment hav-

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ing a general lien on all the real estate liable to levy and sale, subject of course to all antecedent liens. So that in that case there were clearly two funds or sources of payment to which all of the creditors could at the same time resort for payment of their debts, except that the judgment creditors could not resort to so much of the home tract as might be assigned to the debtor as a homestead, and the second mortgage could only resort to the Bolt tract after exhausting a note held as collateral security. The legal title to all of the real estate was in the debtor, and it could therefore be reached directly by his creditors. Here, however, there were not two funds or sources of payment, but only one, the Westfield lot, to which the debtor did not have the legal title, and which could not be reached by his general creditors until the claim for the purchase money was extinguished. The general creditors never did or could have access

to this property for the payment of their debts until the purchase money is paid, and the moment that is done there are then no longer two creditors, one of whom has access to two funds and the other to one of those funds only, and the rule relied upon cannot apply.

We think, therefore, that there was error in holding that the general creditors have an equity to force the purchase money creditors to resort first to the homestead for payment of the balance due on their judgment; but, on the contrary, are of opinion that such balance should be paid out of the proceeds of the sale of that portion of the lot outside of the portion assigned to the widow as her homestead, and that the balance of such proceeds, if any, be applied in due course of administration.

This view renders it unnecessary to consider the fourth question raised by the appeal, as the judgment below will be reversed, except in so far as it confirms the returns as to the personal property.

The judgment of this court is, that the judgment of the Circuit Court be reversed, except in so far as it confirms the return of the commissioners as to the personal property, and that the case be remanded to the Circuit Court for the purpose of carrying out the views herein indicated.

24 S. C. *474

*SULLIVAN v. SULLIVAN.

SAME v. SAME.

(November Term, 1885.)

[*Pleading* ⇨248.]

Plaintiff sued defendant for assault and slander, and defendant demurred for improper joinder of actions. Within twenty days thereafter, plaintiff served an amended complaint for assault and battery, as a substitute for the first complaint, and served a new summons and complaint for slander. *Held*—

1. That the plaintiff had a right to serve his amended complaint, and that the additional allegation of battery, even if a new cause of action, would not justify a dismissal of the complaint, which was good at least as to the assault.

[*Ed. Note*.—Cited in *Sims v. Ohio River & C. Ry. Co.*, 56 S. C. 32, 33 S. E. 746; *Proctor v. Southern Ry.*, 64 S. C. 494, 42 S. E. 427.

For other cases, see *Pleading*, Cent. Dig. § 433; Dec. Dig. ⇨248.]

[2. *Abatement and Revival* ⇨7.]

That the defence of another action pending interposed in the slander suit could not avail unless proved; but there was no other action for slander then pending, as the substituted complaint was only for assault and battery.

[*Ed. Note*.—For other cases, see *Abatement and Revival*, Cent. Dig. §§ 35-37; Dec. Dig. ⇨7.]

Before Pressley, J., Greenville, April, 1885.
Action by Joseph W. Sullivan against Hewlett Sullivan. The opinion fully states the case.

Messrs. Perry & Heyward, for appellant.
Mr. Geo. Westmoreland, contra.

March 26, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. These cases were heard together. They were originally commenced as one with a "complaint for assault and for slander." The defendant demurred upon the ground that the causes of action were improperly united, and within twenty days after service of the demurrer the plaintiff voluntarily amended his complaint by dividing the action. On the new and separate complaint for "assault," which was regularly served on the defendant, there was endorsed a notice, "that the plaintiff serves the above complaint as a substitute by way of amendment to the complaint heretofore served upon you on the 24th day of December, 1884." This substitute contained allegations of a battery which did not appear in the original

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complaint, and the defendant moved to strike out the whole complaint, upon the ground that, being a new cause of action, it could not be set up in an amended pleading. The Circuit Judge refused the motion, and the appeal from that order is the first case stated.

A new and separate action was also brought and regularly served "for slander," to which the defendant answered with a general denial, and also setting up the defence, that "another action was pending for the same cause." When the case was reached on the calendar, the defendant's counsel moved to dismiss the complaint on the ground taken in his answer, that there was another action for the same cause pending. It does not appear that the original complaint, which had been divided, was before the court, or that there was any evidence upon the subject. The Circuit Judge also refused this motion, and the appeal from that order is the other case stated.

The defendant appeals, alleging error of law in refusing the motion in both the cases stated.

First. The demurrer to the original cause of action was under the fifth subdivision of section 165 of the Code, alleging that several causes of action were improperly united. By that section, it is provided that if the court sustains such a demurrer, it may, in its discretion, require the action to be divided into as many actions as may be thought necessary to their proper determination. In that case, the original action here would have been divided into two—one for "assault," and the other for "slander." The plaintiff, however, did not wait for the order of court sustaining the demurrer, but acquiesced in its correctness, and within twenty days, and before the period for answering it had expired, he chose to avail himself of the provis-

ion which allows as a matter of course voluntary amendments. This he did by dividing the original complaint, as the court hearing it would have done, which, we take it, he had the right to do, as it was not made to appear that it was done for delay, that being the only limit to the right by the terms of the section.

But it seems that in the action for "assault," the occasion was taken to add allegations also of a battery, which did not appear in the original complaint, and for that reason the defendant moved to strike out the whole complaint. The section (193) of the

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Code, *which, under certain conditions, allows voluntary amendments, does not in terms fix the character of the amendments thus allowed. But section 194, as to amendments by the court, does seem to indicate that under the form of amendment a wholly different cause of action cannot be substituted in place of the one which the party attempted to set up in the original pleading. See *Trumbo v. Finley*, 18 S. C., 316. But if it be assumed (as to which it is unnecessary to express any opinion here), that the same rule should apply to voluntary amendments as matter of course, necessarily made in the first stages of a case, we cannot say that an amended complaint, charging "assault and battery," was wholly different from one charging "assault" alone. To a certain extent it was the same, and in any view the amended complaint was good at least as to the assault; and, therefore, the Circuit Judge committed no error of law in refusing a motion to strike out and dismiss the whole complaint.

Second, as to the other case. The allegation in the answer of the defendant, that there was a former suit pending for the same cause of action, was, in effect, a plea of new matter, which, in the first place, could have no force until it was proved as new matter. There was no proof of the fact alleged, and, as we think, could not have been; for after the division of the original action, there was no other suit pending "for slander," of which the defendant was fully informed, by the written notice in the first case, that said complaint was served upon him "as a substitute by way of amendment to the complaint heretofore served on him December 24, 1884."

The judgment of this court is, that the judgment of the Circuit Court, in each of the cases stated in the caption, be affirmed.

24 S. C. 476

PUDIGON v. GOBLET.

(November Term, 1885.)

[1. *Appeal and Error* ⇨ 719.]

Where an appeal is taken, but there are no grounds of error alleged, the appeal is not en-

titled to a hearing. This rule applied to this case, as the appeal was from an order refusing defendant's motion to vacate a judgment by default, for delay in docketing the cause, when

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such *delay was a courtesy extended at his own request, and where there was no claim of a bona fide defence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2968; Dec. Dig. ⚡719.]

[2. *Trial* ⚡9.]

Under the present practice, a plaintiff is not out of court for failing to docket the cause within a year and a day, as the defendant has a right to docket. *Hagood v. Riley*, 21 S. C., 143.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 21; Dec. Dig. ⚡9.]

Before Pressley, J., Charleston, June, 1885.

The opinion states the case.

Mr. Chas. E. Carrere, for appellant.
Messrs. Smythe & Lee, contra.

March 26, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. On August 2, 1880, Francis Goblet duly filed his summons and complaint against Louis Pudigon to recover the amount due on certain notes bearing date July 1, 1876, set forth in the complaint. On August 4, 1880, the summons and complaint were duly served personally on Louis Pudigon, and on June 20, 1882, judgment by default in favor of the respondent against the appellant was duly entered. On May 19, 1885, a notice was served on the attorneys for Goblet that "on an affidavit, a copy of which is herewith annexed, and on the records of the court in this cause, and on the minutes and calendars of the court," a motion would be made to set aside said judgment and all subsequent proceedings therein; but upon what grounds, is not stated in the notice. The affidavit annexed was that of appellant to the effect that he was served with the summons and complaint on August 4, 1880, and that said case was not placed on the calendar of the court for trial until the June term of the court, 1882.

In behalf of the respondent, the affidavit of his attorney was submitted, to the effect that a few days after the service of the summons and complaint, he was notified by Messrs. Walker & Bacot that they had been retained as attorneys of the appellant, and requested an extension of time to answer, which request was acceded to by plaintiff's (respondent herein) attorney; that on October 25, 1880, defendant requested Messrs. Walker & Bacot to file the answer, and re-

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ceiving no reply from them, he again *addressed a similar request to those gentlemen on November 19, 1880; that no answer was put in, and, on the contrary, further extension of time was asked for and obtained, pending frequent conferences between the

counsel of the parties as to some settlement of the case; that no adjustment having been effected, deponent, on February 11, 1882, again wrote to the attorneys for appellant to put in their answer; that no answer having still been put in, deponent, on May 23, 1882, served upon the attorneys for appellant formal notice that on the first day of the ensuing term of the court, judgment by default would be asked, and in pursuance of such notice judgment was asked for and obtained as above stated. Deponent further stated that the delay in taking judgment arose solely from the action of the defendant, through his attorneys, in asking continued extensions of time to answer, which were granted as a favor and a courtesy to the defendant and his attorneys.

It is proper to state here that this motion to set aside the judgment was not made by Messrs. Walker & Bacot, but by another attorney, who does not seem to have had any previous connection with the case.

The motion was heard by Judge Pressley, and refused upon the ground that, while the rule is "that a case at law is out of court, if no step has been taken therein for a year and a day," yet he considered what had passed between the attorneys as sufficient to keep the case in court. From this judgment or order Francis Goblet appeals, in general terms, without stating any ground whatever, and without filing any exceptions designating any specific error in the order appealed from. This of itself is sufficient to warrant us in dismissing this appeal under the well settled rule of this court, and this certainly is a case very appropriate for the application of the rule. No excuse for, or explanation of, the delay occasioned by the courtesy extended to his attorneys is even suggested by the appellant, and it is not even intimated that he has a bona fide defence to the action in which the judgment he is seeking to set aside was recovered. There is nothing whatever in the case, as presented to us, calling for or even warranting any indulgence from

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the court, and, on the con*trary, everything seems to call for the strictest application of the rules.

But to avoid any misapprehension as to an important matter of practice, we may add that we do not think the appeal could be sustained, even if it had been taken in the most formal manner. The complaint was filed in due time, and the only ground of objection seems to be that the case was not docketed within a year and a day after service of the summons and complaint. The code provides that if the plaintiff fails to docket his case within the prescribed time, and the defendant desires that the case shall proceed, he may have it docketed and thus avoid any delay, but we do not understand that there is any provision of the code which

declares that a failure to docket a case within the prescribed time puts the party out of court, and the rule, under the old practice, in reference to this matter, does not apply to the practice under the code. Hagood v. Riley, 21 S. C., 143.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 479

WHALEY v. STEVENS.

(November Term, 1885.)

[1. Judgment \S 585.]

A judgment dismissing a complaint, which alleged the obstruction of a road over which plaintiff had a right of way in gross, for lack of evidence to sustain a right of way in gross, is not an adjudication that will defeat a second action alleging the obstruction of this same road over which plaintiff had a right of way appurtenant or appurtenant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1094; Dec. Dig. \S 585.]

[2. Judgment \S 570.]

A judgment dismissing a complaint for failure of evidence to sustain one of its material allegations, is a judgment of non-suit, which will not support a plea of res judicata.

[Ed. Note.—Cited in Willoughby v. North Eastern R. Co., 52 S. C. 175, 29 S. E. 629; Morrow v. Atlanta & C. A. L. Ry. Co., 84 S. C. 244, 66 S. E. 186; McCown v. Muldrow, 91 S. C. 540, 74 S. E. 386, Ann. Cas. 1914A, 139.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1031; Dec. Dig. \S 570.]

Before Aldrich, J., Charleston, February, 1885.

The opinion states the case.

[For subsequent opinion, see 27 S. C. 549, 4 S. E. 145.]

Messrs. Inglesby & Miller, for appellant.
Messrs. Simonton & Barker, contra.

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*March 26, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. In 1882 the plaintiff brought an action against the defendant for obstructing his right of way and obtained a verdict. Upon appeal, this court held that the plaintiff, having alleged in his complaint that he was entitled to a right of way in gross and not a right of way appurtenant or appurtenant to his land, and there being confessedly no evidence that the plaintiff was entitled to a right of way in gross, he could not recover, even though he may have proved that he was entitled to a right of way appurtenant or appurtenant to his land described in the complaint, and that, as there were essential and marked distinctions between the two kinds of rights, the violation of these rights present different and distinct causes of action, which would have to be asserted and established by different and distinct allegations and proofs, the plaintiff's applica-

tion for leave to amend could not be granted under the provisions of the code. Judgment was therefore rendered, dismissing the complaint. See 21 S. C., 221, for a more full statement of the former case.

In 1884 the present action was commenced, and the plaintiff, in his complaint, after alleging that he is the owner of a plantation on John's Island known as "Caneslatch" plantation, as the devisee of his father, the late Wm. S. Whaley, proceeds to allege: "That the said Wm. S. Whaley, during his life-time, and the said plaintiff, since the death of his said father, had a right of way, by prescription, on foot and with horses, mules, carts, and carriages and other vehicles, by means of a road beginning on the said Caneslatch plantation and appurtenant and appendant thereto, and leading from the dwelling house on said plantation, in an eastwardly direction, through land of the said plantation and over the piece of land known as the three hundred acres, originally belonging to the adjoining Seven Oaks plantation, but afterwards purchased by the said William S. Whaley, the father of the plaintiff, from the defendant, William S. Stevens, and now the property of the said plaintiff, out to and across the public road leading to John's Island Ferry, through, over, and upon the adjoining land of the said defendant, known as the Seven Oaks plantation, in a continued eastwardly direction to a creek leading into Stono River, which said creek plaintiff alleges, as advised, is a public

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"highway, to wit, a navigable stream." &c.; and then alleges that defendant had obstructed said way.

The defendant pleaded res adjudicata and a general denial. The Circuit Judge sustained the plea of res adjudicata, and rendered judgment dismissing the complaint. From this judgment plaintiff appeals, and the sole question presented is whether the plea was properly sustained.

It is very manifest that the allegations in the complaints filed in the two actions were essentially different, and, as we think, it is equally manifest that the issues presented in the two actions were entirely different. It is true that the general object in both of the actions was the same—that is, to obtain damages for the same obstruction of what appears from the evidence to be substantially the same road, and an order of injunction to restrain defendant from continuing said obstruction. But to obtain the relief sought by the plaintiff, he was bound to establish the affirmative of two issues: 1st, whether he was entitled to a right of way, as alleged in his complaint; 2d, whether defendant had obstructed said way. Now, conceding that the second issue was the same in both of the cases, the first issue was certainly not. For, as this court held in the former case, the sole is-

sue presented was whether the plaintiff was entitled to a right of way in gross over the land of defendant, while the issue presented in the present action is whether the plaintiff is entitled to a right of way appurtenant or appurtenant to his plantation known as "Caneslateh." As was held in the former case, "These two rights differ substantially, not in form merely, but in their nature and results. The violation of these rights present different and distinct causes of action, which would have to be asserted and established by different and distinct allegations and proofs;" and it was for this reason that leave to amend was refused. It follows, therefore, that it has already been adjudged that the causes of action in the two cases are not the same, and certainly a judgment obtained on one cause of action cannot be pleaded as res adjudicata to an action upon another cause of action; for in such a case one of the identities, "identity in the cause of action," necessary to a successful maintenance

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of such a plea, would be lacking, and *hence the plea could not be sustained. *Mauldin v. Gossett*, 15 S. C., 576.

It seems to be supposed that the cause of action in both of the cases was the defendant's obstruction of the road, and, therefore, that it was the same in both cases. But this was only one of the elements going to make up the plaintiff's cause of action. As is said in *Pomeroy on Remedies*, section 519, pages 554-5: "Every action is based upon some primary right held by the plaintiff, and upon a duty resting upon the defendant corresponding to such right. By means of a wrongful act or omission of the defendant, this primary right and this duty are invaded and broken, and there immediately arises from the breach a new remedial right of the plaintiff, and a new remedial duty of the defendant. Finally, such remedial right and duty are consummated and satisfied by the remedy, which is obtained through means of the action, and which is its object. Now, it is very plain that, using the words according to their natural import and according to their technical legal import, the 'cause of action' is what gives rise to the remedial right, or the right of remedy, which is evidently the same as the term, 'right of action,' frequently used by judges and text-writers. This remedial right, or right of action, does not arise from the wrongful act or omission of the defendant, the delict, alone, nor from the plaintiff's primary right, and the defendant's corresponding primary duty alone, but from these two elements taken together. The 'cause of action,' therefore, must always consist of two factors, (1) the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate—person, character, property, or contract; and (2) the delict, or wrongful act or omission of the defendant, by which the pri-

mary right and duty have been violated," &c.

From this, it follows that the wrongful act of the defendant (if, indeed, it was wrongful), in obstructing the road in question, did not constitute the cause of action in either case, but would be only one of the elements of such cause in both cases, and could only in combination with the other necessary element, the plaintiff's primary right, constitute a cause of action; and as the nature of the plaintiff's right, as alleged in the first case, was essentially different from that alleged in the

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present action, it would seem to *follow that the causes of action in the two cases could not be the same.

But, in addition to this, we think the judgment in the former case was nothing more than a judgment of non-suit for failure of evidence to establish one of the material allegations of the complaint; and it certainly cannot be pretended that such a judgment, on such a ground, would support a plea of res adjudicata. The allegation being, as the court held, that the plaintiff was entitled to a right of way in gross merely, and there being manifestly no evidence to support such an allegation, judgment necessarily followed that the complaint should be dismissed.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

24 S. C. 483

GRAYDON v. STOKES.

(November Term, 1885.)

[1. *Work and Labor* ⇨5.]

An attorney at law has a right to be paid for professional services rendered another attorney; where there is no express contract, the law will imply one. The fact that attorneys sometimes from courtesy render services gratuitously to their brother attorneys does not affect this legal right.

[Ed. Note.—Cited in *Farley v. Charleston Basket & Veneer Co.*, 51 S. C. 241, 28 S. E. 193, 401.

For other cases, see *Work and Labor*, Cent. Dig. § 9; Dec. Dig. ⇨5.]

2. An exception unsupported by any evidence in the case, not sustained.

[3. *Attorney and Client* ⇨167.]

Whether the services were rendered, and their value, were matters of fact decided by the jury, and no appeal lies.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 374; Dec. Dig. ⇨167.]

Before Pressley, J., Greenville, March, 1885. The opinion states the case.

Mr. E. F. Stokes, for appellant.

Mr. G. G. Wells, contra.

March 27, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This action was brought by Ellis G. Graydon, of the Abbeville

bar, against the defendant, who is also an attorney at law of Greenville, upon an open

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account of \$400 for professional services rendered the defendant at Greenville, which was credited with \$17.50 and the plaintiff's hotel bills at Greenville. The defendant answered, denying the allegations of the complaint in the manner and form stated, and also that any account had ever been presented for payment. At the conclusion of plaintiff's testimony the defendant moved for a non-suit on the ground that the plaintiff had not shown that there was any contract, express or implied, that any fee was to be paid for his services, beyond what might be given gratuitously by the defendant; and according to plaintiff's own testimony it appeared that he was in partnership with Mr. Armstead Burt, and the action was not brought in the name of Burt & Graydon, but in the name of Ellis G. Graydon alone, and must fail.

The presiding judge refused the motion, saying: "If the court understands the testimony of Mr. Graydon, such as Mr. Burt should earn outside the county (of Abbeville) was his, and such as Mr. Graydon gets outside the county is his; of course, they are not attorneys outside of the county, and when services are rendered an attorney has to be paid for it." The plaintiff had a verdict for \$382.50. The defendant moved for a new trial on the ground of subsequently discovered evidence, which was refused, and the defendant appeals to this court upon the following grounds:

I. "It is respectfully submitted that his honor erred in not granting a non-suit, inasmuch as the testimony of plaintiff and his witnesses showed that the action should have been brought, if at all, in the name of Burt & Graydon, and not in the name of Graydon alone.

II. "Because his honor erred in not granting a new trial, when the affidavit of defendant showed that evidence had been discovered since the trial of the cause which made it clear that Ellis G. Graydon had no right to sue the defendant, and that only Burt & Graydon, or the survivor, should, under the circumstances, have brought the action.

III. "Because his honor erred in not granting a new trial upon the minutes of the court.

IV. "Because his honor erred in refusing to dismiss the complaint, ruling that the law

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and custom of South Carolina permitted one attorney at law to sue his brother attorney for services rendered in the line of his profession as attorney and counsellor.

V. "Because his honor erred in ruling that the testimony of defendant's witness, tending to show that the services of plaintiff's attorney were of little actual value, was incompetent.

VI. "Because the verdict was contrary to law and the testimony, the records in the cases upon which the complaint was based

conflicting with and contradicting the testimony of plaintiff and one of plaintiff's witnesses.

VII. "Because the verdict was excessive in amount, being for \$382.50, when it should not have been for more than \$50, excluding what had been voluntarily contributed to plaintiff by defendant.

VIII. "Because his honor erred in not calling the attention of the jury to the letter of plaintiff to defendant, which was an implied admission that there was no cause of action in the claim of plaintiff.

IX. "Because his honor erred in not charging the jury that they should weigh very carefully and cautiously the testimony of C. M. Furman and T. Q. Donaldson, inasmuch as their prejudices might unconsciously bias their judgment, the former having testified that he did not admire the defendant, and the latter that he would not make a companion of him.

X. "Because the jury were totally incompetent to grapple with the nice points of law and professional etiquette and custom involved in the case, and blinded by prejudice and argument of counsel. Hence the defendant appeals and asks for reversal or a new trial."

We know of no principle which would exclude the professional services of an attorney from the benefit of the general rule, that services rendered by one at the instance of another should be paid for at their true value, and if there is no express contract to that effect, the law will imply one. Professional services are no less useful than others, whether we regard the preparation necessary to fit one to render them, the importance of the matters with which they are generally concerned, or their real value and importance to those who may engage them. Certainly since the cases of *Duncan v. Breithaupt* and *Huger, as the Executors of Yancey, and William Harper v. C. E. Williamson*,

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decided in 1821, and reported in 1 McCord, 149 and 156, it has been settled in this State, "that an attorney may rightfully and legitimately charge, by way of counsel fee, a sum proportioned to the value of the services, and which a jury of the country, upon evidence before them, are competent to ascertain and decide upon." This proceeds upon the principle above stated, that where one employs another to render him certain services, and the services are rendered, the law implies a contract on the part of the employer to pay their value.

While there does exist in certain localities at least a "courtesy" among gentlemen of the bar not to charge each other, but when requested by a brother lawyer to render him services in the line of their profession without fee or reward, yet where such "courtesy" exists, it does not touch the legal rights of the parties. The very fact that it is called

a courtesy indicates that making no charge is exceptional, and that the general rule is to charge. Besides, even where such courtesy is generally practised, we have no doubt that there are certain well grounded exceptions to the rule, and certainly the moment the parties, from any cause whatever, stand upon their rights, there can be no such thing as courtesy in the case.

As to the exceptions which complain that the action was improperly brought in the name alone of Ellis G. Graydon, when it should have been in the name of "Burt & Graydon," partners in the practice of the law. The presiding Judge says that Mr. Graydon, the plaintiff, proved that he and Mr. Burt were partners in the practice of the law in and for Abbeville County alone; that each was authorized to practice for himself outside of the County of Abbeville, and of course to receive individually the income from such practice on the Circuit. We hear nothing in the case of the employment of Burt & Graydon, or of Mr. Burt, but only of the plaintiff, Mr. Graydon.

Whether the services rendered were valuable, and to what extent, was of course left to the jury, and there is no appeal from their verdict fixing the amount.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. *487

*WEBB v. CHISOLM.

(November Term, 1885.)

[1. *Specific Performance* ¶95.]

A purchaser cannot be compelled to take a doubtful title, but the court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility. *Laurens v. Lucas*, 6 Rich. Eq., 222, recognised and followed.

[Ed. Note.—Cited in *Maccaw v. Crawley*, 59 S. C. 350, 37 S. E. 934.

For other cases, see *Specific Performance*, Cent. Dig. § 262; Dec. Dig. ¶95.]

[2. *Powers* ¶44.]

When an executrix and life tenant had full power under the will to sell the land devised and make titles therefor, provided the proceeds "be reinvested in bank or other stocks or other property," her deed made under this power carried a good title, and it was not the duty of the purchaser to see to the proper application of the purchase money, in the sense that a misapplication of the same could defeat his title. The same principle applied to another power in this case.

[Ed. Note.—Cited in *Campbell v. Virginia-Carolina Chemical Co.*, 68 S. C. 445, 47 S. E. 716.

For other cases, see *Powers*, Cent. Dig. § 164; Dec. Dig. ¶44.]

[3. *Executors and Administrators* ¶147.]

But the purchaser having given his bond and mortgage for the purchase money, and all of the adult remaindermen, except two, having released their interest therein to him, one of those two being largely indebted to the purchaser, and

the other not heard from in twelve years, and the only infant having signed this release and not complained for six years after his majority—there was not any misapplication of the purchase money.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 591-594; Dec. Dig. ¶147.]

[4. *Vendor and Purchaser* ¶150.]

A deed properly executed, even if improperly probated, is binding on the maker.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 297; Dec. Dig. ¶150.]

[5. *Costs* ¶60.]

In action for specific performance of an agreement to purchase a city lot, the Circuit Judge may, in his discretion, decree, that each party pay his own costs.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 271; Dec. Dig. ¶60.]

Before Pressley, J., Charleston, June, 1885.
The opinion sufficiently states the case.

Mr. J. Bachman Chisolm, for appellant.
Messrs. Rutledge & Young, contra.

March 27, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On February 4, 1885, William L. Webb and William B. Chisolm entered into a written agreement by which the said Webb agreed to sell to the said Chisolm a lot of land in the city of Charleston, described in the complaint, for \$2,000, to be paid one-fourth cash, and the remainder in two equal successive annual instalments, secured by a mortgage of the premises sold. Afterwards the purchaser,

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Chisolm, declined *to pay the purchase money, on the ground that the said Webb could not make good titles to the same. Whereupon this action was brought by Webb for specific performance of the agreement, and the following is an agreed statement of the facts:

The lot in question was a part of a tract of land formerly the property of Daniel Cannon Webb, the father of the plaintiff, who died in 1850, leaving a will of which his widow, Eliza Ann Webb, was the sole qualified executrix. The tract of land, of which the lot in question was a part, passed under the residuary clause of his will, which declares, "that the whole of the residue of my estate, both real and personal, I give to my beloved wife, Eliza Ann Webb, for her natural life, and after her death I give the same to my beloved children, share and share alike. * * * But should my beloved wife (in whose prudence and good judgment I have for forty-three years placed implicit confidence) deem it expedient for her comfort or convenience, or the interest of herself and family, to sell any part of my estate, she is hereby authorized to make such sale in public or private, and to make good and

sufficient titles for the same; provided, however, that the moneys arising from such sale be reinvested in bank or other stocks or other property, to be held by her during her life as aforesaid, and to go to my children as aforesaid at her death."

The children of the testator were John Webb, Thomas L. Webb, Martha C. Johnstone, and William L. Webb. On June 27, 1867, Mrs. Eliza A. Webb, the life-tenant with a power of sale, after reciting the terms of the power, and expressly in pursuance thereof, and in consideration of \$9,000, sold and conveyed the aforesaid tract of land, of which the lot in question was a part, to her son, W. L. Webb, as trustee for his wife, Susan W. Webb and children. As to the terms of this conveyance we will speak more particularly hereafter. Contemporaneous with the execution of this deed to William L., as trustee, he executed a mortgage of the premises to secure his bond (\$9,000) for the purchase money. In November, 1870, Mrs. Webb, the mortgagee, assigned the bond and mortgage "for value" to R. H. McDowell, and on February 12, 1885, he entered on the mortgage satisfaction as follows: "The bond

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secured by this mortgage *having been paid in full, I hereby declare said bond and mortgage forever satisfied and discharged."

By deed of July 23, 1873, the other devisees of the father, D. C. Webb, in consideration of moneys due by them to William L. Webb, the purchaser, released to him their interest in the bond and mortgage. This deed was duly executed by the widow and all the children of John Webb¹ and by the husband and all the children of Martha W. C. Johnstone (born Webb), and duly probated, except that the signature of F. W. Johnstone, son of Martha, although signed in the presence of two witnesses, was not proved by either of them. But on August 13, 1873, the said F. W. Johnstone went before James M. Watson, a notary public, in Wilmington, Delaware, "duly commissioned," and acknowledged the signature to the said release to be his free act and deed, and desired that it should be put on record. George² and Charles Webb, children of John Webb, deceased, were not of age in 1873; Charles executed the release when a minor for valuable consideration, and came of age in 1879, and makes no objection. Thomas L. Webb mortgaged his interest to his brother, Wm. L.

¹ Except by Thomas L. Webb, the son of John, who left the State a young man, prior to July, 1873, was last heard from in 1874, and is believed by his family to be dead. Thomas L. Webb, the brother of William L., mortgaged his share in the property to William L. for a sum greatly in excess of his interest in July, 1871, and died in April, 1872. The opinion has confused this uncle and nephew of the same name.—REPORTER.

² George duly executed a release after he came of age. No question was made about George's interest.—REPORTER.

Webb, in July, 1871, for "a sum greatly in excess of his interest in the property," left the State unmarried, and has not been heard from since 1874, and is considered by his family dead.

As before intimated, the deed of Mrs. Eliza A. Webb to her son, William L. Webb, in execution of the power of sale in the will of her husband, D. C. Webb, was in trust for his wife, Susan W. Webb, and children, and itself contained another power of sale on his part. The trusts are long and somewhat complicated, and may be found in the brief. Among other things, the power is given to W. L. Webb to dispose of the land by will, substantially for his wife during her life,

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and after her death for his chil*dren, absolutely, who may be living at the time of her death. The children are two daughters, both of age. In addition, the trust deed to William L. contained a power of sale in the following words: "Provided always, furthermore, that the said W. L. Webb shall, from time to time, and at all times, have full power to sell, barter, exchange, alien, or otherwise dispose of all and singular the aforesaid property, or any other property representing the same: Provided, however, that the proceeds of such sale, barter, exchange, alienation, or other disposition, shall be reinvested in such securities, real or personal, or both, as to the said trustee shall seem fit; and held by him, subject to the trusts hereinbefore declared of and concerning the same; and should the said property not consist in a house, whereby a house can actually be provided as aforesaid, then the annual proceeds arising therefrom shall be applied in such a way as substantially, and as near as possible, to carry out the above said trusts, by applying the annual proceeds thereof to such as would be entitled to a home in any house representing the said property as aforesaid." In February, 1883, William L. Webb, trustee, his wife and two daughters, under this power mortgaged the land to Gourdin, Matthiessen & Co., which mortgage was substituted by another in July, 1884, to secure said Gourdin, Matthiessen & Co. against certain endorsements made by them for Mr. W. L. Webb, but the lien of this mortgage has been lifted from so much of the land as the lot bargained to be sold as aforesaid to Chisolm. The deed tendered to Chisolm by W. L. Webb, trustee, was also executed under this power.

The cause came on to be heard by Judge Pressley, who decreed "that the defendant do comply with his purchase and accept the deed tendered to him in compliance with the contract of sale and purchase, and that each party pay his own costs."

From this decree, the defendant appeals upon the following grounds: "I. Because his honor erred in holding that William L. Webb, trustee, 'has sufficient interest in the

land to enable him to give good title to the portion sold to defendant'; whereas his honor should have held that the plaintiff did not have a good marketable and unencumbered title to the premises. II. Because his honor erred in ordering the defendant to comply

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with his *purchase, and accept the deed tendered to him in compliance with the contract of sale and purchase. III. Because his honor erred in ordering 'that each party pay his own costs'; whereas he should have ordered that plaintiff pay all the costs."

In considering the question as to whether agreements for the sale and purchase of lands shall be enforced by the order of the court, the following rule seems to have been adopted: "A purchaser cannot be compelled to take a doubtful title. But on this subject the court acts on moral certainty, and a purchaser will not be permitted to object to a title on account of a bare possibility." *Laurens v. Lucas*, 6 Rich. Eq., 222, and authorities there cited. Taking this rule as our guide, let us see how this case stands. First, as to the devisees under the will of D. C. Webb. This land was given to the widow, Eliza A., for life with limitation over to his children, who were four in number, viz., John, Thomas L., Martha C. Johnstone, and William L. Webb. The life tenant was also executrix, and had, under the will, a very full power "to sell in public or private, and to make good and sufficient title for the same." &c., provided that the moneys arising from said sale be invested in stocks or property upon the same trusts. Under this power Mrs. Webb sold and conveyed the land to her son, William L. Webb, as trustee, and received the purchase money.

We cannot doubt that her conveyance carried the legal title to William L. Webb, and that it was not his duty to look after the proper application of the purchase money, in the sense that a misapplication of the same could defeat his title. See *Lining v. Peyton*, 2 Desaus., 378, and notes; *Spencer v. Bank*, Bail. Eq., 472; *Redheimer v. Pylon*, Speers Eq., 140, and *Jones v. Hudson*, 23 S. C., 494. But if this were not so, and the title of William L. Webb from his mother depended upon the proper application of the purchase money, we think it appears to a moral certainty that there was no misapplication as to the devisees of D. C. Webb. The parties themselves or their representatives have in effect admitted its proper application. In 1873, all the remaindermen (with the exception hereafter stated), "in consideration of moneys advanced and paid to them"

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(a larger amount than *their interest in the bond and mortgage), released their respective shares to William L. Webb.

It is said, however, that the signature of F. W. Johnstone, one of the children of Martha, was never formally proved by the affi-

davit of the subscribing witnesses. There is nothing in that. It is not denied that he signed it, and went before a notary public in the State of Delaware and declared that it was his act and deed, and he desired it recorded. The release binds him whether it was recorded or not.

Then it is said Charles, one of the children of John, was a minor when he signed with his family. It appears that it was for more than full consideration, and it was not void but voidable. He came of age in 1879, and has made no claim for his share of the purchase money, and we do not think it at all probable that he will ever claim that there was a misapplication of the purchase money, to the extent of his very small share; and if he does, he will not succeed.

But it is still further objected that Thomas L. did not sign the release. That is true; he was not in the State in 1873, when the release was executed. He was a young man without family, and in 1871 he executed a mortgage to his brother, William L. Webb, of all his interest in his father's estate, for a debt largely in excess of his interest in the property, and then left the country. He has never been heard from since 1874, and is presumed to be dead; but if he is not dead in fact, his mortgage is at least evidence that there was no misapplication of the purchase money to the extent of his share.

Second. Then as to the rights of the wife and two daughters of W. L. Webb under the trusts of the deed from Eliza A. Webb to the said William L., as trustee. That deed carried the legal title to William L. Webb, and also gave him full power to sell; and it was under this power that the agreement was made by him to sell part of the premises to the defendant, William B. Chisolm. We know of no reason why the authorities above cited as to the sale and conveyance of Eliza A. Webb to her son, William L., under the power in her husband's will, should not be applicable to the sale and tender of title by the said William L., under the power in the deed to him from his mother, Eliza A. Webb.

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The *children of William L. Webb are of full age. If William L. Webb, acting under the said power, and with the consent of the cestuis que trust, had the right to execute a valid mortgage to Gourdin, Matthiessen & Co., we think he may certainly make a valid sale and conveyance to the defendant, Chisolm. We can not see that there is anything in the view suggested that said mortgage was executed before formal satisfaction was entered on the original mortgage given by William L. Webb to his mother. That mortgage, as we have seen, is now undoubtedly satisfied, and that of Gourdin, Matthiessen & Co. has been released to the extent of the lot now in question. We agree with the Circuit Judge, that the deed tendered to the de-

pendant, Chisolm, carried a good marketable title.

As to the third exception, in relation to so much of the decree as required "each party to pay his own costs." This was a suit in equity for specific performance, and it was within the discretion of the Circuit Judge to direct the payment of the costs, "as a part of the relief given on the final disposition of the cause;" and we see no good reason for interfering in the matter.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

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ARNOLD v. BAILEY.

SAME v. SAME.

(November Term, 1885.)

[1. *Assignments for Benefit of Creditors* ◊ 342.]

It is too late for a creditor, after having accepted an assignment and received his pro rata share of the proceeds, to raise any question as to the validity of the assignment itself, growing out of the provision that all creditors who did not accept should be excluded from its benefit, and the surplus, if any, returned to the assignor.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 1044; Dec. Dig. ◊ 342.]

[2. *Accord and Satisfaction* ◊ 7.]

The rule, that the acceptance of a part of a debt does not operate as a discharge of the whole, applies only to cases where money is paid. The acceptance in writing of the terms of an assignment, and especially a receipt of a portion of the proceeds of the assigned estate, is a sufficient consideration to support the agreement to accept in full, and neither the written acceptance nor the receipt need be under seal.

[Ed. Note.—Cited in *Jaffray v. Steedman*, 35 S. C. 41, 14 S. E. 632; *Burgiss v. Westmoreland*, 38 S. C. 428, 17 S. E. 56; *Ex parte Zeigler*, 83 S. C. 80, 64 S. E. 513, 916, 21 L. R. A. (N. S.) 1005.

For other cases, see Payment, Cent. Dig. § 133; Accord and Satisfaction, Dec. Dig. ◊ 7.]

[3. *Evidence* ◊ 441.]

Where an assignment for the benefit of

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creditors and the acceptance of its terms are both in writing, parol evidence is inadmissible in behalf of an accepting creditor, to show that its terms have been modified in his favor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1733; Dec. Dig. ◊ 441.]

[4. *Trial* ◊ 136.]

A letter alleged to contain a contract, must be construed by the court and not submitted to a jury for construction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. ◊ 136.]

[5. *Contracts* ◊ 189.]

A debtor having made an assignment, wrote to one of his creditors, saying: "I promised to pay you one-half of the amount due you, and intended to do so. In order to close my business, I made an assignment of all my effects to pay my debts. All my effects are placed in the hands of B. [the assignee], who will settle all

my business as soon as it can be done. Your debt will be paid. Your debt will be paid as soon as the money can be made." Held, that this letter was not a promise by the debtor to pay this creditor in full, but referred to an expected payment out of the assigned estate.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 823; Dec. Dig. ◊ 189.]

Before Pressley, J., Abbeville, February, 1885.

Mr. Justice McGOWAN having been of counsel in the case, his seat in this court was occupied by Judge FRASER of the Third Circuit.

James Bailey, the defendant, having made an assignment for the benefit of his creditors on January 14, 1867, wrote to Francis Arnold, the plaintiff, one of his creditors, the following letter, as printed in the brief:

Madison C. H., Fla., Feb. 2, 1867.

Mr. Francis Arnold:

I have yours of 19th January. I intended to pay you one-half of the amount due you, and intended to do so. I sold my own property at a sacrifice conditionally to get money to pay you my part of my obligation, parties failed to comply with their engagements. I done all I could do. I could not remain at home any longer. I was compelled to come here to get my hands fixed and arrangements made. Consequently, in order to close my business in South Carolina, I made an assignment of all my effects to pay my debts. All my effects is placed in the hands of Mr. S. P. Boozer, who will settle all my business as soon as it can be done. Your debt will be paid. Remember this is not a debt of my own. I am not the only party. Your debt will be paid as soon as the money can be made. I regret the delay and disappointment to you, but it is not in my power to prevent it.

Your obedient servant,

(Signed) J. Bailey.

Having received this letter, and, as plaintiff alleges, on the faith of it, plaintiff accepted the assignment, and afterwards, in

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*January, 1870, received his dividends on the two notes held by him against said Bailey. This action was commenced in August, 1883, to recover the balance on these two notes. Verdict was for plaintiff. Other matters are stated in the opinion.

Messrs. Lee & Blake, and Ellis G. Graydon, for appellants.

Messrs. Parker & McGowan, contra.

March 29, 1886. The opinion of the court was delivered by

Mr. Justice FRASER. These cases were tried together. The cases come to this court on exceptions to the admission of testimony, and also to the charge of the presiding judge. Defendant appeals. Only so much of the

facts will be here stated as will be necessary to explain the questions presented to this court.

On September 19, 1856, Bailey & Co. gave to plaintiff a sealed note, payable at one day, for \$1,771.43, and on July 1, 1859, Bailey & Connor gave to plaintiff a sealed note, payable at one day, for \$2,800. The defendant, James Bailey, was a member of each of these firms, but in some way, not material to this case, it had been agreed that he was liable for only one-half of these notes. On January 14, 1867, defendant executed under seal an assignment to S. P. Boozer, in trust for his creditors. The plaintiff accepted this assignment in writing on February 12, 1867, within the time limited by the assignment for acceptance of its terms. This acceptance was not under seal. On February 2, 1867, between the date of the assignment and the acceptance by the plaintiff, a letter was written by defendant from Madison, Florida, to plaintiff in reference to this indebtedness. On January 25, 1870, plaintiff gave his receipt to the trustee under the deed of assignment for the sum of \$2,238.37. This amount being credited on the two notes, left unpaid on defendant's half of these notes, respectively, the sums of \$544.59 and \$764.19. It is claimed that this amount and interest is still due by him, and the action is brought on these notes to recover the amounts. The deed of assignment with the schedules, the acceptance by plaintiff, the Florida letter, and the receipt given by plaintiff to the trustee, will be found in the "Case," and will be referred to when necessary.

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*It will be observed that the action has been brought on the original notes, and not on any new promise to revive an old debt.

It is, therefore, unnecessary to consider how far the existence of a balance of a debt left unpaid by the proceeds of an assignment like this will be a sufficient consideration for the new promise, or what will be a sufficient promise, or in what way it may be proved. The actions are on the original notes, and by the terms of the assignment it was provided that "every accepting creditor shall receive the sum which may be apportioned to him in full satisfaction of his claim against the said James Bailey." The questions, therefore, raised by the exceptions are these: 1. Was there a valid acceptance by the plaintiff of this assignment? 2. Can parol testimony be admitted to show that there was any condition attached to the acceptance other than those contained in the assignment? 3. Was it the duty of the presiding judge to construe the Florida letter? 4. Does that letter so modify the acceptance as to leave the balance on these notes a valid claim against the defendant? An analysis of the various exceptions will show that these are the material questions raised by

this appeal, and the only ones necessary to be considered.

It is too late for the plaintiff, after having accepted the assignment and received his pro rata share of the proceeds, to raise any question as to the validity of the assignment itself, growing out of the provision that all creditors who should not accept should be excluded from its benefits, and the surplus, if any, returned to the debtor, James Bailey. The general rule is that the acceptance of a part of the money due on a note, even if stated to be in full, will not operate as a discharge of the debt unless the receipt or release is under seal. *Mills v. Starr*, 2 Bail., 360; *Eve v. Mosely*, 2 Strob., 203; *Boulware v. Harrison*, 4 Rich. Eq., 317. "If the release is under seal, it implies a consideration, otherwise if it is not under seal and the consideration must be proved." [*Corbett v. Lucas & Dotterer*] 4 McCord, 323.

It is now the well understood law that the rule that the acceptance of a part does not operate as a discharge of the whole unless under seal, applies only to cases where money is paid. Any other valid consideration which can support an agreement, if paid and accepted in good faith, however small

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it may be, will discharge the debt, and the evidence of its acceptance in full need not be under seal. The acceptance in writing of the terms of an assignment, and especially a receipt of a portion of the proceeds of the assigned estate, is a sufficient consideration to support the agreement to accept in full, and neither the acceptance nor the receipt need to be under seal. *Tennant v. Stoney*, 1 Rich. Eq., 222 [44 Am. Dec. 213]; *Aiken v. Price*, Dudley, 50; *Fitch v. Sutton*, 5 East., 230; *Pierce Butler & Co. v. Jones*, 8 S. C., 273 [28 Am. Rep. 288]. If the plaintiff accepted the terms of the assignment and received his pro rata share, he is bound by the terms of the assignment, unless it was in some way legally modified so as not to extinguish his notes except to the extent of actual payment.

Was parol testimony admissible to show that there was any such modification? The doctrine laid down on this subject is that "parol contemporaneous evidence is inadmissible to vary the terms of a valid written instrument," and this applies not only to writings under seal, but to simple contracts in writing as well. *Greenl. Evid.*, 275, 276. See also *Miller v. Edwards*, 18 S. C., 600. All the parol testimony, therefore, which was introduced to show that the terms of the assignment were modified as to these notes was inadmissible.

It was the duty of the presiding judge to have construed the Florida letter, and it would have been error to have referred its construction to the jury. *Mowry v. Stogner*, 3 S. C., 253; *Bank v. Heyward*, 15 Id., 296; *Russell v. Arthur*, 17 Id., 480; *Hammond v.*

A. & P. R. R. Co., 15 Id., 10; DeCamps v. Carpin, 19 Id., 124. The original letter has been examined by the court, and the printed letter in the "Case" corresponds with it except the word "intended" in the first line of the letter in the "Case" is written "promised" in the original. The defendant says, I "promised" to pay, and "intended to do so," both in the past tense. He then says, "In order to close my business in South Carolina, I made an assignment of all my effects to pay my debts. All my effects is placed in the hands of S. P. Boozer, who will settle all my business as soon as it can be done. Your debt will be paid." If S. P. Boozer had all the effects and was to settle all his business in South Carolina, there is no room for the inference that any one

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else was to do it, or that the defendant *himself would do so. He might have gone on to say that in case S. P. Boozer did not pay, he himself would do so. After saying that S. P. Boozer would "settle all his business as soon as it can be done," the words "your debt will be paid" and "your debt will be paid as soon as the money can be made," refer to the expressions going just before, "as soon as the money can be made" and "as soon as it can be done". They seem to refer to the same subject matter, i. e., making the money out of the assigned effects by the trustee. This court, therefore, cannot concur with the Circuit Judge in holding that this letter was a promise to pay plaintiff's debt in full.

Having reached this conclusion as to the construction of this letter, it is not necessary, and perhaps it would not be proper, to consider how far a promise to pay these notes in full, if contained in a letter written under these circumstances, would have been binding on the defendant, either by continuing the liability on the original notes or as the foundation of an action on the new promise itself.

This court holds that it was error to admit in an action on these notes parol testimony to show that the acceptance of the assignment and a pro rata share under its provisions was not in full payment, as provided in the assignment. The court also holds that the Florida letter, whether construed by itself or in connection with the assignment and the acceptance, is not an agreement either to exempt these notes from the conditions of the assignment or sufficient evidence of any new and distinct promise to pay them. What may be a sufficient new promise, and how far the Florida letter and parol testimony are sufficient to establish it, are questions not now before the court.

It is, therefore, ordered and adjudged, that the judgment of the Circuit Court be reversed, and the case remanded to the Circuit Court for a new trial.

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*WOODY v. DEAN.

(November Term, 1885.)

[1. *Appeal and Error* ⇨274.]

An exception to the admission of a judgment roll in evidence does not raise any question as to whether the judgment so introduced was valid and legal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1631; Dec. Dig. ⇨274.]

[2. *Evidence* ⇨183.]

The purchaser at sheriff's sale, under whom defendant claimed, having testified that she had made a search for the sheriff's deed and could not find it, her testimony as to her purchase, her compliance, and her receipt of a deed from the sheriff, though secondary, was admissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 636; Dec. Dig. ⇨183.]

[3. *Trial* ⇨62.]

The judge having admitted in the reply by plaintiff testimony which he ruled to be strictly in reply, but afterwards ruled to be new matter, he did not err in permitting defendant to offer evidence in rebuttal thereof. In such cases much must be left to the discretion of the presiding judge.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 148; Dec. Dig. ⇨62.]

[4. *Evidence* ⇨83; *Judgment* ⇨272.]

A rule of court having forbidden an entry of judgment before the adjournment of court, the Circuit Judge did not err in instructing the jury that a judgment entered on the day that court convened, might, in the absence of all testimony, raise a presumption that the court had on the same day adjourned, as it was the duty of the clerk not to enter judgments of the term before an adjournment.

[Ed. Note.—Cited in *Rice v. Bamberg*, 72 S. C. 385, 51 S. E. 987.

For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. ⇨83; *Judgment*, Cent. Dig. § 523; Dec. Dig. ⇨272.]

[5. *New Trial* ⇨41.]

An erroneous instruction to the jury which could have made no possible difference in their verdict, is not ground for a new trial.

[Ed. Note.—Cited in *Rapley v. Klugh*, 40 S. C. 154, 18 S. E. 680.

For other cases, see *New Trial*, Cent. Dig. § 71; Dec. Dig. ⇨41.]

[6. *Trial* ⇨193.]

A judge should not express to the jury his opinion of what has been proved, and what has not; but in stating the law he must necessarily say something about the testimony. As to any disputed matter of fact in issue between the parties, while he may state the evidence, yet he is not permitted to give his opinion as to its force and effect, or make remarks tending to influence the jury as to their finding. He may state the case alternatively, but he must not take the testimony from the jury.

[Ed. Note.—Cited in *State v. Anderson*, 26 S. C. 602, 2 S. E. 699; *State v. Howell*, 28 S. C. 254, 5 S. E. 617; *Greene v. Duncan*, 37 S. C. 252, 15 S. E. 956; *Norris v. Clinkscales*, 47 S. C. 513, 515, 520, 522, 25 S. E. 797.

For other cases, see *Trial*, Cent. Dig. §§ 436-438; Dec. Dig. ⇨193.]

[7. *Taxation* ⇨796.]

In an action to recover land held by defendant under a sheriff's deed, the plaintiff cannot object to defendant's title upon the ground

that the purchase money was not paid in full to the sheriff.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1578; Dec. Dig. Ⓒ796.]

[8. *Fraudulent Conveyances* Ⓒ169.]

Where a conveyance founded on a valuable consideration is attacked for fraud, fraud in the grantor is not sufficient, but the purchaser also must be implicated. But this rule does not apply to voluntary conveyances; in such case a man must be just before he is generous.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 494, 520; Dec. Dig. Ⓒ169.]

[9. *Taxation* Ⓒ651.]

The judge was asked to charge the jury that "there was no authority for the sheriff to sell the land in dispute under the judgments and executions introduced in evidence." This he declined, saying that the sale would be valid if, at the time, there was any valid judgment or execution to which the sale could be referred. *Held*, that in this there was no error, and that this request did not call upon the judge to charge as to what would constitute a legal judgment or execution.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1319; Dec. Dig. Ⓒ651.]

[10. *Certiorari* Ⓒ1.]

[It is the office of certiorari to test the jurisdiction of the inferior tribunal to which it is directed.]

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 1; Dec. Dig. Ⓒ1.]

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*Before Cothran, J., Spartanburg, March, 1885.

The opinion sufficiently states the case.

Messrs. J. S. R. Thomson and W. S. Thomason, for appellants.

Messrs. Bomar & Simpson, contra.

March 30, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff brought the action below to recover a certain tract of land in the possession of the defendant. The plaintiff claimed under a deed from her father, Larkin Ballenger, dated March 31, 1855, and the defendant, through a deed from the sheriff of Spartanburg, who had sold the land under execution against the said Ballenger, at which sale one Elizabeth White was the purchaser, and from whom, by successive conveyances, the land reached the defendant. So that both parties claimed from a common source; the question was, which had the better title? There was no doubt as to the execution of the plaintiff's deed, but the defendant alleged that at the time of the execution of this deed there were judgments against Larkin Ballenger under which the land had been sold by the sheriff; and, further, that the conveyance from said Ballenger to his daughter (the plaintiff) was a voluntary conveyance, made to hinder and delay creditors, and therefore was fraudulent and void.

The jury found for the defendant. The appeal questions the admission of certain testi-

mony, and assigns error to the charge of his honor, Judge Cothran, who tried the case, and to his refusal to charge certain requests. The exceptions in which these alleged errors are assigned will be disposed of in the order in which they are presented in the "Case."

The 1st complains that a judgment roll and execution in the case of William White v. Larkin Ballenger was admitted in testimony. It is stated in the "Case" that the defendant put in testimony judgment rolls of the Court of Common Pleas against Larkin Ballenger. Among these rolls was one (in-

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dorsed) "Spartanburg, *roll 3792, William White v. Larkin Ballenger. Confession, \$141.36. Interest from July 14, 1873. Recorded in book K, page 639." The execution is not signed by any one, but is tested by the "clerk, otherwise regular." It was to the admission of this roll that the first exception above applies. It will be observed that this exception does not raise any question as to the point whether this roll constituted a judgment, whether in law the legal requisites of a confession had been complied with, so as to make it a valid and legal judgment, but it is confined to the question of its admission in the case as testimony.

The two questions are very different. The first is before us, but the latter is not. The appellant's counsel has argued the latter, and has pointed out several particulars in which he claims that the paper was fatally deficient as a judgment. This may or not be so, but the judge made no ruling on this subject, nor does it appear that he was requested to do so. Or if he did rule upon it, the exception under consideration assigns no error to such ruling. It does no more than object to the paper being in testimony. It may not have been worth much, certainly not unless its defects were sufficiently explained; but its admission for what it was worth does not seem to us to have been legal error. It was competent to the point at least that there was such a roll in the clerk's office. The appellant discusses the legality of other judgments introduced by the defendant, but we find no exception under which such discussion becomes pertinent.

2d exception claims error, because his honor overruled plaintiff's objection to the testimony of Elizabeth White in regard to the sheriff's deed and the contents thereof. This witness was the purchaser at sheriff's sale of the land in dispute. The deed was not produced. The witness was examined by commission, and in reply to the interrogatories she stated, "I know the Larkin Ballenger land. I bid them off at sheriff's sale and paid the bid; the land was sold under execution. All the Larkin Ballenger land was sold. I got a deed for certain lands from Sheriff Wingo. I have made search for this deed but cannot find it. I never bought any other

land at sheriff's sale but the Larkin Ballenger land." &c. It is true that a portion of this is secondary evidence, and it suggests better and primary evidence; but secondary evi-

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dence is *admissible where the primary has been lost or destroyed, after proper search for it in the proper place. The witness testified that she had made search for it. She does not say where, but the paper was hers, she was the proper custodian, and if she was unable to find it after search, the way was clear for the introduction of the secondary evidence which she gave. *Oliver v. Sale*, 17 S. C., 587; 1 *Greenl. Evid.*, § 558; *Floyd v. Mintsey*, 5 *Rich.*, 362; *Berry v. Jourdon*, 11 *Rich.*, 75; *Congdon v. Morgan*, 14 S. C., 592.

3d. Error is alleged in allowing the defendant to put up additional testimony to rebut the testimony offered in reply by plaintiff. It appears that during the reply in testimony by the plaintiff certain evidence was introduced which the judge ruled at first was in reply, but upon consideration he ruled that it was new matter, and he then, because it was new, permitted the defendant to offer rebuttal evidence thereto. This cannot properly be assigned as error. It was simply correcting a mistake. It was no more than putting the parties back in their former status. If this new matter had been introduced by the plaintiff in her evidence in chief, where it ought to have been introduced, certainly the defendant would have been allowed to rebut it, and when it came out in the way it did, justice required that the defendant should be permitted to meet it; otherwise, he would have been taken at a disadvantage, by a mistake of his honor. Besides, the object of all judicial investigations is to reach the truth, and while the mode of procedure, long in use, affords the best of means of accomplishing the end, and therefore should be adhered to, yet in a case like this, where that mode has inadvertently been departed from on the one side, it is no violation of the principle to have the mischief repaired by relaxing the rule on the other side. In such cases much should be left to the discretion of the presiding judge. *Kairson v. Puckhaber*, 14 S. C., 627; *Christian v. Lebeschultz*, 18 *Id.*, 602; *Cantey v. Whitaker*, 17 *Id.*, 529.

4th. "In charging that a judgment obtained in court could be filed and entered on the first day of the term." This exception, it seems to us, was taken under a misapprehension of what the judge said. We do not find in the charge as printed in the "Case" that the judge charged as here stated. On the

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contrary, he *called attention to the old rule, 11, of the court, which forbade the entering of judgments until the rising of the court, and he stated that it did not appear when the court rose, or how long it sat. It was to assemble on that day, and if it adjourned on that day, the judgment was entered up prop-

erly on the day the court met and adjourned—further stating that public officers in the discharge of their public duties were presumed to discharge them properly and according to law, and in order to break this presumption down, there should be proof such as to satisfy the jury that that presumption was not well founded. With this he seems to have left the question to the jury. Where was the error in this? The judge's law seems to be sound, and it is with his law only that we are allowed to deal.

5th. "In charging on the facts, in charging, in substance, that the deeds of gift made by Larkin Ballenger were void." Here, again, we think the appellant misapprehended the charge. We do not find that he charged anywhere directly and positively, or in substance, as alleged, that these deeds were void. On the contrary, he asked what was the purpose of their execution. Was Ballenger in embarrassed circumstances at the time, insolvent, and being sued? Did he mean to defraud his creditors? "If so, the law would not tolerate fraud, &c., but it is for you to say for what purpose. If it was fraudulent, then they cannot stand; otherwise a man can do as he pleases with his own, because it is his." These remarks are not objected to, except in the general language of the exception, that, in substance, he charged that the deeds were void. We do not think the exception is sustained by the charge. Nor do we find that the 6th exception is borne out by the charge.

7th. "Because his honor charged that when the sheriff levies upon land under execution, the titles by operation of law pass out of the defendant and into the sheriff." This is an abstract question, in no way affecting this case. What the judge meant, as it evidently appears from reading all of his charge on this point, was that the sheriff, when he levied on land, was invested with power to convey the same to the purchaser by executing a deed thereof. But even if he expressed this idea in the language of the exception, what difference did it make? It could have

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had *no influence with the jury in determining the question of title as between the parties litigant. The main idea was that after levy and upon the sale, the sheriff could convey to the purchaser. It could have made no difference to the jury, whether he obtained title when he levied or was invested with power to convey when he sold.

We do not see where he charged as objected in the 8th exception, but if he did, that is disposed of by what has already been said.

The 9th "alleges that the judge charged on the facts, in reference to Mrs. White obtaining from the sheriff a deed for the land in dispute." While a judge has no right under the constitution to charge on the facts to the extent of giving his opinion to the jury,

of what has or has not been proved as matter of fact, yet, in stating the law, he must necessarily say something about the testimony, or else his charge would be barren of fruit, and in many cases a useless ceremony. The appellant has not pointed out to us wherein the judge gave his opinion to the jury in connection with Mrs. White obtaining a deed from the sheriff. He stated what Mrs. White said, but he did not say that in his opinion it was true, nor that the jury was bound to find the facts as she stated them.

10th error. "In charging that the sheriff could make a valid deed to Mrs. White, although she had not paid her bid in full, \$19 being unpaid." The sheriff may have made himself responsible for this balance, if he executed the deed in advance of its payment, but the deed would not have been void on account of its non-payment. Upon executing the deed, he is presumed to have received the money, and, as to the execution creditors, he would be estopped from denying it. Besides, there is no evidence that any one entitled to this balance has complained.

The 11th exception is the 10th in a different form, and the 12th has no bearing upon the case, and the same may be said as to the 13th.

14th. Again complains that the judge charged on the facts, in reference to Mrs. White's agreement with the children of Larkin Ballenger, to make titles to them when she was reimbursed the money paid by her. Charging on the facts is a vague term, al-

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*though qualified by stating the subject-matter, to which the charge referred, as in this exception, and the other exceptions, as to the facts. Sometimes a fact is admitted all round, and in such case there would be no objection to the judge assuming it, and declaring the law applicable to such fact. What is meant by the constitutional inhibition upon a judge in charging on the facts, as we understand it, is that as to any disputed matter of fact in issue between the parties, while he may state the evidence, read it over to the jury, or state it orally, yet he is not permitted to give his opinion as to its force and effect, or make remarks intended, or tending, to influence the jury as to their finding. He may state the case alternatively, as, if they find thus and so from the testimony, which he has recounted to them, the law will be one way, if not, it will be otherwise. The point is, that the judge shall not take the testimony from the jury, either directly or impliedly, as to its effect. It has not been pointed out to us wherein Judge Cothran violated this rule below.

The 15th and 16th exceptions were not discussed by the appellant, nor do we see their pertinency.

17th. "Alleges error, because his honor re-

fused to charge that it is not sufficient to defeat plaintiff's title, simply to show that the grantor had a fraudulent intent when he conveyed it to her, and in charging that such rule cannot apply here." His honor was requested to charge "that it was not enough to show that the grantor's conveyance was with fraudulent intent." He replied: "That would be so, if this conveyance was a conveyance for valuable consideration, but that rule does not apply to voluntary conveyances, and especially conveyances to children." Was this not the proper and legal distinction between these two classes of conveyances? Ordinarily, it is true that where a conveyance, founded on a valuable consideration, is attacked for fraud, you must not only prove the fraud in the grantor, but you must go further and implicate the purchaser; but this rule does not apply to voluntary conveyances. In such case, a man must be just before he is generous, and he cannot part with his property by a mere gift, thereby defeating his creditors, however innocent or commendable may be his motives, or however worthy the objects of his bounty.

18th, and the last. "There was not au-

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thority for the sheriff *to sell the land in dispute under judgment and executions introduced in testimony." In reply to a request to charge this, his honor said: "I cannot charge this, gentlemen, because you may find from the proof here that there were judgments; and if there was any judgment in the sheriff's office at the time the sale was made, to which that sale could be referred, the law says that it is a valid sale, whether the execution under which he levied was a good execution or not. If there was an execution in this office to which this sale could be referred, then the sale was valid for the purpose of taking title out of the parties. *Agnew v. Adams*, 17 S. C., 364. I have charged you already upon the subject of enough property remaining to satisfy the judgments against him, outside of the lands conveyed to the plaintiff. But it must appear clearly that there was enough in his possession, not only to satisfy the execution, but to pay all of his debts. Where a man conveys his property voluntarily, and owes debts at the same time, if he has not got an abundance of property to pay the debts, then the creditors who are injured by that voluntary conveyance have the right to draw that property back."

The main point in this quotation is, that the judge declined to say for himself that the judgments or executions introduced were insufficient. What would constitute a legal judgment or execution was doubtless a question of law, and had the judge been requested to state the legal requisites of a valid judgment, and he had declined or had stated them incorrectly, an exception would have been proper; but whether there was

such a judgment, was a question of fact. This he left to the jury, and had he not done so, he would have usurped the province of the jury, and been subject to the criticism of charging on the facts. His law, that if there was any judgment or execution in the office under which the sale could be made, whether levied or not, yet the sale would attach thereto, was certainly correct.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. *507

*STATE ex relatione NESBITT v. MARSHALL.

(November Term, 1885.)

[1. *Justices of the Peace* ⚭36.]

A proceeding before a trial justice to eject a tenant (Gen. Stat. § 1819), who claims title in himself, is not an action involving the title to land, but a summary proceeding, and the trial justice has jurisdiction. *O'Neale v. Fickling*, 10 S. C., 301.

[Ed. Note.—Cited in *Swygert v. Goodwin*, 32 S. C. 148, 10 S. E. 933.

For other cases, see *Justices of the Peace*, Cent. Dig. § 91; Dec. Dig. ⚭36.]

[2. *Landlord and Tenant* ⚭304.]

But in such proceeding, the tenant must be personally served with the notice to show cause, and when served by copy left, and he appeared and objected to the jurisdiction upon this ground, the trial justice was without jurisdiction, and the tenant, under a writ of certiorari, is entitled to have the proceeding vacated.

[Ed. Note.—Cited in *Shumate v. Harbin*, 35 S. C. 527, 15 S. E. 270; *Kellar v. Pagan*, 54 S. C. 265, 32 S. E. 353.

For other cases, see *Landlord and Tenant*, Cent. Dig. § 1300; Dec. Dig. ⚭304.]

[This case is also cited in *Kellar v. Pagan*, 54 S. C. 263, 32 S. E. 353, as to facts.]

Before Wallace, J., Richland, December, 1884.

The opinion fully states the case.

[For subsequent opinion, see 28 S. C. 539, 6 S. E. 564.]

Messrs. Bacon & Moore, for appellant.

Messrs. Lyles & Haynsworth, contra.

April 1, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This was a petition praying a writ of certiorari, to be directed to J. Q. Marshall, trial justice for Richland County, commanding him to certify and send to the court below a certain proceeding had before him by the respondent, Cavender, as alleged landlord, to eject the appellant, as alleged tenant, from certain real estate situate in said county. Upon this petition, a rule to show cause was issued by his honor, Judge Kershaw, upon the return to which the case was heard by his honor, Judge Wallace, who issued an order, of which the following is a copy: "The petition

for the issuance of a writ of certiorari in the above entitled cause having been heard: it is ordered, that the said petition be, and the same is hereby, refused, and that the order of Judge Kershaw restraining the respondent herein be, and the same is hereby, dissolved." From this order the appeal before us has been taken, with a number of exceptions, which, however, need not be set out seriatim, as we think the points involved may be considered and determined without this.

The appellant claims as a foundation for

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the writ, that the trial justice had no jurisdiction, either of the subject matter in question or of the person of the relator; not of the subject matter, because title to land was raised, and not of the person, because he had not been personally served with notice to quit, or to show cause why he should not be ejected, as required by section 1819, General Statutes. Further, that the relator was not a tenant of Cavender, and owed no rent; that no entry and claim of possession of the premises had been made by Cavender, and that the trial justice committed errors of law in refusing to hear certain testimony offered by the relator and in allowing certain other testimony offered by Cavender; and also that there was error of law in the ruling of the trial justice in some other respects.

We think that the main questions raised in this appeal are concluded by our cases of *O'Neale v. Fickling*, 10 S. C., 301; *State ex rel. McCall v. Cohen*, 13 Id., 198; and *State ex rel. Maxwell v. Lewis*, 21 Id., 598. In the first case above, the proceeding below was to eject the petitioner from certain premises in the city of Columbia, of which the respondent claimed to be the owner, and that the petitioner was a tenant at will. The petitioner denied the tenancy at will, and claimed title in herself. The trial justice heard the proceeding, and ordered the petitioner to be ejected, and the petitioner prayed a writ of prohibition, mainly upon the grounds: 1st. That title to real estate being involved, the trial justice had no jurisdiction; and 2d. That it appeared on the face of the proceedings that the relator was not a tenant at will. The court held, that while it was the law, that trial justices had been excluded from jurisdiction in "actions" where the title to real estate came in question (Old Code, § 81), yet that this law did not apply to summary proceedings like the one then under consideration, because such proceeding could not be regarded as constituting an action. The court says: "That this was not intended is evident from the fact that this section [the section under which the proceeding had been instituted] was re-enacted as a part of the general statutes, after the code took effect." Now, this

applies fully to the case here. For the reason given above, the proceeding before the trial justice, Marshall, was not an action in the sense of section 81, old code, and therefore, under authority of *O'Neale v.*

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Fickling, supra, the raising of title by the relator did not oust the trial justice of jurisdiction on that ground.

Inasmuch as this case, however, ultimately turns upon another question of jurisdiction in the trial justice's court, it is not necessary to discuss the errors of law assigned to the court below, nor how far such alleged errors are reviewable by this court, on appeals in certiorari proceedings originating in the Court of Common Pleas. But there is no doubt that it belongs to the office of certiorari to test the jurisdiction of the inferior court to which it may be directed. We have, therefore, addressed ourselves to this question in the first instance, and finding the trial justice's court was without jurisdiction for the reasons given below, we have not considered the errors of law assigned.

As to the subject matter, the question of title being out of the way, it may be assumed for this case that the trial justice had jurisdiction, under section 1819 of General Statutes, and whether the rent was due, or had been paid in whole or in part, were questions of fact for him, and also in a case of prohibition it would be for him to ascertain, whether the relation of landlord and tenant existed between the parties, and whether it was of the character required by the section of the General Statutes under which he was acting. *O'Neale v. Fickling*, supra. See, however, *Leonard's Case*, 3 Rich., 113; *Cooper v. Stocker*, 9 Rich., 292; and *State ex rel. Sawyer v. Fort & Harth* [24 S. C. 510], next case infra, as to certiorari.

But to give the trial justice complete jurisdiction, it should appear upon the face of the proceedings that he had jurisdiction of the person of the relator as well as the subject matter. Now, to give the trial justice such jurisdiction, the section 1819 requires that he shall have a notice served on the tenant to show cause before him, if he can, within three days from its date, why he should not be dispossessed, and that this service shall be a personal service. In the case of *State ex rel. McCall v. Cohen*, it was held that a judgment rendered by an inferior court against a party not brought within its jurisdiction by proper service of process, may be set aside under proceedings by certiorari. True, it was intimated in that case that a voluntary appearance without service before judgment would have been sufficient,

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as equivalent to a personal service. Code, § 160. And in the case of *State ex rel. Maxwell v. Lewis*, it was held, where the trial justice himself had served the process, which

was irregular, yet the defendant having appeared and fixed a day for the trial, could not afterwards interpose the objection of non-service.

Now, the relator here was not personally served. He denies such service, and the constable testified that the service was made by leaving a copy at the house of the relator; but, notwithstanding this, had he voluntarily appeared, without objecting to the service, under the authority of the cases supra, he would have been concluded. Did he voluntarily appear? He appeared and demanded a complaint to be filed, setting forth the cause of action. He then answered, objecting, amongst other things, that no personal service of the notice to show cause had been made upon him, thus raising a jurisdictional question. This, it seems to us, is different from those cases where the party appears without service of summons and consents to go on with the cause. The objection that no personal service had been made, was in effect a protest to the further progress of the case, and it accompanied its progress to termination. It is true that the relator, not having been personally served, might have disregarded the notice, and might have refused to appear; then clearly the trial justice would not have had jurisdiction of his person. *McCall v. Cohen*, and *Maxwell v. Mitchell*, supra. If so, should his appearing under protest give jurisdiction? We think not.

It is the judgment of this court, that the judgment of the Circuit Court be reversed, and that the proceeding before the trial justice be vacated and set aside.

24 S. C. 510

The STATE ex relatione SAWYER v. FORT.
(November Term, 1885.)

[1. *Certiorari* ⇨64.]

Under the grant of powers by the constitution to the Supreme Court, that court can, under its writ of certiorari, inquire only as to the jurisdiction of the inferior court (*Ex parte Childs*, 12 S. C., 111); but the Court of Common Pleas, under the same writ issued by that court, can also review errors of law apparent upon the record, but not errors of fact.

[Ed. Note.—Cited in *Frazee v. Beattie*, 26 S. C. 350, 2 S. E. 125; *Ex parte Bacon*, 36 S. C. 130, 15 S. E. 204, 16 L. R. A. 586; *Salinas & Sons v. Aultman & Co.*, 49 S. C. 383, 27 S. E. 407.

For other cases, see *Certiorari*, Cent. Dig. § 175; Dec. Dig. ⇨64.]

[2. *Landlord and Tenant* ⇨315.]

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*In proceedings to eject a tenant at will holding over (Gen. Stat., § 1818), findings of fact by the trial justice are final, and cannot be reviewed under any process.

[Ed. Note.—Cited in *State ex rel. Nesbitt v. Marshall*, 24 S. C. 509; *Charles v. Byrd*, 29 S. C. 558, 8 S. E. 1; *Morris v. Palmer*, 44 S. C. 468, 22 S. E. 726.

For other cases, see *Landlord and Tenant*, Cent. Dig. § 1328; Dec. Dig. ⇨315.]

[3. *Certiorari* ⇨29.]

Under a writ of certiorari issued by the Court of Common Pleas, that court has the power to determine, as matter of law, the construction of a written agreement; and having construed it as not creating the relation of tenancy at will, it has the power to restrain the order of the trial justice based upon a contrary construction.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 42; Dec. Dig. ⇨29.]

[4. *Landlord and Tenant* ⇨302.]

Where a tenant rents land for a year, and agrees to surrender possession at the end of the year, but continues in possession for two years longer, it is not a tenancy at will; and, therefore, in such case a trial justice has no jurisdiction, under section 1818 of the General Statutes.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 1298; Dec. Dig. ⇨302.]

Before Kershaw, J., Lexington, June, 1885.

The tenancy in this case was under the following agreement:

State of South Carolina, County of Lexington.

These presents are known as such: Wm. Fort, now deceased, purchased a tract of land at sheriff's sale, sold as the estate land of George Sawyer, deceased, February 7th, 1870, and sold the same to George Sawyer and John W. Sawyer, on condition that they pay him the sum of twenty-five hundred dollars, with interest from 7th July, 1870, interest to be paid annually; and whereas the said George Sawyer and John W. Sawyer are unable to pay the said Wm. Fort for the same, we, whose names are signed to this instrument, make this agreement, and we desire to have a settlement without litigation or suits at law. I, H. Arthur Fort, administrator of the estate of Wm. Fort, do hereby certify and agree that if George Sawyer and John W. Sawyer will yield to the said H. Arthur Fort, as aforesaid, peaceable possession of all that piece, parcel, or tract of land, containing five thousand three hundred and thirty-eight acres of land (well understood that fifty-five acres are to be deducted, as I, the said H. Arthur Fort, have made to the said George and J. W. Sawyer a title for the same), the said George Sawyer and John W. Sawyer are to be released from said agreement on the payment of the sum mentioned with the interest thereon; and also they are to be released from the payment of the dower and the costs that Wm. Fort and H. Arthur Fort have paid for them in the case of *Ann C. Murphy vs. W. Fort, George and J. W. Sawyer*, and also the taxes for the same that has been paid by W. and H. Arthur Fort since the purchase of the land by W. Fort.

I, the said H. Arthur Fort, promise and agree to permit George and John W. Sawyer

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to stay upon said land and cultivate all *or any portion of the land that is now cleared and under fence for one year; and that said George Sawyer and John W. Sawyer be per-

mitted to cut, saw, and raft two hundred logs off of said land, and saw all logs that they have cut and on hand ready to be sawed and raft the same to Charleston. They are also permitted to remove and raft to Charleston lumber and timber that they have on hand sawed and cut up to this date; they, the said George Sawyer and John W. Sawyer, are permitted to saw and raft all the timber John W. Scofield may cut and haul to said mill within one month from date, and to saw all the timber John W. Scofield now has at said mill.

In consideration of the foregoing agreement, H. Arthur Fort, administrator as aforesaid, promises and agrees to withdraw a suit entered against George Sawyer and John W. Sawyer on an injunction, and that the suit shall proceed no further against them.

In witness whereof we have set our hands and seal, January 27th, 1882. H. Arthur Fort, Geo. Sawyer.

The trial justice reported his judgment and the reasons therefor, as follows:

Mr. Meetze had the defendant, George Sawyer, sworn, and endeavored to prove by him that he (George Sawyer) claimed to hold the land at that time as tenant of minor heirs of George Sawyer, sr., deceased, who had commenced an action against Col. Fort's heirs for the possession of this land. Mr. Graham, attorney for plaintiff, objected to this evidence or defence on the ground that the defendant was estopped from such defence because he was plaintiff's tenant, having entered under him, and had not surrendered his tenancy, nor had he ever notified plaintiff that he held adversely to him or for third parties, and therefore he was estopped from such defence, because it was contrary to public policy; and to support this objection he cited me to the following authorities, to wit: Sedg. & Wait T. T. L., pp. 218-20, and authorities there cited; and also cited the following South Carolina decisions: *Syme v. Sanders*, 4 Strob., 201; *Milhouse v. Patrick*, 6 Rich., 352. Under the foregoing authorities I held that defendant was estopped from such defence, and accordingly ruled out his testimony.

Defendant then claimed that I had no ju-

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risdiction of the case, *because the proper notice to quit had not been given to defendant by Mr. Fort. I have already stated Mr. Fort's testimony, which was amply sufficient under the circumstances of this case, for Mr. Fort had notified him personally on more than one occasion, besides he had written him twice what he might depend on if he failed to make satisfactory arrangements about the rent, and Mr. Fort had never given him permission to remain on this land. *Davis v. Carew and Dawson*, 1 Rich., 276. Besides this, the Supreme Court, in the case of the *State v. Stenart*, decides that "A tenant

who, after the expiration of the first year, continues to hold over without any new contract, except that implied by law, and refuses to give his note for the rent, as he had done in the first year, or to pay rent, is not entitled to the usual notice to quit. But the defendant endeavored to show that he claimed to hold the land for third parties, which conduct on his part waived the notice if he had not been notified legally (which is not the case)." *State v. Stenart*, 5 Strobl., 31.

The defendant did not pretend to claim any title in himself to this land, and his whole conduct showed that he never intended to pay any rent to Mr. Fort. In a word, the defendant absolutely failed to show any cause why he should not be ejected from the said premises.

Therefore I passed an order directing that a writ of ejectment should issue against him, requiring the sheriff or any lawful constable of Lexington County to eject him from said premises; and on the same day I issued a warrant of ejectment against him, according to the statute in such case made and provided.

The Circuit decree was as follows:

In this case summary proceedings had been instituted on the part of the plaintiff to eject the defendant as tenant of the land described in the proceedings, under section 1818 of the General Statutes. An order of ejectment was issued by the trial justice, and the defendant petitioned for and obtained a writ of certiorari issued to the Trial Justice Court, requiring that the record be brought into this court for examination on account of alleged defects in the same arising from the want of jurisdiction and power of that court to proceed under the act in question under the circumstances of this case.

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*In order to the exercise of the power attained by the Trial Justice Court, the act invoked by plaintiff, all the circumstances must concur, required by the act, before the court would have jurisdiction. The case must clearly fall within one or more of the specified instances in which the act authorizes the Trial Justice Court to proceed in this manner. The person sought to be ejected must either be the tenant at will of the premises, or must have gone into possession of the same under a contract of service as a domestic servant or common laborer, or otherwise. The act applies only to those classes of tenants and none other.

If the agreement introduced by the plaintiff is to be considered as characterizing the nature of the holding (and it is certainly the best and most reliable evidence appearing in the case), the defendant held under the terms of that paper for one year from January 27, 1882, and agreed to surrender the possession of the land at the expiration of that time. The defendant did not so surren-

der, but continued to hold and occupy the land during the years 1883 and 1884, and not until the present year was there any demand for possession or notice to quit; and it may well be doubted if the notice or demand here claimed to have been made was sufficient or would have been sufficient to terminate a tenancy, and to set in motion the machinery provided by the act for the ejectment of the tenant.

But conceding that the proceedings would have been regular in the case of a tenant at will, can the defendant be so regarded? He did not enter as tenant at will, but as purchaser under a valid contract. This is stated in the written agreement; certainly up to the date of that instrument he held in his own right and not as tenant. That agreement undertakes to set aside the contract of sale, and it was agreed thereby, that if the defendant would give up possession of the land, he should be released from all liabilities for the purchase money, and should occupy the premises for one year longer. Now, if we give to this agreement the same effect as if it were a lease of the premises for one year, and an acknowledgment of tenancy for a year, which is the most favorable view for the plaintiff, when he held on for another year, held again for another year, he became a tenant from year to year, and the terms of the act would not apply to such a tenancy.

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*If the agreement is not to be construed as creating a tenancy by contract for a year from its date, it must be a contract to surrender the possession of the land at the expiration of a year, and the incidents of a tenancy would not attach, but it would have been an agreement to be enforced by those courts having the power to enforce the performance of contracts. However, as I have said, it is most favorable to the plaintiff to construe it a contract for a tenancy for a year, which continuing, resolved itself into a tenancy from year to year, which can be terminated only in the modes applicable to such a tenancy. Any other view of the case appears to me impossible to be entertained.

To eject a farmer at this season of the year, and so deprive him of the fruits of his labor, would require the strongest and clearest case of right to sustain it. If the plaintiff, before the commencement of the new year, had served the defendant with notice to quit in proper time, there would have been no wrong done in ejecting him; it would have been the defendant's own wrong to have continued in possession and planting a crop upon the land would have been his own folly. But after having suffered defendant to continue year after year without notice to quit, the continuance in possession during the present year was a right of the defendant, of which he cannot be deprived by the method adopted in this case.

It is therefore ordered and adjudged, that the proceedings of the Trial Justice's Court herein are without jurisdiction, null, and void, and that the same and all proceedings thereunder be set aside.

From this decree the respondents, Fort and Harth, appealed on the following grounds:

1. Because it appeared upon the face of the return and petition that the proceedings in this cause were had in a matter pending, within the summary jurisdiction of Wm. T. Harth, trial justice, and that having jurisdiction of the subject matter and the person of the defendant, George Sawyer, the Circuit Judge could not, by the writ of certiorari, it is submitted, review the judgment or proceedings in said cause.

2. Because the Circuit Judge erred in holding and deciding that the defendant, George

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Sawyer, was a tenant from year to *year, and could not be ejected by a trial justice under section 1818 of the General Statutes.

3. Because it is respectfully submitted that the Circuit Judge committed a gross error in holding and deciding that, "To eject a farmer at this season of the year, and so deprive him of the fruits of his labor, would require the strongest and clearest case of right to sustain it."

4. Because the decision of the Circuit Judge shows that he set aside the judgment of Trial Justice Harth, simply because the defendant, George Sawyer, had planted a crop upon the premises from which the plaintiff sought to have him ejected.

5. Because the Circuit Judge erred in finding as a fact that the plaintiff, James C. Fort, had not demanded possession of the premises in question, or notified the defendant, George Sawyer, to quit until the present year, whereas the evidence offered by the plaintiff showed that the defendant had been notified verbally and in writing on more than one occasion prior to the present year, and Trial Justice Harth found as a fact that he had been so notified.

6. Because the Circuit Judge erred in holding "that the proceedings of the Trial Justice Court were without jurisdiction, null, and void."

7. Because the Circuit Judge had no right to review the facts found by the trial justice, nor had he any right to set aside the proceedings of the trial justice in said cause.

Mr. George T. Graham, for appellant.
Messrs. Meetze and Muller, contra.

April 1, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case the appellant, J. C. Fort, obtained an order from W. I. Harth, a trial justice in Lexington County, to eject the respondent, Sawyer, from a certain tract of land, by proceedings under section 1818, General Statutes, providing for the ejectment of tenants at will and

domestic servants. Thereupon the respondent petitioned his honor, J. B. Kershaw, for the writ of certiorari, which was granted.

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Upon *hearing the return to this writ, his honor holding that the proceedings before the trial justice were without jurisdiction, and therefore null and void, ordered the same to be set aside. The appeal questions the correctness of this order.

The appellant in support of the appeal contends, first, that the office of certiorari is not for the correction of errors of law or fact in the inferior court, but it is to test the jurisdiction of such court, and that this is its only office; second, that the errors complained of here did not involve a jurisdictional question in the Trial Justice's Court, and therefore, even admitting the complaint to be well founded, yet said errors are beyond the reach of certiorari; the questions involved belonging under the act to the trial justice, and without appeal. The case of *Ex parte Childs* (12 S. C., 111), is relied upon to sustain the first position, and *O'Neale v. Fickling* (10 S. C., 301), the second.

Ex parte Childs was a case within the original jurisdiction of this court, and what was said in that case, it must be remembered, was applicable to the office of the writ, as issued by this, the Supreme Court, under the authority of the constitution, giving it power to issue certain writs. Art. IV., § 4. And it is true that the court there did hold that the only office of certiorari, when issued by the Supreme Court, was to confine inferior courts within their legal and proper boundary, and that neither errors of law nor of fact, made in a case within the jurisdiction of said courts could be brought up for review by this court under writ of certiorari, issued by said court. This decision was in accordance with the construction of art. IV., section 4, of the constitution given by the Supreme Court in the case of the State *ex rel. Wallace v. Hayne and Mackey* (8 S. C., 368), in which it was held, that while the power of the Supreme Court, in reference to certain writs named in the constitution, to wit: injunctions, mandamus, &c., was the same as it existed at common law when the constitution was adopted, yet with reference to other original and remedial writs not named, as certiorari, its power was limited by the words, "as may be necessary to give it general supervisory control of all other courts in the State;" and in the case of *Ex parte Childs*, *supra*, these words were construed as limiting the power of this court in

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such writs to the supervising of the jurisdiction of the other courts, and not to the correction of either errors of law or fact made therein, the powers of this court as to errors of fact and law being confined, under the constitution, to appellate cases in chancery, and to the correction of errors of law

under such regulations as the general assembly may prescribe. And no regulations having been prescribed by the general assembly by which the errors of inferior tribunals can be corrected through the medium of certiorari, it followed, as Melver, A. J., said in delivering the opinion, that such errors could not be so corrected by this court. "And, therefore, however it may be as to the Court of Common Pleas, this court cannot issue a writ of certiorari as a substitute for a writ of error."

The case of *Ex parte Childs*, however, did not decide that the Court of Common Pleas in certiorari was confined to jurisdictional errors, as is the Supreme Court. The general question as to the office of certiorari, it is true, was somewhat discussed, but as to the power of the Court of Common Pleas thereunder, there was no positive adjudication, because that question was not before the court; and therefore, as will be seen from the extract above, it was left open. This question, however, has been before our court in at least three cases. *State v. Seuff & Prioleau*, 2 Hill, 367; *State v. Stewart*, 5 Strob., 29; and *Cooper v. Stocker*, 9 Rich., 292; in each of which it was held, that while the writ of certiorari could not be regarded as a substitute for an appeal, and while errors of fact could not be reviewed thereunder, yet that the Court of Common Pleas might review errors of law, although not jurisdictional in their nature, when the record had been brought up by the writ.

It may be regarded as somewhat of an anomaly that the Court of Common Pleas should have greater power under the writ of certiorari than the Supreme Court, but yet such is the law under the cases supra; and besides, when article IV., section 15, of the constitution, in which power is conferred upon the Court of Common Pleas to issue these writs, is compared with section 4, of article IV., conferring this power on the Supreme Court, it would seem that the framers of the constitution had in view this difference. In the first, it is declared that "the Court of Common Pleas shall have power to issue writs of mandamus, prohibition, and

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scire *facias, and all other writs which may be necessary for carrying their powers fully into effect." In the second, that the Supreme Court "shall always have power to issue, * * and such other original and remedial writs as may be necessary to give it general supervisory control over all other courts in the State." Why this difference in the terms employed, but to show a difference in the powers conferred? And that the Supreme Court has none of the powers of a writ of error, for the correction of errors at law under a certiorari, is made still more plain by the fact, as already stated, that the constitution further provided that such errors of law could be corrected by said court only under such regulations as the general as-

sembly might provide. These regulations have been provided, and they do not include proceeding by certiorari.

So that we conclude that there was no error on the part of the Circuit Judge in looking into all assigned errors of questions of law involved, whether jurisdictional or otherwise, there being no appeal allowed in such cases, the ordinary mode of correcting such errors. *State ex rel. McCall v. Cohen*, 13 S. C., 198.

It is contended, second, that the trial justice had jurisdiction of the subject matter, and of the person of the respondent, and such being the case that all questions arising were for him, and without appeal—that his decision was final, subject to no review. So far as any errors of law are concerned, what we have said above disposes of this question. But the position of the appellant is correct as to the facts. These cannot be reviewed either by certiorari or by any other process; whether wisely so or not, they are final with the inferior court. Now, was the order of the Circuit Judge based upon a question of fact, or was it upon a question of law? And if upon the latter, did the judge err in his holding? The proceeding under which the trial justice acted, was founded upon section 1818 of General Statutes, which provides for the ejectment of tenants at will and domestic servants. It is not claimed that the respondent was a domestic servant, but the trial justice held that he was a tenant at will, and therefore ordered that he be ejected. The Circuit Judge holds that respondent was not a tenant at will, and therefore that the trial justice had no jurisdiction.

The appellant relies upon *O'Neale v. Fick-*

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ling (10 S. C., 302), *in which the court said: "That it was for the trial justice to ascertain by proofs whether the relation of landlord and tenant existed between the parties, and, if a tenancy existed, whether it was of the character that the statute required, and if the trial justice arrived at an erroneous conclusion, that is no ground for prohibition." That case was a case of ejectment, like this, of an alleged tenant at will. The question raised by the defendant was title, and the trial justice having disregarded this defence, a writ in prohibition was sought, mainly on the ground that the question of title being raised, the jurisdiction of the trial justice was ousted. The court held that the proceeding before the trial justice not being an action, the defence of title did not oust jurisdiction, under section 78 of the Code. It does not appear in the case upon what evidence the tenancy rested. It is true, that one of the exceptions claimed, "that his honor erred in refusing the prohibition, when the fact appeared on the face of the return, that the relator was not a tenant at will," and it was in reply to this exception, that the court used the language quoted above, and which is relied on by appellants here.

We do not think that this concludes this case, for several reasons. First, the case of *O'Neale v. Fickling* was a case of prohibition, and not certiorari, and the court in that case held, that the only ground of prohibition is want of jurisdiction—that it can “be properly asked only on the ground that the issue was placed by law beyond the jurisdiction of the trial justice to determine the truth or falsehood of the allegations contained therein.” While in reference to certiorari, the cases referred to above have distinctly determined that questions of law other than jurisdictional may be considered thereunder. See *Leonard's Case*, 3 Rich., 113; *Cooper v. Stocker*, 9 Rich., 292; in both of which cases it was held, that errors of judgment in a point of law by an inferior court could not be reviewed under prohibition, the remedy being a writ of certiorari. See, also, *State ex rel. Richland County v. Columbia*, 17 S. C., 82. Second. It does not appear, in that case, but that the tenancy at will was entirely a question of fact. If so, the ruling of the court was in accordance with the cases *supra*, even in cases of certiorari, as it is nowhere contended that the facts can be reviewed in such proceedings.

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*In the case before the court, whether the respondent was a tenant at will, it is true, was the main question, but this question did not depend upon the evidence of facts, the truth or falsehood of which had to be determined; but it depended upon the construction of a certain agreement between the parties, which was before the court. This was a question of law, and therefore subject to review. We think, therefore, that the Circuit Judge was not bound by the judgment of the trial justice as to the construction of this agreement, as he would have been upon a mere finding of a fact, and that he had the right to construe it for himself. We think further, that his construction was the correct one, and that there did not exist such a relation of tenancy at will between these parties as gave jurisdiction to the trial justice to eject respondent under section 1818, General Statutes.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

24 S. C. 521

HOLLADY v. HOLLADY.

SAME v. SAME.

(November Term, 1885.)

[1. *Executors and Administrators* ⚡513.]

Where executors made a final return, crediting themselves with debts paid, but not charging themselves with rents received from lands of the devisees, an order of the probate judge approving this return and striking a balance in

favor of the executors cannot be pleaded as *res judicata* to an action afterwards brought by these devisees against the executors for the recovery of such rents.

[Ed. Note.—For other cases, see *Judgment, Cent. Dig. § 1070*; *Executors and Administrators, Dec. Dig. ⚡513.*]

[2. *Executors and Administrators* ⚡513.]

Where an executor takes possession of lands of infant devisees, receives the rents, and applies them in part to the debts of the testator, he is liable to an action by these devisees for the surplus; and this right of action does not terminate with his life, but may be prosecuted against his executor.

[Ed. Note.—For other cases, see *Executors and Administrators, Cent. Dig. § 2290*; *Dec. Dig. ⚡513.*]

[3. *Executors and Administrators* ⚡117.]

The finding of fact by the master, concurred in by the Circuit Judge, that this executor had appropriated these rents to his own use, approved; and the judgment against his estate for such rents, less the pro rata liability of these devisees for the balance found in the executor's favor by the probate judge, affirmed.

[Ed. Note.—For other cases, see *Executors and Administrators, Cent. Dig. §§ 323, 469-471*; *Dec. Dig. ⚡117.*]

[4. *Appeal and Error* ⚡832.]

[A rehearing will be denied where it does not appear that the court has overlooked any material fact or important principle of law.]

[Ed. Note.—For other cases, see *Appeal and Error, Cent. Dig. § 3227*; *Dec. Dig. ⚡832.*]

Before Cothran, J., Greenville, July, 1885.
The opinion states the case.

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*Messrs. Perry, Perry & Heyward, for appellants.

Messrs. Geo. Westmoreland and A. C. Welborn, contra.

April 7, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. These were actions to account for the rents and profits of land. They were brought by brothers in the same right, only differing in the amounts claimed. They were heard together and they will be so considered; but, to prevent confusion, we will refer to the case of Edda, intending that what is said shall be considered as applying *mutatis mutandis* to that of Emory M.

Robert Hollady died in 1874, leaving a will, of which Henry Hollady and G. W. Hollady were the executors. After making other dispositions, the testator, by the 6th clause of his will, devised directly to his sons, Emory M. and Edda (to be equally divided between them), a small tract of land, containing 192 acres, and known as the “Cooley tract.” At this time, and for some time afterwards, these two boys were both minors, living with their mother, and, as alleged, the executors took possession of the “Cooley land,” and for several years received the rents and prof-

its, which, as they claimed, were applied in payment of the debts of the estate. In February, 1880, the debts all being paid, the executors, after formal publication, made a final settlement of the estate in the probate office, and were discharged. In that settlement it was ascertained that the executors were in advance to the estate in the sum of \$2,825.93; but it did not appear that they had ever charged themselves for the rents and profits received from the lands. Nor was any effort made by the probate judge to ascertain how much had been received from the different devisees, or to adjust the amounts which they should respectively contribute to reimburse the executors for the amounts they had advanced for the estate.

In February, 1884, one of the executors, G. W. Hollady, died testate, and the defendant, John T. Chapman, is the sole executor of his will. Some time afterwards Emory M. and Edda Hollady came of age—Emory first, who was then placed in possession of his half of the Cooley land, and afterwards Edda, to

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*whom was turned over the other half. Each of them now brings his action against Henry Hollady, the surviving executor of his father's will, and John T. Chapman, the executor of the deceased executor, G. W. Hollady, for the rents and profits of their respective portions of the land, down to the time they were placed in possession of the same. The defendant, Chapman, executor of the deceased executor, answered, denying knowledge or information sufficient to form a belief as to the allegations of the complaint, and pleading *plene administravit* as to the estate of his testator.

The case was referred to the master, S. J. Douthitt, Esq., to report his conclusions of law and fact; and he, after taking the testimony, reported, among other things, "that Edda Hollady was a minor about eleven years of age when his father died; that the rent of his portion of the real estate devised to him and his brother by his father was worth one hundred dollars a year, on an average, during the time the executors received the same, and that the defendant, John T. Chapman, as executor of the will of G. W. Hollady, has not come into the possession of any property belonging to the estate of his testator," &c. And as conclusions of law: "That the defendants, Henry Hollady and John T. Chapman as executor of the estate of G. W. Hollady, are liable to the plaintiffs for the rents and profits of his real estate from the death of Robert Hollady up to the final settlement of his estate, a period of six years, at one hundred dollars a year, with interest thereon from January 1 of each year after the same became due, less his pro rata of the amount found to be due them on said settlement, which, after making said deduction, he finds to be at this date the sum of six hundred and sixty-two dollars and six-

teen cents (\$662.16). 2nd. That the judgment should be given against the defendant, John T. Chapman, as executor of the estate of G. W. Hollady, subject to the plea of *plene administravit*, as it appears that he has never received anything on account of the estate of his testator," &c.

The cause came upon exceptions to this report, and Judge Cothran granted an order confirming it; and from this order John T. Chapman appeals to this court upon the grounds: I. That the matter in controversy

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is *res adjudicata*. II. That the *appellant, as executor of G. W. Hollady, cannot be made liable for mesne profits of land alleged to have been wrongfully held by the said G. W. Hollady. III. That, even if this were not true, the respondent here, having failed to prove that any of the profits of the land were appropriated by G. W. Hollady to his own use, it is submitted that he cannot recover.

First. As to the question of *res adjudicata*. It does not appear that the question was either made in the pleadings or submitted to the master, but if it had been, it could not have prevailed. The settlement of the estate in the probate office was a mere statement of the receipts and expenditures of the executors with a view to their discharge. It is true that devisees must abate for the payment of debts, but it must be an abatement equal by all, in the same character. It would undoubtedly have been more satisfactory if, at that time, an account could have been taken of advancements of the different parties in the way of rents and profits, and how much more, if any, each devisee should contribute to reimburse the executors. It seems, however, that the executors did not ask for such accounting, but proceeded on the line that the rents and profits belonged to them, and the devisees were liable to them for the whole amount found in their favor by the Probate Court. In that view, the executors could require contributions only by a proceeding on the equity side of the Court of Common Pleas. As we understand it, the Probate Court had not jurisdiction to enforce the equity of executors to have contribution from devisees to refund debts of the testator paid by them; and having no jurisdiction of the question, it is, of course, not *res adjudicata*.

Second. As to the right of plaintiff to recover from the executor of G. W. Hollady rents and profits received by the testator in his lifetime from lands alleged to have been wrongfully held. That is to say, is this a proper case for the application of the principle, *actio personalis moritur cum persona*? The test is whether "the deceased actually held the property of the plaintiff so as to derive a benefit therefrom, so that a promise to pay therefor could be presumed or implied, while an action for tort could not be main-

tained, yet the tort could be waived and assumpsit brought for the value of the property." 2 Add. Torts, 539; *Chaplin v. Barrett*, Administrator, 12 Rich., 284 [75 Am. Dec. *525]

731]; *Huff v. *Watkins*, 20 S. C., 477. This is certainly not an action of trespass to try titles to the land, nor for damages *quare clausum fregit*, nor, as it seems to us, in form *ex delicto*.

It is true, a devise is a form of conveyance, subject, however, to the payment of the debts of the testator. As lands are liable for debts, executors, whose duty it is to provide for debts, have some qualified right to control lands devised, so far at least as debts are concerned. *Smith v. Grant*, 15 S. C., 149. The plaintiff, devisee, was a minor without guardian. His devise was liable to abate for debts, and we do not see that the executors committed a bald trespass in receiving the rents and profits of it, to the extent of its pro rata share of contribution for the payment of the debts of the testator; but for any excess beyond that amount the profit was money had and received for plaintiff's use, which *ex equo et bono* belongs to him, and he may recover it from the executor. "It is an established principle of equity, that if one intrude upon the estate of an infant and take the profits thereof, he will be treated as a guardian and held responsible therefor to the infant, in a suit in equity." *Goodhue and wife v. Barnwell*, Rice Eq., 198.

Third. But it is claimed that the plaintiff cannot recover, for the reason that "he failed to prove that any of the profits of the land were appropriated by the testator, G. W. Hollady, to his own use." That was a question of fact, which, after careful consideration, was decided by the master, who, as it happened, had also been the judge of probate when the executors made their final settlement in that court. Even if it had satisfactorily appeared that the executors applied the whole of the rents and profits received by them in payment of the debts of the estate, the result would have been the same; for they got credit for all the debts paid, and never charged themselves with the rents and profits, the effect of which was necessarily to appropriate the rents and profits to their own use. The master first found the amount of rents and profits received from the plaintiff's land by the executors, and after deducting from it "his pro rata of the amount found to be due the executors on settlement," gave judgment for the balance. In this the Circuit Judge concurred, and we cannot say that it was error.

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*The judgment of this court is that the judgment of the Circuit Court, in each of the cases stated in the caption of this opinion, be affirmed.

24 S. C. 526

CLARK v. WRIGHT.

(November Term, 1885.)

[1. *Judgment* ⇨793.]

Where a vendee receives a title deed to land, and undertakes, in part payment, to discharge a judgment against his vendor, then constituting a lien upon this land, the administrator of such vendor cannot afterwards require the judgment creditor to proceed against the land itself by levy and sale, to the relief of the vendor's estate, where such a proceeding would be beset with difficulties and would involve litigation.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1385; Dec. Dig. ⇨793.]

[2. *Trusts* ⇨35.]

Nor did this agreement between vendor and vendee create a trust enforceable by the vendor against the land itself, but only a simple contract debt in vendor's favor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 49; Dec. Dig. ⇨35.]

[3. *Trusts* ⇨30½.]

And this vendee having made a voluntary conveyance of this land to trustees for the benefit of his wife and children, and the trustees having sold the land and received the purchase money, the court declined to order them to apply it to the judgment debt.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 41, 41½; Dec. Dig. ⇨30½.]

[4. *Appeal and Error* ⇨843.]

This court cannot decide by anticipation questions that may hereafter arise.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3331-3341; Dec. Dig. ⇨843.]

[5. *Appeal and Error* ⇨832.]

Petition for rehearing refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3215-3228; Dec. Dig. ⇨832.]

[6. *Costs* ⇨58.]

[In taxing costs in a supplementary proceeding, such a proceeding is not to be deemed a "special proceeding," but an "action" rather; it being a continuation of the original action.]

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 29; Dec. Dig. ⇨58.]

[This case is also cited in *Hardin v. Clark*, 32 S. C. 483, 11 S. E. 304, as to facts.]

Before Wallace, J., Chester, March, 1885.

This was an action by W. A. Clark, as administrator of the estate of C. D. Melton, deceased, against Ann E. Wright, executrix, J. J. McLaure and C. H. Alexander, trustees for the widow and children of G. W. Melton, deceased, the said widow and children, and W. H. Hardin and J. C. Hardin. The complaint prayed the following relief:

1. That the money realized by the said trustees, and now in the hands of the said John J. McLaure and Charles H. Alexander, from the sale of the said Chester property, be ordered to be brought into this court and held subject to the decree herein.

2. That the said defendant, Ann E. Wright, should be required by the use of her judgment to assist plaintiff in subjecting the Chester property to her claim, before de-

manding payment from plaintiff out of the estate of the said Cyrus D. Melton, she has-

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*ing two funds from which she may be paid in full, while the other creditors can at best only have a pro rata share of an insolvent estate.

3. That to this end the said Ann E. Wright may be restrained from enforcing payment from this plaintiff, except under the direction and decree of this court.

To the statement of facts made in the opinion it will be necessary to add only this, that the funds realized from the sale of the Melton house and land to W. H. Hardin were in the hands of the trustees, J. J. McClure and C. H. Alexander.

The Circuit decree, omitting its statement, was as follows:

This demand of the complaint is rested upon two grounds:

First. That Mrs. Wright has two sources to which she can resort for payment—one the Chester property and the other the general assets—her judgment being a lien upon both, while the other unsatisfied judgment creditors have a lien only upon the general assets, their judgments being junior to the conveyance to George W. Melton. Second. That all the transactions in reference to this Chester property between C. D. and G. W. Melton resulted in imposing an express trust upon G. W. Melton to pay the Wright judgment, and that that trust binds the land to that end and to that extent.

It is a well settled doctrine in this State that when a judgment debtor sells a part of his property upon which there is an existing general lien, the judgment creditor is remitted in the collection of his debt by process to the available property remaining unsold in the hands of his debtor, and only when that is exhausted and his execution unsatisfied can he resort to the property previously conveyed by his debtor, and then only in the inverse order of the sales. *Bank of Hamburg v. Howard and Germany*, 1 Strobl. Eq., 173. As this principle was not controverted at the hearing, it is supposed to be conceded.

Then, as to the first ground of the demand of the complaint, that the Wright judgment must first be levied upon the Chester property, because a lien on that as well as the general assets, and the other judgment creditors hold liens only upon the general assets in the hands of the administrator. The rule here invoked is a familiar doctrine of equity, and

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founded upon fairness and *justice. When, however, its application would defeat a subsisting and otherwise valid right of third parties, then equities come into play and prevent the application of the rule, because fairness and justice forbids the destruction of one rightful equity to promote another. If here Mrs. Wright be required to go upon the Chester property for the satisfaction of her

demand, the rights of the beneficiaries under the trust deed are destroyed. 3 Pom. Eq. Jur., § 1414.

Second. Did the transactions between C. D. Melton and Geo. W. Melton create and impose upon G. W. Melton an express trust which bound this property and which this court will enforce, and hold the property bound to respond? There can be no question that the rights of the holders of the Wright judgment, as against C. Davis Melton, were unaffected by these transactions. C. D. Melton surrendered his security for the purchase money of the property upon the promise of Geo. W. Melton to him to pay the judgment set out in the statement supra. It was a contract upon valuable consideration. Geo. W. Melton did not perform, and unquestionably a right of action at law accrued to C. D. Melton to recover damages for his failure to perform his contract. *Estes v. Stokes*, 2 Rich., 133. And if an action at law will lie for breach of the agreement, that is a conclusive reason that an express trust was not created. *Lever v. Lever*, 2 Hill Ch., 162; *Stroman v. O'Ginn*, 13 S. C., 103.

Other defences are set out in the answers which need not be considered here, as the foregoing principles are fatal to the complaint.

It is adjudged and ordered, that the complaint be dismissed.

From this decree the plaintiff appealed upon the following grounds:

1. Because the case shows certain transactions touching the transfer of the Chester property, between C. D. Melton and G. W. Melton in their life-time, which, as between them, gave rise to certain well established equities which his honor in his decree has overlooked and entirely disregarded.

2. Because the transactions, all in writing, evince such a state of facts that a court must hold that G. W. Melton became, not a mere debtor, but a trustee of an express

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trust, which relation *created rights and obligations enforceable in a court of equity; and to hold otherwise, as his honor has done in his decree, is error.

3. Because, when G. W. Melton assumed to lift certain debts in judgment and otherwise (among these the Wright judgment) then pressing upon the shoulders of C. D. Melton, and when in consideration thereof C. D. Melton on his part released the legal lien (the mortgage) that was good against G. W. Melton for twenty years, and when G. W. Melton on his part assumed the legal lien (the Wright judgment) which was good against C. D. Melton for twenty years, the equity of the latter party and the obligation of the former party were concomitant, and until the obligation assumed was discharged, the attending equity continued to exist, and a court of equity will compel the observance of good faith in the whole transaction.

4. Because, to permit G. W. Melton to keep the Chester property discharged from all liability in his hands, and at the same time to permit G. W. Melton to disregard what he assumed as a concomitant binding obligation, would be to permit G. W. Melton to take advantage of his own wrong, and aid him in perpetrating a fraud, which a court will never for a moment sanction: on the contrary, were it necessary to the justice of the cause, a court would wipe out the "satisfaction" of the mortgage and remit C. D. Melton or his representatives to his original rights under it.

5. Because, whether the Wright judgment were a valid judgment or not, it was not in G. W. Melton's mouth to dispute its validity, and as to him and all volunteers, or purchasers, with notice under him, equity will deal with it as a judgment which he and they will not be permitted to dispute.

6. Because the Wright judgment is and was a valid judgment, binding upon the said C. D. Melton at the time of the transaction between him and the said G. W. Melton, and ever has been and now is a valid lien upon the Chester property in the hands of the said G. W. Melton and those holding under him: and while the owners of the Wright judgment cannot be prevented from claiming payment from the estate of C. D. Melton, still in equity the estate of C. D. Melton should be allowed the benefit of that payment out of the fund from the sale of the Chester

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property, which fund is now in the hands of those who paid nothing for the property, can lose nothing, and are in fact mere volunteers.

7. Because, while it is admitted that the Wright judgment was a legal claim against C. D. Melton in his life-time, and as a legal claim has been enforced against his estate, his honor has entirely overlooked the equity of C. D. Melton not to have that judgment "satisfied," but to be permitted in equity to have it enforced in the name of Ann E. Wright against the Chester property for his benefit, or the benefit of his estate.

8. Because the trustees, McLure and Alexander, under the trust deed to them and the beneficiaries under that trust deed, are volunteers merely, and as such are affected with all the equities that affected their grantor, G. W. Melton.

9. Because W. Holmes Hardin and J. C. Hardin, who became purchasers of the Chester property (the latter of whom is now in possession), purchased the same with full knowledge of the Wright judgment, and in no sense are purchasers for value without notice: and after their purchase, when notified by the plaintiff not to pay the purchase money over to the trustees, McLure and Alexander, and when in the face of this notice they did so pay the purchase money,

they must take the consequences of their own voluntary act.

10. Because the plaintiff, Clark, standing in the shoes of C. D. Melton as his personal representative, is clothed with all the rights and equities of the said intestate, and is entitled to enforce them as they are now set forth in this cause, sustained as they are by the evidence therein.

[For subsequent opinion, see 26 S. C. 196, 1 S. E. 814.]

Mr. J. D. Pope, for appellant.

Mr. J. H. Rion for McLure, trustee.

Mr. S. P. Hamilton, for Alexander, trustee, and Mrs. Melton and children.

Mr. J. L. Glenn, for W. H. Hardin and J. C. Hardin.

April 20, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. On November 15, *531

1867, Samuel *Wright obtained a judgment against the late C. D. Melton for a considerable sum. Ten days afterwards (November 25), C. D. Melton sold and conveyed to his brother, George W. Melton, a tract of land and lot in the town of Chester for \$8,000, and took for the purchase money four notes and a mortgage of the premises sold to secure them. On November 25, 1871, the brothers, C. D. and George W. Melton, had a settlement, in which the purchase money aforesaid was ascertained to amount to \$10,240, upon which was credited certain obligations of C. D. Melton to the amount of \$4,286.29, leaving \$5,953.71 still due; and in order to discharge this, George W. Melton assumed the payment of certain judgments against C. D. Melton, which had "liens upon the premises," and among them the judgment of Wright above referred to, then amounting to \$1,979.30. The aggregate of these judgments amounted to \$6,587.97, which overpaid the purchase money by \$634.26, and for this C. D. Melton gave his note, and marked the old notes and mortgage for the land "satisfied."

On August 28, 1875, George W. Melton conveyed the land to J. J. McLure, C. H. Alexander, and W. A. Clark, in trust for the use of his wife and children, with certain limitations over. This deed was regular, but voluntary. C. D. Melton died December 4, 1875, and the plaintiff, W. A. Clark, became his administrator. George W. Melton died July 6, 1876, leaving the aforesaid Wright judgment unpaid. In the meantime, the judgment creditor, Samuel Wright, had also died, and his executrix, Ann E. Wright, on October 13, 1877, caused the judgment to be renewed against the plaintiff as administrator of C. D. Melton. Execution was issued on the renewed judgment and levied upon the aforesaid Chester property. Thereupon the trus-

tees instituted proceedings to enjoin the sale, and upon the discovery of some supposed irregularities and defects in the record of the judgment, the levy and sale were not pressed. In 1879, the trustees obtained an order to sell the Chester property for reinvestment, and at that sale Holmes Hardin purchased the property, and subsequently sold it to J. C. Hardin, one of the defendants, who is in possession of the same.

The plaintiff, Clark, as administrator of

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the estate of C. D. *Melton, finding that the estate was insolvent, instituted proceedings to call in the creditors and marshal the assets. Under this call Mrs. Wright presented her judgment, to which, as stated, objection had been made for want of formalities when it was levied, and undertook to establish it. After contest, it was determined that the judgment was "valid and had a lien from its entry in the abstract of judgments." See *Clark v. Melton*, 19 S. C., 498.

Thereupon the plaintiff, administrator of C. D. Melton, commenced this action, for the purpose of requiring Mrs. Wright to seek payment out of the Chester property or its proceeds upon two grounds: First, That having a lien upon the Chester property, she has two sources from which she may be paid, viz., that property and the general assets, and she must exhaust the former, to the relief of the other creditors, who, having no lien upon the Chester property, can go only against the general assets; and second, That all the transactions in reference to the Chester property between C. D. and G. W. Melton, considered together, amounted to "an express trust on the part of George W. Melton to pay the Wright judgment, and to that end and to that extent the trust binds the land."

All the parties resisted the claim; the trustees and cestuis que trust insisting upon the statute of limitations; that G. W. Melton and his heirs had adverse possession of the premises for more than ten years; the purchasers, that they bought at a judicial sale for full value and without notice; and Mrs. Wright insisting that "while indifferent as to the source from whence payment of her judgment may be had, and while asserting her right to be paid from the sale of the premises in question, upon which her said judgment is a lien, she denies that any equity exists to restrain her by injunction from pursuing her remedy against the assets in plaintiff's hands, and to require her to embark in expensive litigation to seek payment elsewhere."

The cause was heard by Judge Wallace, who dismissed the complaint, and from his decree the plaintiffs appeal upon the several grounds stated in the brief.

We do not understand that this is a pro-

ceeding to enforce the judgment of Mrs. Wright by a levy and sale of the Chester property. That could only be done by Mrs.

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Wright herself, the *owner of the judgment, but, having once made an unsuccessful effort in that direction, she declines to do so again. But, in the first view of the plaintiff, it is a proceeding to marshal the securities and to secure for the estate of C. D. Melton, or rather the other creditors of it, the application of the equitable principle, that a person, having two funds to satisfy his demand, shall not, by his election, disappoint other parties, having but one fund. This is an undoubted principle of equity, and has been well stated thus: "The general rule is, therefore, that if one creditor, by virtue of a lien or interest, can resort to two funds, and another to one of them only, as, for example, where a mortgagee holds a prior mortgage on two parcels of land, and a subsequent mortgage on but one of the parcels is given to another, the former must seek satisfaction out of that fund which the latter cannot touch," 3 Pom. Eq. Jur., § 1415. If there was no difficulty about the right of Mrs. Wright to receive payment out of the Chester property, then the plaintiff, Clark, acting for the other creditors, would undoubtedly have a right to enjoin her and to require her, in their relief, to receive payment of her judgment from that source. But the same author, on the same page, says: "These rules must be taken with the modifications and exceptions that in their application the paramount incumbrancer shall not be delayed or inconvenienced in the collection of his debt, for it would be unreasonable that he should suffer because some one else has taken imperfect security; that the rights of third parties shall not be prejudiced, and that the parties themselves are creditors of the same debtor."

In this case we do not lay much stress upon the rights of the widow and children of George W. Melton as standing in the way of the enforcement of this equity, for they are mere volunteers, and their rights, whatever they may be, are no greater than those of their ancestor, under whom they entered and held. But we think there is great force in the objection that the right of Mrs. Wright to receive payment from the Chester property is stoutly contested. It is, indeed, beset with difficulties, and we agree with the Circuit Judge, that it would not be just to Mrs. Wright, in enforcing a mere equity of others, to require her, against her protest, to embark in an expensive litigation, and to be

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"delayed and *inconvenienced in the collection of her debt." In this respect, the case is somewhat like that of *Walker v. Covar* (2 S. C., 20), in which the court say: "Such relief as is here asked is never granted, if the prior creditor is thereby endangered or his

right to raise the money out of both funds the least impaired. *Evertson v. Booth*, 19 Johnson [N. Y.], 493; *Evans v. Duncan*, 4 Watts [Pa.], 24; *Ramsay's Appeal*, 2 Watts [Pa.], 228 [27 Am. Dec. 301]. Or where the fund to be resorted to is dubious, or one which may involve him in litigation, notwithstanding the claims of a junior creditor may be defeated thereby. *Fowler v. Barksdale*, Harp. Eq., 165; *Goodwyn v. The State Bank*, 4 Desaus., 393; *Moore v. Wright*, 14 Rich. Eq., 134." In the case last cited it was said: "In adjusting priorities and marshalling securities, the usual course is not to restrain the preferred creditor in the first instance, but to compel him to place his remedies at the disposition of the other claimant, after they have served the purpose of satisfying his own debt. It seems only just to require that those who insist on the sufficiency of remedy as a means of payment should be obliged to take the risk and delay of enforcing on themselves. *Aldrich v. Cooper* (Am. notes), 2 Lead. Cas. Eq., 276." The injunction is dissolved in this case without prejudice to any right which W. A. Clark as administrator may have to be subrogated to the rights which Mrs. Ann E. Wright may have had to enforce her judgment against the Chester property.

But, apart from the question as to the equity doctrine just considered, the plaintiff's second view is, that all the transactions between C. D. and G. W. Melton in reference to the Chester property created an express trust on the part of George W. Melton to pay the Wright judgment, and to that end and to that extent the trust binds the land; and the plaintiff, as administrator of C. D. Melton, may have it enforced in equity like a mortgage. We may venture to say, that it would not be matter of regret if such a binding trust could be established; for it does not seem to be in accordance with the principles of justice and equity that the widow and children of George W. Melton should be protected in the possession of property which he gave them, but had never paid for, certainly to the extent of the Wright judgment.

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*The matter, however, is not at all free from difficulty. If C. D. Melton had not conveyed the title to George W., or, having executed title and taken back a purchase money mortgage, he had left uncancelled so much of the mortgage as would cover the Wright judgment, there could have been no difficulty about it; for in the latter case it would have been easy to foreclose the mortgage, and in the former, if he had retained the title (the promise to pay the Wright judgment having been substituted pro tanto for the purchase money notes, which were cancelled), we suppose that C. D. Melton or his administrator might have gone into the court of equity for specific performance of the contract, as an executory agreement as to land, and, if the

Wright judgment were not paid, obtain an order to sell it to produce payment. See *Walker & Trenholm v. Kee*, 16 S. C., 78, and *Kerngood v. Davis*, 21 Id., 206. But C. D. Melton did not retain the title, but, on the contrary, made an absolute deed, and cancelled his notes and mortgage. The contract for the sale of the land was then executed; and it looks as if C. D. Melton, in doing so, committed a mistake which is irreparable. He had an express lien on the land to secure the consideration, and we suppose (after the cancellation of the notes) it would have covered and secured the promise to pay the judgment as a substituted part of the consideration, and yet he voluntarily renounced it. After that, it is difficult to suppose that, in lieu thereof, he relied upon an obscure and doubtful trust, only inferrible from a number of facts, and difficult, if not impossible, to establish.

George W. Melton did promise to pay the Wright judgment. Upon that promise, and possibly the inherent lien of the judgment to enforce itself, C. D. Melton must have relied, but the very point of the difficulty is that the promise did not touch the land specifically. The only conceivable connection between the promise and the land was the fact that the promise to pay the judgment was part of the consideration for the conveyance of the land. That is substantially true and is conceded, but that does not authorize the inference that the promise attached to the land, which had been previously and absolutely conveyed. There is in this State, in regard to executed contracts as to land, no such thing as the equity of the vendor. If

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one sells and conveys *land, taking in payment a note, the grantee may transfer the land the next day, and the purchase money note, as it cannot follow the land, may never be paid. Whether the promise of George W. Melton to pay the Wright judgment is called a contract, obligation, agreement, or trust, it seems to us the insuperable difficulty still remains, that the undertaking was not specific, but general, like any other promise, for the performance of which reliance is placed only on the honesty and ability to pay of the party making it.

The judgment of this court is that the judgment of the Circuit Court, with the reservation herein stated, be affirmed.

A petition for rehearing was filed by plaintiff, upon which

May 24, 1886. The following order was passed:

PER CURIAM. We have carefully considered this petition for a rehearing. All the issues made by the pleadings were considered and decided, and the court cannot undertake, by administrative orders or otherwise, to decide by anticipation any questions which may hereafter arise.

As it does not appear that any material fact or principle involved was overlooked in the decision, there is no ground for a reargument. Petition refused.

At the same time the court refused to grant the petition of W. Holmes Hardin and J. C. Hardin for a rehearing.

24 S. C. 536

DAUNTLESS MANUFACTURING COMPANY v. DAVIS.

(November Term, 1885.)

[1. *Appeal and Error* ⇨873.]

This court cannot consider exceptions to the taxation of costs by the clerk, the proper course being first to take the judgment of the Circuit Court upon such exceptions, and then appeal from such judgment if it is supposed to be founded upon any error.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 796; Appeal and Error, Dec. Dig. ⇨873.]

[2. *Costs* ⇨147.]

The presumption being that a public officer, and more especially a Circuit Judge, has acted in accordance with law, such a construction will be placed upon an order of the Circuit Judge, if practicable, as will make it conform to law.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 571; Dec. Dig. ⇨147.]

[3. *Costs* ⇨169.]

There being no little confusion, even in the books, in the use of the terms "costs" and "disbursements," regard must be had to the

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sense in which those terms are intended to be used, more than to their strict technical signification.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 652, 653, 657, 658, 663, 759; Dec. Dig. ⇨169.]

[4. *Execution* ⇨415.]

In supplementary proceedings, the order of the Circuit Judge directed "that the plaintiff be allowed the usual costs of this proceeding to be taxed by the clerk, together with thirty dollars in addition for his disbursements." This order did not confine the allowance granted the plaintiff to the "thirty dollars," and was in strict accordance with the provisions of the code. In supplementary proceedings, a party may be allowed not only the sum provided for by section 321 of the Code, but also such other costs as may be provided for the several officers of the court, including the attorneys, for any specified services in an action.

[Ed. Note.—Cited in *Chenham v. Seawright*, 30 S. C. 104, 8 S. E. 526.]

For other cases, see Execution, Cent. Dig. § 1194; Dec. Dig. ⇨415.]

[5. *Costs* ⇨73.]

A party cannot tax as costs \$10 for motion for appointment of a receiver, there being no order of the court allowing the costs of such motion.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 305; Dec. Dig. ⇨73.]

[6. *Costs* ⇨150, 158.]

The plaintiff's attorney, under the order above stated, was entitled to have taxed as

costs, \$5 for order of injunction, \$25 for five days' references, and \$3 for three sub-writs, in addition to the \$30 allowed by said order.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 579, 582-584; Dec. Dig. ⇨150, 158.]

Before Pressley, J., Greenville, April, 1885.
The opinion fully states the case.

Messrs. W. L. Wait and Wells & Orr, for appellant.

Mr. Julius H. Heyward, contra.

April 20, 1885. The opinion of the court was delivered by

Mr. Justice McIVER. On January 2, 1884, Judge Kershaw, under supplementary proceedings in the above entitled action, granted an order appointing a receiver, and, amongst other things, directed "that the plaintiffs be allowed the usual costs of this proceeding to be taxed by the clerk, together with thirty dollars in addition for his disbursements, said costs and disbursements to be paid to the plaintiff's attorney by the receiver out of any funds first coming into his hands." There was no exception to or appeal from this part of the order. On March 3, 1885, due notice, accompanied with an itemized taxation proposed, of adjustment of costs was served upon the attorneys for appellant. The clerk disallowed the following items of the proposed taxation, to wit: "Procuring order of injunction, \$5; five days' reference before master, \$25; motion for re-

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ceiver, \$10; three sub-writs, \$3;" and the plaintiff's attorney duly excepted, upon the ground amongst others which it is needless to state, that the clerk erred in disallowing said items.

Upon hearing the exceptions to the action of the clerk, Judge Pressley granted the following order: "Upon hearing the appeal from the taxation of costs made by the clerk in above entitled supplementary proceedings, it appearing that the order of Hon. J. B. Kershaw, of date January 2, 1884, provides for the taxation of said costs, it is ordered that the appeal be sustained, and that the clerk be required to tax the costs in accordance with said order. April 8th, 1885." In pursuance of this order, another notice of adjustment of costs, containing the items above mentioned as previously disallowed, was served on defendant's attorneys, and the clerk made another adjustment of the costs, allowing the items previously disallowed by him. Defendant appeals upon the following grounds:

1. Because the first taxation made by the clerk was in accordance with the former order of Hon. J. B. Kershaw, and his honor erred in refusing to sustain it.

2. Because his honor should have decided that the "thirty dollars" provided for in Judge Kershaw's order was intended to cover

all the costs to be allowed to the plaintiff or his attorney to the date of that order.

3. Because, this being a special proceeding, his honor should have decided that there are no "usual costs" which can be allowed to the successful party or his attorney, and that the amount of such costs is in the discretion of the Circuit Judge, except that he cannot exceed the sum fixed by section 321 of the Code of Procedure, and must be settled by him.

4. Because the amount of costs that can be allowed to the plaintiff or his attorney in a proceeding of this kind, being limited by section 321 of the Code of Procedure to thirty dollars, and that amount having been fixed by Judge Kershaw's order, his honor erred in deciding that the plaintiff was entitled to any more costs.

5. Because his honor erred in referring this case back to the clerk to tax the costs, it being the duty of his honor to fix the amount of the plaintiff's costs.

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*The defendant further excepts to the taxation of costs made by the clerk on April 22, 1885 (the last adjustment), 1. Because he allowed the plaintiff the following items: Procuring order of injunction, \$5; five days' reference before master, \$25; motion for receiver, \$10; sub-writs, \$3. 2. Because the clerk erred in taxing anything more as costs for the plaintiff than the thirty dollars allowed by Judge Kershaw's order. 3. Because the clerk erred in taxing more than thirty dollars as costs for the plaintiff in addition to the amount allowed by the order of Judge Kershaw.

We may say in the outset that we cannot consider exceptions to the taxation of costs by the clerk, the proper course being first to take the judgment of the Circuit Court upon such exceptions, and then appeal from such judgment, if it is supposed to be founded upon any error. It is true, as was held in *Dilling, Baker & Co. v. Foster* (21 S. C., 334), a taxation of costs made under an erroneous order of the Circuit Court may be practically corrected by an appeal from such order. But no appeal from a taxation of costs by the clerk, or motion to correct the same, can be heard by this court. We are pleased to find, however, that the appellant will suffer no injury by this view, for the same questions raised by the exceptions to the clerk's last taxation are substantially presented by the exceptions to the order of Judge Pressley, which are properly before us for consideration.

That part of Judge Kershaw's order which relates to the costs and disbursements, not having been excepted to or appealed from, must be regarded as the law of this case, and therefore the real question presented by this appeal is whether Judge Pressley has placed the proper construction upon the order of Judge Kershaw, though it will aid

us in the consideration of this question to ascertain what is the law in reference to the matter in hand, as the presumption always is that a public officer, and more especially a Circuit Judge, has acted in accordance with law. Hence it is our duty to place such a construction upon the order, if practicable, as will make it conform to, rather than depart from, the law. It is true that Judge Pressley does not, in express terms, undertake to construe the order of Judge Kershaw, and at first view it might seem that his order amounted to nothing more than a direction to the clerk to carry out

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the order of Judge Kershaw, and, *therefore, affording no ground for appeal, yet when we consider that the clerk had, by his first adjustment of costs, undertaken to carry into effect the order of Judge Kershaw, and in so doing had disallowed the items of costs in controversy, and the exceptions to such adjustment had imputed error to him in disallowing said items, and when we find Judge Pressley sustaining those exceptions, and directing the clerk to tax the costs in accordance with the order of Judge Kershaw, we are bound to conclude that Judge Pressley so construed Judge Kershaw's order as to allow the costs disallowed by the clerk in the first adjustment. So that the question for us to determine is whether such construction was correct.

In construing orders of this kind, we must bear in mind the fact that they are usually drawn by the counsel in the cause, in the hurry of business during the sitting of the court, and that neither counsel nor judge have the time or opportunity to give such critical attention to the phraseology used as to insure technical accuracy. Indeed, there seems to be no little confusion, even in the books, in the use of the terms "costs" and "disbursements," one sometimes being used for the other, and we must look to the sense in which those terms are intended to be used more than to their strict technical signification. The theory seems to have been that the fees of the several officers of court, as well as the witnesses, would be paid by the party at the time he called their services into requisition, and when that is done the amounts thus paid would properly constitute disbursements; but unless this is done we do not see how such fees could be properly classed as disbursements, when nothing has been disbursed; and in such case, which very frequently occurs, we do not see why such fees may not properly be taxed as costs due to the several officers of court. *Lewis v. Brown*, 16 S. C., 58. Indeed, we suppose that a good deal of the confusion in the use of the terms "costs" and "disbursements" has arisen from this conflict between the theory and the practice—the theory being that the fees of the several officers of court and the witnesses are paid by the plaintiff

or defendant, as the case may be, at the time the services are rendered, in which case they would very properly be termed disbursements and taxed as such, in order

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to reimburse the party for *the outlay he has been required to make; while the practice, in many cases, is that such fees are not paid at the time, but remaining due to the several officers at the termination of the action, are taxed as costs due to such officers.

We do not think, then, that any stress is to be laid upon the manner in which those terms are used in the order which we are called upon to construe, for the allowance is there spoken of as an allowance for disbursements, while in the Code, § 321, such allowance is termed costs, and such it was manifestly intended to be. The order directs "that the plaintiffs be allowed the usual costs of this proceeding to be taxed by the clerk, together with thirty dollars in addition for his disbursements." It is quite clear that the order does not confine the allowance granted the plaintiff to the thirty dollars, but that in addition thereto the plaintiff must be allowed "the usual costs;" and this, we think, is in strict accordance with the provisions of section 321 of the Code, which reads as follows: "The judge may allow to the judgment creditor, or to any party so examined, whether a party to the action or not, witness' fees and disbursements, and a fixed sum in addition, not exceeding thirty dollars, as costs."

It will be observed that this section reads now as it did when the code was originally adopted (see section 327 of the original code), at which time no costs were allowed to the attorneys, but certain fixed allowances were made to the parties for the usual proceedings in an action which were expressly designated as costs, but no fixed allowance was made for supplementary proceedings, and this section was probably inserted for the purpose of supplying that omission, and leaving it to the discretion of the judge, controlled only by a maximum, to fix the amount of such allowance in a supplementary proceeding, which, not being one of the usual proceedings in an action, was not elsewhere provided for. This section having been left unrevoked, after the amendment to the code substituting for the fixed allowances to the parties for the usual proceedings in an action the provision that the attorneys shall be entitled to certain fixed amounts for certain specified services as costs, just as the other officers of court are entitled to fixed amounts for specified services as costs, the effect is that, in supplementary proceedings, a party

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may be allowed not only the *sum provided for by section 321 of the Code, but also such other costs as may be provided for the sev-

eral officers of the court, including the attorneys, for any specified services in an action.

It is contended, however, that a supplementary proceeding is not an action, and that as the code only provides for costs "in every civil action commenced or prosecuted in the courts of this State," and makes no special provision for costs in supplementary proceedings except that contained in section 321, no other costs can be taxed in such proceeding. But as is said by Mr. Justice McGowan, when speaking of a supplementary proceeding, in *Kennesaw Mills Co. v. Walker*, 19 S. C., at page 107: "The proceeding is not technically what is called a special proceeding, but a continuation of the action in which the judgment was recovered, and in one sense a substitute for the former creditor's bill;" though, as is said in *Dilling, Baker & Co. v. Foster*, 21 S. C., at page 339, "not subject to all the rules governing the chancery practice under a creditor's bill."

This, therefore, being a continuation of an action, it only remains to inquire whether the items of costs, which we think the order of Judge Pressley in effect sanctioned, are allowed by the statute fixing the costs of attorneys. All these items we find expressly provided for in sections 2426 and 2428 of the General Statutes, except the item of \$10, allowed for motion for the appointment of a receiver; and finding no warrant for that, it must be disallowed. It is true that the code, in section 328, does provide that costs, not exceeding ten dollars, may be allowed, in the discretion of the court or judge, on any motion; but it is not allowed as a matter of course, but only under the order of the court or judge hearing the motion. In this case, no such order appears, and hence that item cannot be allowed.

The judgment of this court is that so much of the order of Judge Pressley as allows the item in the taxation of costs of ten dollars for motion for receiver be reversed, and that in all other respects the order be affirmed.

24 S. C. *543

*JENNINGS v. ABBEVILLE COUNTY.

(November Term, 1885.)

[1. *Counties* ⇨ 210.]

Under the constitution of 1868 and the laws since passed, the board of county commissioners have exclusive jurisdiction to audit and provide payment for county claims, subject to the right of appeal; and therefore no action upon such claims can be instituted against the county in the Court of Common Pleas.

[Ed. Note.—Cited in *Chick v. Newberry and Union Counties*, 27 S. C. 421, 3 S. E. 787; *Tinsley v. Union County*, 40 S. C. 281, 18 S. E. 794; *Cunningham v. Clarendon Co.*, 81 S. C. 202, 62 S. E. 212; *State ex rel. People's*

Bank of Greenville v. Goodwin, 81 S. C. 424, 62 S. E. 1100; Greenville County v. City of Greenville, 84 S. C. 414, 66 S. E. 417; Du Pre v. Lexington County, 90 S. C. 181, 73 S. E. 70.

For other cases, see Counties, Cent. Dig. § 340; Dec. Dig. ⚡210.]

[2. *Counties* ⚡47.]

The board of county commissioners are the one administrative body of the county, with jurisdiction local but large, having original and exclusive powers over all matters pertaining to county affairs.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ⚡47.]

[3. *Counties* ⚡47.]

The powers and duties of the board of county commissioners under the constitution of 1868 and the laws passed in pursuance thereof, considered and declared.

[Ed. Note.—Cited in State ex rel. People's Bank of Greenville v. Goodwin, 59 S. E. 37.

For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ⚡47.]

[4. *Counties* ⚡204, 215.]

A county may be sued, but if upon a county claim it must be done before the board of county commissioners by filing the claim for audit; for certain causes of action ex delicto, the suit may be maintained in the Court of Common Pleas.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 312, 316-321, 337, 345; Dec. Dig. ⚡204, 215.]

[5. *Counties* ⚡47.]

The board of county commissioners was created by the constitution as a new body with certain local powers and for certain special purposes, and in such case the powers given and the mode and manner of their exercise are in their nature exclusive.

[Ed. Note.—Cited in Walpole v. City Council, 32 S. C. 555, 11 S. E. 391.

For other cases, see Counties, Cent. Dig. § 55; Dec. Dig. ⚡47.]

Before Pressley, J., Abbeville, February, 1885.

The opinion fully states the case.

Mr. L. W. Perrin, for appellant.

Mr. Eugene B. Gary, contra.

April 20, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. In 1881, the county commissioners of Abbeville let out the contract to build a wooden bridge over Little River at Searls' Mill, in said county, to Catlett Corley, William Harmon, J. T. Jennings, and J. C. Jennings as the contractors, for \$556. After the contract was made, it was changed so as to require rock piers, at the additional cost of \$60 per pier (being three in number). There were specifications as to the kind of rock and the manner in which the piers were to be built, requiring "good rock that will not crumble, laid solidly in good hydraulic cement, the workmanship to be very substantial and

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*complete," &c. It was announced that the bridge was finished according to contract, inspected by the county commissioners, and

from its external appearance accepted by them in September, 1881, and the claims of the contractors (the whole claim, it seems, was divided among them) were approved by the county commissioners November 7, 1881, and payment in part made, but checks for the balances still due on the contract were not drawn.

Within a few months, during the high waters of January and February, 1882, the bridge fell down. The county commissioners then made a careful examination of the fallen piers, and, as they thought, discovered for the first time that they had not been built according to contract, but, on the contrary, instead of being built solid with good rock laid in cement, only the rim or outer wall was laid in cement, and the hollow filled up with loose rock from the stream; and having, as they supposed, made this discovery, refused to issue the checks for the remainder of the price agreed to be paid. Thereupon the contractors brought this action against the County of Abbeville. The interest of Catlett Corley had been assigned to one Henry Young, and as he would not join in the action as plaintiff, he was made a defendant.

The defendant demurred, on the grounds that the complaint did not state facts sufficient to constitute a cause of action, and that the Court of Common Pleas has not jurisdiction to hear and determine an original action upon a county claim. The presiding judge overruled the demurrers, and sent the case to the jury. They found a verdict for the plaintiffs to the extent of the whole balance of the price agreed upon, and the defendant, County of Abbeville, appeals to this court upon the following grounds: First. Because his honor erred in overruling the demurrers of defendant: 1. That the complaint did not state facts sufficient to constitute a cause of action. 2. That the Court of Common Pleas did not have original jurisdiction of the subject matter of the action. And failing in these, then for a new trial. * * *

From the view the court takes of this case, it will not be necessary to consider any of the grounds of appeal, except the first, as to the demurrers. This is the first case in which the question has been made in this court whether, under the constitution of 1868 and the laws since passed, the board of

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county commissioners have exclusive jurisdiction to audit and provide payment for that class of demands which, being contracted by the commissioners as representing the county, are called "county claims," subject only to the right of appeal; or whether the Court of Common Pleas may take original jurisdiction of such claims and hear and determine them, rejecting or giving judgment against the county precisely as in ordinary

cases. There have been cases in which the question might have been made, as for instance, *Ostendorff v. Charleston County*, 14 S. C., 403; *Holmes & Calder v. Same*, *Ibid.*, 146; *Edmondston v. Aiken County*, *Ibid.*, 622; *Wheeler v. County of Newberry*, 18 Id., 135; and *Duke v. Williamsburg County*, 21 Id., 414.

But in these cases the point was not raised, and cannot, therefore, be considered as adjudged. This court, in *Wheeler v. Newberry*, *supra*, said: "The court has never been required to consider how a creditor, having a claim already audited, should proceed to enforce it against the county—whether, considering the audit as a judgment of the tribunal established for the purpose of deciding county claims, he should seek to enforce it by mandamus, requiring the county commissioners to have the money raised to pay it, or sue upon it in the Court of Common Pleas to get thereby an enforceable judgment against the county. There is some want of uniformity in the practice of the different States upon the subject, and until the point is made and argued before us, we will make no ruling upon it." And in the subsequent case of *Duke v. County of Williamsburg*, *supra*, Mr. Justice McIver, who delivered the judgment of the court, said: "No question has been raised as to the form of proceeding in this case, and we shall not volunteer to do so. Whether a person claiming to be the creditor of a county can bring his action in the usual form for the recovery of his alleged debt, except in such cases as the right of action is given by statute, or whether he should not submit his claim for audit to the county commissioners, from whose judgment, if unfavorable to him, he may appeal, and after he has thus established his claim, whether his remedy is not by mandamus to compel the county commissioners to levy a tax to pay the same, is a question upon which we prefer to reserve our judgment," &c.

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*The point is now, however, formally made, and it is necessary for us to decide it. The constitution of 1868 made a new distribution of the judicial power of the State. Section 15, article IV., provides that "The courts of common pleas shall have * * exclusive original jurisdiction in all civil cases and actions *ex delicto*, * * and appellate jurisdiction in all cases as may be provided by law," &c. Section 19, article IV., provides as follows: "The qualified electors of each county shall elect three persons for the term of two years, who shall constitute a board of county commissioners, which shall have jurisdiction over roads, highways, ferries, bridges, and in all matters relating to taxes, disbursements of money for county purposes, and in every other case that may be necessary to the internal improvement and local concerns of the respective counties: Pro-

vided, that in all cases there shall be the right of appeal to the State courts."

These sections stand in what is known as the judicial article, and, considered together as parts of the same instrument, seem to show two things: First, that a new body, known as the "board of county commissioners," was then created, having a local but large jurisdiction, having, indeed, entire charge of county affairs as the one administrative body of the county; not only to contract but to "audit" and provide payment for all that class of demands known as "county claims." And second, that these powers are not only original, but in their very nature exclusive; not falling within any other jurisdiction, except as provided by appeal to the State courts. This view is fortified by the fact that at the time the constitution was drafted, giving this right of appeal, the counties of the State were not bodies politic and corporate, and as such capable of being sued directly.

When we look to the acts of the legislature passed to carry into effect the important provision of the constitution creating the board of county commissioners, we think it appears that they were all framed on the line of making one consistent system for the management and control of county affairs, intended to be expeditious, but just, economical, convenient, and complete in itself. See General Statutes, chapter XVI., as to "County Commissioners," and the act of 1882, "to define their duties," appended as a note.

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*1. The county commissioners are required annually to make an estimate of what the government of the county will require, and report the number, character, and amount of claims audited for the fiscal year to the comptroller general, who shall transmit the same to the governor, to be by him laid before the legislature, indicating the amount necessary for county purposes to be raised by taxation; and all claims against a county not presented during the fiscal year in which they are contracted or the next thereafter shall be forever barred.

2. It is made the duty of the county commissioners not only to make all contracts in behalf of the county, but to "audit" (or disallow) all county claims, and provide for those approved by giving checks upon the county treasurer. They are allowed to give checks only for legal claims audited by themselves, with the single exception of a judgment recovered against the county in an action *ex delicto*, brought by express authority of an act of the legislature, which in the case provided for expressly directs that they shall check for such judgment. To this act more particular reference will be hereafter made.

3. The commissioners are in terms forbidden to check for any claims unless they are legal and valid county claims, and there

is money in the treasury for the express purpose of paying such claims. And the treasurer is forbidden, under the penalties of misdemeanor, from paying any claims whatever, unless they are approved, audited, and drawn for by the county commissioners.

These constitutional provisions and regulations of law constitute a system as to county claims, in which all questions fall within the jurisdiction of the commissioners, subject only to correction by the right of appeal given. If one holding a county claim may, without filing it in the office prescribed or obtaining "audit," or after audit, upon refusal to pay, go at his pleasure into the Court of Common Pleas and sue the county to judgment, it seems to us that it would tend to derange the system, to produce confusion, and to entail upon the county unnecessary expenses and delays.

But it is said that, by an act of 1868, the counties were made bodies politic and corporate, and may now "sue and be sued." That is true, but we do not see that a sub-

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sequent act of the legislature should control the construction of the constitution previously adopted. Besides, the simple fact that counties may now "be sued" determines nothing as to the court or the manner in which it may be done. There is no requirement that it can only be done in the Court of Common Pleas; and we think that, when the holder of a county claim files it for "audit" in the office of the commissioners, he may be said in effect to sue the county, not in the Court of Common Pleas, but in the tribunal specially provided to hear and determine such claims. The legislature has, however, made special provision that certain actions of a particular character—actions *ex delicto* for damages on account of defective "repairs on highways," the destruction of houses by mobs, &c.—may be brought directly against the county in the Court of Common Pleas. See Gen. Stat., §§ 1087, 2571, and 2572.

It seems to us that this special permission as to particular actions authorizes the inference that such permission was necessary, and that no such right exists beyond the special cases thus provided for. *Expressio unius est exclusio alterius*. This view is aided by the terms of those special acts, "may recover in an action against the county the amount of damage fixed by the finding of a jury, * * may claim and prosecute the county in which the offence shall be committed for any damage he shall sustain thereby; and the said county shall be responsible for the payment of such damages as the court may award, which shall be paid by the county treasurer of such county on a warrant drawn by the county commissioners thereof, which warrant shall be drawn by the county commissioners as soon as a certified copy of the judgment roll is delivered to them for file in

their office." No such special direction as to the manner of payment exists as to any other judgment against the county, and the fair inference is that none such were expected or intended to be rendered. The State cannot be sued, nor can the county as a part of the State, without permission given. *Young v. City of Charleston*, 20 S. C., 116 [47 Am. Rep. 827].

It is, however, further said, that the court of Common Pleas is a court of general jurisdiction, and as such has jurisdiction of all matters not given exclusively to an inferior tribunal or expressly forbidden to that court. The

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principle contended for may *be correct, but, as we think, does not apply to this case. Jurisdiction is expressly given to the board of county commissioners, but not to the Court of Common Pleas, without, however, any express negation. Under some circumstances, this might give the Court of Common Pleas concurrent jurisdiction; but in this case we think it does not. First, the same instrument (constitution) defines the powers and duties of both, giving original jurisdiction to the board of county commissioners with only the right of appeal to the Court of Common Pleas; and, second, the board of county commissioners was created by the constitution as a new body, with certain local powers and for certain special purposes, and in such case the powers given and the mode and manner of their exercise are in their nature exclusive. "It is the general rule, that if an affirmative statute, which is introductive of a new law, direct a thing to be done in a particular manner, that thing shall not, even although there are no negative words, to be done in any other manner." *Sternberger v. McSweeney*, 14 S. C., 35; *Kennedy v. Reames*, 15 Id., 552; *Ex parte Lewie*, 17 Id., 154. In this latter case, the Chief Justice said: "The Court of Common Pleas is the general fountain of justice, and when the rights of a citizen, either derived from the common law or the statutes, are invaded and the power to protect is conferred upon no special jurisdiction, he may seek redress in that court. But where rights are created by statute, to be obtained and protected in a special manner specified in the act and by a special tribunal, no other court can assume jurisdiction. On the contrary, parties interested must pursue the course prescribed, and must seek the aid of the tribunal upon which the power to grant or protect has been conferred, &c. *Howze v. Howze*, 2 S. C., 232," &c.

It may assist us in testing the right claimed to bring an original action in the Court of Common Pleas upon an ordinary *ex contractu* county claim to inquire how a judgment rendered in such a case could be collected. Certainly the execution could not be levied on the private property of the citizens of the county, nor could it be levied upon the public funds or property of the county.

see Gen. Stat., §§ 617, 440. "All county poor farms, poor houses, and hospitals, court houses, jails, and all other public property of every kind or description, actually used

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as such, are *forever exempt from attachment, levy, and sale, on account of any judgment, lien, or claim whatsoever against the county to which they or any of them belong," &c. The judgment creditors in this case could not claim the benefit of the express statutory provision made for the payment of judgments recovered in the special cases of tort heretofore referred to. It would, therefore, be necessary for them to go back to the county commissioners to obtain a warrant on the county treasurer for the payment of the judgment, as the said treasurer is positively forbidden, under penalties, to pay any kind of county claim, whether in judgment or not, except upon the warrant of the county commissioners. In case such warrant was refused, they might, as suggested in the argument, apply for a writ of mandamus to test the question, whether the board of county commissioners, having already audited their claim, are not bound to issue a warrant for its payment, and that right they had as clearly as now before they commenced this action in the Court of Common Pleas. *Moses Mand.*, 104; *Boyce v. Supervisors of Cayuga County*, 20 Barb. [N. Y.] 294; *People v. Supervisors of Chenango*, 4 Seld. [S. N. Y.] 318; *State ex rel. Marshall v. Starling*, 13 S. C., 266; and *In re Conant's Claims*, 21 Id., 364.

It seems to us that an original action in the Court of Common Pleas upon an ordinary county claim is not only unauthorized by the system provided for the settlement of county claims, but can be productive of no advantage whatever.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the complaint be dismissed for want of jurisdiction, without prejudice to the plaintiffs to enforce their claim by other proper proceedings, as they may be advised.

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CARTEE v. SPENCE.

(November Term, 1885.)

[1. *Equity* ⇨241.]

The Circuit Judge cannot hear and determine a question raised by demurrer after all the issues in the action, both of law and fact, have been referred to the master for trial, and in advance of his report.

[Ed. Note.—Cited in *Hull v. Young*, 29 S. C. 69, 6 S. E. 938.

For other cases, see *Equity*, Cent. Dig. § 515; Dec. Dig. ⇨241.]

[2. *Reference* ⇨29.]

In the absence of any showing to the contrary, it must be assumed *that all the circumstances existed, which would have authorized

such an order of reference as was granted by the Circuit Judge in this case, notwithstanding no written consent appeared upon the face of the order.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 49; Dec. Dig. ⇨29.]

[3. *Equity* ⇨233.]

A complaint that contains allegations of fraud insufficient to warrant the cancellation of a deed, but states facts sufficient to entitle plaintiff to a partition, cannot be held, on demurrer, not to state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 509; Dec. Dig. ⇨233.]

[4. *Equity* ⇨405.]

The master is a special tribunal, and has no power to require the defendants to produce a deed in their possession, no such power having been conferred upon him.

[Ed. Note.—Cited and criticized in *Parker v. South Carolina & G. R.*, 48 S. C. 364, 26 S. E. 639.

For other cases, see *Equity*, Cent. Dig. § 884; Dec. Dig. ⇨405.]

5. Doubtful, whether a Circuit Judge could on motion require a party to the cause to produce a deed in his possession to be used in evidence against him.

[Ed. Note.—Cited in *Jenkins v. Bennett*, 40 S. C. 400, 18 S. E. 929; *Wenzel v. Palmetto Brewing Co.*, 48 S. C. 82, 26 S. E. 1.]

Before Pressley, J., Anderson, February, 1885.

The opinion states the case.

Mr. T. C. Ligon, for appellants.

Mr. J. L. Tribble, contra.

April 20, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiffs, as heirs at law of Robert Spence, sr., who died intestate in October, 1870, bring this action against the defendants, all of whom are heirs at law of said Robert Spence, sr., except the defendants, B. F. Brown and Sallie V. Brown, for the partition and sale of a tract of land alleged to constitute a part of the real estate of said intestate. They allege substantially that soon after the death of intestate, the defendant, Robert Spence, jr., filed his petition in the Court of Probate for the partition and sale of the real estate of said intestate, to which they as well as the other heirs at law of said Robert Spence, sr., were made parties; that under an order of said court the greater part of the real estate of the intestate was sold and the proceeds applied to the payment of his debts; that the tract of land which constitutes the subject matter of the present action, owned by the said Robert Spence, sr., at the time of his death, "was, by fraud on the part of the said Robert Spence, jr., and by mistake on the part of the other parties to

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that proceeding, entirely omitted from said proceeding, and has never been partitioned among the parties thereto;" that the said

Robert Spence, jr., did thereafter, "to wit, on the day of A. D. 187 , fraudulently convey to J. P. Reed, as trustee for the defendants, B. F. Brown and Sallie V. Brown, the aforesaid tract of land," and that the said Browns, ever since the date of said conveyance, have been in possession of said land, enjoying the rents and profits thereof; that the trustee, Reed, is dead and no one has been appointed in his place, and that some of the heirs at law of the intestate are minors. The relief demanded is that the land be sold and the proceeds divided amongst the heirs at law of said Robert Spence, sr., or their assigns, and that the defendants, Robert Spence, jr., B. F. Brown, and Sallie V. Brown, account for the rents and profits of said land during the time it has been in their possession.

A formal answer was filed by the minor defendants through their guardian ad litem, and the defendants, B. F. Brown and Sallie V. Brown, put in an answer, the purport of which is not stated, except that it contains a demurrer, upon the ground that the complaint does not state facts sufficient to constitute a cause of action against them.

On March 6, 1884, an order was granted by Judge Hudson, "that it be referred to W. W. Humphreys, master, to take testimony, and try all issues of law and fact, and report the same to this court." On January 21, 1885, the master, on the motion of plaintiffs, granted an order discontinuing the action as to the defendant, Robert Spence, jr., he being then dead, and the only demand made against him being for rents and profits—he having conveyed all his interest in the land to B. F. Brown and Sallie V. Brown. On January 17, 1885, a notice was served on the attorneys for the Browns by the plaintiffs' attorney, requiring them to produce a certain deed to Robert Spence, at a reference to be held by the master on January 19, 1885, "for the use and inspection of the plaintiffs herein." The said defendants having refused to produce the deed, the master, on February 10, 1885, made an order requiring the defendant, B. F. Brown, and his attorneys, "forthwith to produce said deed for the use of the plaintiffs as evidence in this case." From this order the de-

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fendants, B. F. Brown and Sallie V. Brown, appealed to the Circuit Court, and Judge Pressley set aside the order of the master, upon the ground that he had no jurisdiction to grant such an order. Immediately following this order of Judge Pressley, without further statement or explanation in the "Case," comes the following statement: "The court then ruled that the demurrer was first in order, and after argument the following order was made," to wit, an order sustaining the demurrer.

The plaintiffs appeal upon the following grounds:

1. Because his honor erred in calling up the demurrer for argument, the case being at the time under reference before the master by a previous order of his honor, Judge J. H. Hudson, and no report of the case having been made by the master back to this court.

2. Because his honor erred in sustaining the demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action against the defendants, B. F. Brown and Sallie V. Brown.

3. Because his honor erred in holding that the complaint did not sufficiently connect B. F. Brown and Sallie V. Brown with the alleged fraud, and that the allegations must be made connecting them directly with the fraud, and state that said fraud was discovered within four years before the commencement of this action.

4. Because his honor erred in not holding that the defendants, B. F. Brown and Sallie V. Brown, were estopped from raising the demurrer, they having allowed the case to be referred to the master, without objections, to try all issues of law and fact, and report the same to the court.

5. Because his honor erred in holding that the master was without jurisdiction to grant the order requiring B. F. Brown and his attorneys, to produce the deed of George S. Smith to Robert Spence, dated December 24, 1847.

6. Because his honor erred in holding that his honor, Judge J. H. Hudson, was without jurisdiction to refer the case to the master to try all issues of law and fact, and that the master in this case could only take the testi-

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mony and report the same to this court, and that this case was still in the hands of this court, and not in the hands of the master, for determination.

It will be observed that while these grounds of appeal question the right of the Circuit Judge to hear the question raised by the demurrer pending the reference of all the issues to the master, they do not, as in the case of *Smythe & Adger v. Brown* [25 S. C. 89], decided at the present term, question his right to hear an appeal from an intermediate order of the master before his report has been made, and hence that question will not be considered here. The first inquiry presented by the appeal is whether the Circuit Judge could hear and determine the question raised by the demurrer after all the issues in the action, both of law and fact, had been referred to the master for trial in advance of his report and exceptions thereto. Exactly how the question presented by the demurrer was brought before the Circuit Judge, does not appear. There are, it is true, some statements made in the argument of counsel as to this matter, but these, as we have frequently had occasion to say, we cannot consider, but must confine ourselves

to the "Case" as prepared for argument here; and there we find nothing to show how the question came up. All that we know is, that it did not come up upon the master's report and exceptions thereto, for it is stated in the "Case" that upon the notice of appeal from the order of the master requiring the defendant, B. F. Brown, and his attorneys to produce the deed above referred to, "the master held that the appeal suspended the further hearing by him until the appeal was disposed of by the Circuit Court."

This being the state of the case, we do not think that the question presented by the demurrer was properly before Judge Pressley for consideration and determination. This was one of the issues presented by the pleadings, for it is stated in the "Case" that an answer was filed by the defendants, B. F. Brown and Sallie V. Brown, "containing, amongst other things, the following demurrer," to wit, that the complaint does not state facts sufficient to constitute a cause of action against said defendants. And after all the issues of law and fact had been referred to the master for trial, we do not see

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how another Circuit Judge could *try one of those issues until the previous order of reference had been revoked, unless such order was so wholly beyond the jurisdiction of the judge who granted it as to render it a nullity. It is assumed in the sixth ground of appeal that Judge Pressley did hold that the order was void for want of jurisdiction, though this does not appear in the "Case" as the reason why Judge Pressley held that the demurrer was properly before him.

But, as a question of jurisdiction may be raised at any time, we will proceed to consider whether the order of reference was void for want of jurisdiction. This being an order of a court of general jurisdiction—the Court of Common Pleas—need not, like a proceeding in an inferior court, show upon its face all the facts necessary to give jurisdiction, but those facts, in the absence of any showing to the contrary, will be assumed. Now, there is no doubt that Judge Hudson, holding the Court of Common Pleas, had the power to grant an order of reference in the case, under certain circumstances, and he having granted it, we are bound to assume that he first ascertained the existence of those circumstances which would authorize him to grant such an order. It is true that it does not appear upon the face of the order that the defendants consented in writing to the order; but this is not necessary, as their written consent, which is all that the code requires, may have been otherwise given, and we are bound to assume, in the absence of any evidence to the contrary, that it was so given, especially when it is not suggested, even in argument, that any objection was ever made to the order of reference on that or any other ground, and, on the contrary, it

appears that defendants recognized its validity by attending the reference, without protest, held in pursuance of such order.

One Circuit Judge cannot disregard an order made by his predecessor, unless it is void for want of jurisdiction, and, therefore, we do not think that the issue of law presented by the demurrer was properly before Judge Pressley for determination, and hence, upon this ground, his order sustaining the demurrer must be set aside. To say nothing else, it might work great injustice to a party to be called on suddenly to argue a question of law before the Circuit Judge, when he supposed, and had a right to suppose, that such issue had been previously referred to the

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master to be *heard by him in the first instance. This case differs from the cases of *Kennerty v. Etiwan Phosphate Company*, 17 S. C., 411 [43 Am. Rep. 607], and *Davis v. McDuffie*, 18 Id., 495; for there the cases were properly before the Circuit Judge for hearing, while here, as we have seen, this case was not properly before him, except, perhaps, upon the single question presented by the appeal from the order of the master requiring defendants to produce a certain deed.

Under this view, the question whether upon the merits the demurrer was properly sustained, does not arise; but, as that question has been argued, it may save another appeal to consider it now. Even assuming that the allegations with respect to the alleged fraud in the conveyance from Robert Spence, jr., to Reed as trustee for the Browns are insufficient to warrant a court in setting aside such conveyance, we do not see how it follows from this that no cause of action is stated in the complaint. Eliminating from the complaint all the allegations of fraud, its statements are substantially as follows: that Robert Spence, sr., being seized and possessed of the land in question, departed this life intestate in October, 1870, leaving, as his heirs at law, the plaintiffs and the defendants, other than the two Browns; that soon after his death his lands, under proceedings in the Court of Probate, were sold, but that, by mistake, the tract of land now in controversy was omitted from said proceedings, and has never been partitioned amongst the heirs of the intestate; that Robert Spence, jr., one of the heirs, sold and conveyed said tract of land to J. P. Reed as trustee for the defendants, B. F. Brown and Sallie V. Brown, who are now in possession of said land, receiving the rents and profits thereof.

Now, if these facts be true, as they must be assumed to be, in considering the question presented by the demurrer, we do not see why a case for partition is not properly presented. If the land belonged to the intestate at the time of his death, then clearly one of his heirs, Robert Spence, jr., could only convey his interest in the land, even though

his deed might purport to convey the entire interest to Reed as trustee; and this would constitute him, or his cestuis que trust, the Browns, if the statute executed the use, tenants in common with the plaintiffs and the other heirs of the intestate, and as such

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amenable to the demand of *the plaintiffs for partition. Indeed, we do not know that it was any part of the object of the complaint to set aside the conveyance from Robert Spence, jr., to Reed as trustee for the Browns, on the ground of fraud. No such relief is demanded in the prayer of the complaint, and, on the contrary, the prayer is that the proceeds of the sale of the land be distributed amongst the heirs at law of the said Robert Spence, sr., or their assigns, and in the order which the plaintiffs offered discontinuing the action against Robert Spence, jr., the validity of such conveyance seems to be expressly recognized. And if the fact be, as alleged in the complaint, that the land belonged to the intestate at the time of his death, then, as Robert Spence, jr., could only convey his interest or share to Reed as trustee for the Browns, we do not see what possible interest the plaintiffs could have in setting aside such conveyance.

It seems to us, therefore, that all the allegations in the complaint with respect to fraud were wholly unnecessary to the real object of the action, and were probably inserted only as one of the reasons why this tract of land was omitted from the proceeding in the Court of Probate. It may be that the defendants, B. F. Brown and Sallie V. Brown, have been in adverse possession long enough to give them title, but that is a matter to be set up in their answer, and cannot be considered under the demurrer, for it does not appear in the complaint when they went into possession, the date of the conveyance being left blank, and there is certainly no statement as to the character of their possession. It may be, too, that, when the terms of the trusts declared in the conveyance to Reed are made to appear, it will be necessary that the trustee should be made a party, but that also is a matter for the answer; for taking the naked fact, as stated in the complaint, that the conveyance was made "to J. P. Reed as trustee for the defendants, B. F. Brown and Sallie V. Brown," without more, there can be no doubt that the statute would execute the use, and vest the legal title in the Browns, in which event the trustee would not be a necessary party.

The only remaining inquiry is whether the Circuit Judge erred in setting aside the order of the master, requiring the defendant, B. F. Brown, and his attorneys to produce

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the deed mentioned in *the order. We agree with the Circuit Judge, that the master

had no authority to grant such an order. That officer being constituted a special tribunal, as it were by statute, can only exercise such powers as are conferred upon him by the statute law. We are unable to find any law investing him with the power to grant such an order. It is certainly not embraced in the powers conferred upon that officer either by section 791 of the General Statutes or by section 294 of the Code; but, as we learn from the argument of the appellants' counsel, the power is claimed under section 389 of the Code. The powers conferred by that section are, however, in express terms conferred upon "the court before which an action is pending or a judge or justice thereof," and not upon any other officer. We do not think that the master could claim the power in question under that section.

Indeed, it is not by any means clear that the provisions of section 389 would authorize even the court or a judge thereof to grant an order of the character of that now under consideration. The object of that section seems to be to enable a party to obtain an inspection or copy of some documentary evidence which his adversary expects to use on the trial, and not to obtain from his adversary evidence for his own use, for that he could obtain by a subpoena duces tecum or by notice to produce a paper, in default of which secondary evidence of its contents would be offered. Here the order was "to produce said deed for the use of the plaintiffs as evidence in this case;" and it is at least questionable whether the object of the section was to force one party to furnish testimony to be used by the other. But, as this point has not been argued, we do not propose to decide it now, but rest our decision upon the ground that the section does not confer the power in question upon the master.

The judgment of this court, is that the order of the Circuit Judge sustaining the demurrer be reversed, and that his order setting aside the order of the master requiring the defendant, B. F. Brown, and his attorneys to produce the deed mentioned in the order be affirmed.

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*McLURE v. MELTON.

(November Term, 1885.)

[1. *Appeal and Error* ⇨172.]

A question not raised before the referee nor in the Circuit Court cannot properly be brought before this court for consideration.

[Ed. Note.—Cited in *Bomar v. Railroad Co.*, 30 S. C. 455, 9 S. E. 512.

For other cases, see *Appeal and Error*, Cent. Dig. § 1070; Dec. Dig. ⇨172.]

[2. *Constitutional Law* ⇨116.]

Piester v. Piester, 22 S. C., 139 [53 Am. Rep. 711], affirmed, and held not to have effected

any change in the law, impaired the obligation of any contract, nor divested any rights vested by the decision in *Edwards v. Sanders*, 6 S. C., 316, which was simply an erroneous declaration of what was the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 278; Dec. Dig. ⚡116.]

3. This case distinguished from *Herndon v. Moore*, 18 S. C., 339, and the extent of that decision stated.

[4. *Constitutional Law* ⚡116.]

That a contract valid under the law as expounded at its date cannot be impaired by subsequent judicial decision, is a doctrine confined to cases of contract, and probably not even then, where it depended upon a single case, never recognized nor followed, and overruled at the first opportunity.

[Ed. Note.—Cited in *King v. Belcher*, 30 S. C. 385, 9 S. E. 359; *Henry v. Henry*, 31 S. C. 7, 9 S. E. 726; *Rumph v. Hiott*, 35 S. C. 455, 15 S. E. 235; *People's Loan & Exchange Bank v. Garlington*, 54 S. C. 425, 32 S. E. 513, 71 Am. St. Rep. 800.

For other cases, see Constitutional Law, Cent. Dig. § 278; Dec. Dig. ⚡116.]

5. The decision in *Piester v. Piester* does not affect the validity of any contracts; it only declares the proper construction of a statute prescribing the order in which the debts of a decedent are to be paid. The right of priority forms no part of the contract itself.

[6. *Constitutional Law* ⚡93.]

If it be conceded that that case did change the law, still there is nothing in the constitution to prevent a change in the law of priority of payment out of the assets of one deceased, which is a mere direction to the administrator as to the manner in which he shall administer the assets—a matter at all times subject to legislative control.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 216; Dec. Dig. ⚡93.]

[7. *Constitutional Law* ⚡92.]

[Cited in *King v. Belcher*, 30 S. C. 387, 9 S. E. 359, as to the point that it is very difficult to define precisely rights so vested as to be protected from legislative interference.]

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178-180, 207, 225-227, 237; Dec. Dig. ⚡92.]

[This case is also cited in *Ex parte Hardin*, 34 S. C. 386, 13 S. E. 615, 13 L. R. A. 723, 27 Am. St. Rep. 820, without specific application, and in *Ex parte Hardin*, 34 S. C. 382, 13 S. E. 615, 13 L. R. A. 723, 27 Am. St. Rep. 820, as to facts.]

Before Wallace, J., Chester, March, 1885.

The opinion states the case. The appeal was from the following Circuit decree:

The act of 1879 (5 Stat., 111) has been much discussed by our courts, in so far as it relates to the order of payment of the debts of a decedent. The case of *Tunno v. Happpoldt* (2 McCord, 188), followed by the case of *Kinard v. Young* (2 Rich, Eq., 258), in construing the language of that act, decides that a mortgage is a preferred claim only so far as it is a lien upon specific property, and when that lien is exhausted, the debt secured by it took rank according to the nature of the instrument by which it was evidenced. As thus declared the law stood

(until October 14, 1875, when the case of *Edwards v. Sanders* (6 S. C., 316) was filed, which announced a different rule as derived

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from the act of *1789, which had at that time been incorporated in the revised statutes of 1872. By this latter case it was held that after the specific lien of a judgment had been exhausted by foreclosure and sale, the mortgage still took rank amongst judgments and executions as a mortgage, and this without any reference to the nature of the instrument by which the debt was evidenced.

While this case stood as the declared rule of construction of the statute, the referee held that the mortgages set up in this case were preferred claims as such. Before this case came on to be heard upon the exceptions to the referee's report, the case of *Piester v. Piester*, 22 S. C., 139 [53 Am. Rep. 711], was filed, which reverses the rule as laid down in *Edwards v. Sanders* and re-establishes the rule as declared in *Tunno v. Happpoldt* and *Kinard v. Young*, supra. Of course, the mortgages in this case, then, are not preferred claims, as such, unless there is some reason why they are not under the operation of *Piester v. Piester*. Counsel accordingly argue that the mortgages here are not under the operation of this latter case, but are to be governed by the rule as stated in the case of *Edwards v. Sanders*, because that was the declared rule, by the court of last resort, while their mortgages were in existence, and rely upon the case of *Herndon v. Moore*, and the cases there cited, to support this position. 18 S. C., 339.

As is well known to the profession, the Supreme Court of this State, in the case of *Davenport v. Caldwell* (10 S. C., 317), decided that the Probate Court had no jurisdiction in matters of partition of real property of deceased persons, and that the act of the general assembly of 1868 providing for the exercise of such jurisdiction by that court was unconstitutional. The Court of Probate, provided for in the constitution of 1868, was organized by act of the general assembly of the same year, and immediately proceeded to exercise jurisdiction in the partition of real estates in pursuance of the power provided for in the organizing act. The trial judge, Hudson, J., in his opinion in the case of *Herndon v. Moore*, supra, says: "No question was made as to the constitutionality of the act. The profession at large and the Probate Courts and the Circuit Courts and the Supreme Court, all recognized and acted upon a conceded jurisdiction to Courts of Probate in matters of par-

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tion. Under this conceded and recognized jurisdiction from 1868 to 1878, thousands of acres of land have been sold in all parts of the State, a vast amount of money invested, conveyances and reconveyances made, ti-

ties and rights vested, and innocent purchasers, acting under this common error, shared by legislatures, lawyers, and courts, have become involved." These facts are held by Hudson, J., sufficient to sustain the validity of sales, or at least to render them unimpeachable, made under partition proceedings in the Probate Court in the exercise of a jurisdiction provided for in an act of general assembly decided to be unconstitutional—the ground of the opinion of Hudson, J., being that "a common error makes law."

The Supreme Court sustains the Circuit Judge in this view, and rests the affirming opinion mainly upon the remark of Lord Ellenborough in the case of *Isherwood v. Oldknow*, 3 M. & S., 396 (55 Geo. III.), who says: "It has sometimes been said communis error facit jus, but I say communis opinio is evidence of what the law is, not where it is an opinion merely, speculative and theoretical, floating in the minds of persons, but where it has been made the ground work and substratum of practice." The Supreme Court held, in *Herndon v. Moore*, supra, that the facts show that an opinion favorable to the jurisdiction of the Probate Court was the "ground work and substratum of practice" for many years, and therefore sustain the validity of the proceedings. With a view to a clear apprehension of the rule, it may be stated thus: where under a prevailing and common mistake as to the rule of law contracts are made by which rights are acquired and obligations incurred, which would not have been made but for the existence of the common error, such contracts will be upheld, and rights and liabilities under them enforced because the law will not allow itself to be made an instrument of fraud and injustice.

Now, in the case at bar the mortgage of Hopkins, Dwight & Co. was executed at a time when it had been declared by the court of last resort, that mortgages were preferred claims against the general assets even after its specific lien had been exhausted. But it does not appear that the contract had been made and the mortgage executed under a common belief in the soundness of the rule declared to be the law at that time, or that

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the rule so *declared had been "the ground-work and substratum of practice," or that the practice of taking mortgages would not have been the same if the rule as stated in *Tunno v. Hapgoodt*, supra, had never been changed. It may be added that the rule laid down in *Edwards v. Sanders* cannot be considered as within the description of the words *communis error facit jus*, because McGowan, A. J., in the opinion in the case of *Piester v. Piester*, states substantially that the profession in the State had never accepted that rule as sound construction.

The rule, therefore, as stated in *Piester v.*

Piester is binding upon this court, and there is nothing to take the mortgages in this case from under its operation. It follows that the mortgages here must take rank as against the assets in the hands of the administrator according to the nature of the instruments the mortgage was given to secure, and that the specific lien of the mortgages having been exhausted, they are no longer preferred claims as mortgages. I have not discussed the facts relating particularly to the mortgage set up by Mr. Kerr, because he can stand at least on no better ground than the other mortgage, his mortgage having been executed before the decision in the case of *Edwards v. Sanders* was filed.

From this decree, Hopkins, Dwight & Trowbridge appealed upon the following grounds:

I. For that his honor, the presiding judge, held that the lien of the mortgage held and owned by Hopkins, Dwight & Co.'s successor has been exhausted, and that the debt secured thereby is no longer a preferred claim, and can only be proved and take rank against the assets in the hands of the administrator, according to the nature of the instrument evidencing the debt and the statute relating thereto.

II. For that his honor, the presiding judge, did not hold that the rank given by the referee to the debt, and mortgage securing the same, of Hopkins, Dwight & Co.'s successor, being in accordance with the decision of the Supreme Court in force at the time of the commencement of the action and of the finding of the referee, must be sustained.

III. For that his honor, the presiding judge, did not hold that the law in force at the time of the execution of the note and

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mort*gage securing the same, and at the time of the death of intestate, should determine the rank of the debt as a claim against the estate.

IV. For that his honor, the presiding judge, held that there was no proof that said note and mortgage were executed by the parties with reference to the decision of *Edwards v. Sanders*; whereas he should have held that the parties were to be presumed to have contracted with reference to the law as expounded by our highest court at the time.

V. For that the ruling of his honor, the presiding judge, that the rank of appellants' claim should be determined by the decision of *Piester et al., Ex'rs, v. Piester et al.*, rendered by the Supreme Court, after the execution of the contract, after the death of the deceased, after the commencement of this action, and after the referee's decision upon the claim, was giving said decision of *Piester et al., Ex'rs, v. Piester et al.*, a force and effect in violation of sec. 10, art. I., of the constitution of the United States.

VI. For that the decision of the Supreme Court in the case of *Piester et al. Ex'rs, v.*

Piester et al., as (or if) applied to appellants' claim, is in violation of section 10, article I., of the constitution of the United States.

An appeal was also taken by W. H. Kerr, clerk, and Mrs. Melton and her children, but the grounds are substantially the same as those above stated.

Messrs. J. H. Rion, A. S. Douglass, and S. P. Hamilton, for appellants.

Messrs. McLure & McLure, J. F. Hart, and Paul Hemphill, contra.

April 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The facts of this case, so far as necessary for a proper understanding of the points made by the several appeals, are substantially as follows: On July 9, 1876, Geo. W. Melton died intestate, and his estate being found to be largely insolvent, this action was commenced in July,

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1877, to marshal the assets. Creditors were called in and numerous claims were established, but the only ones that need be specially stated are the following: a note under seal to G. R. Ratchford & Co., bearing date February 22, 1859; a note under seal to Dr. A. P. Wylie, bearing date May 3, 1872; a note under seal to Samuel D. Melton, bearing date February 1, 1871; a bond, secured by a mortgage of real estate to Duvall, sheriff, dated June 4, 1875, which has been transferred to the defendant, Kerr, as clerk of the court for Fairfield County; and a bond, secured by a mortgage of real estate to Hopkins, Dwight & Co., dated May 19, 1876.

The mortgage to Hopkins, Dwight & Co. has been foreclosed, and the proceeds of the sale of the mortgaged premises being insufficient to pay the debt, the balance is now set up against the general assets, and preference for it is claimed as a mortgage debt. The land covered by the Kerr mortgage was sold under an order in this cause before Kerr became a party by proving his mortgage debt; and after that sale, Kerr not having got the proceeds, he brought his action to foreclose his mortgage against the purchaser at the sale made under the order in this cause, and the land was again sold but the proceeds of this last sale being insufficient to pay his debt, the balance is now set up as a mortgage debt against the general assets. The Circuit Judge held that the liens of the two mortgages having both been exhausted, the rank of these debts must be determined by the nature of the obligations which they were given to secure, and cannot be classed as mortgages. The appellants question the correctness of this ruling, and the defendant, Kerr, also appeals upon the ground that the Circuit Judge erred in not holding "That so much of the proceeds arising from the sale of the mortgaged premises under the order of the court in this action as are in the hands

of the clerk of this court be applied to said mortgage debt."

In relation to this last mentioned ground of appeal, we have only to say that we are unable to discover where any such question was made in the court below. It does not appear that the referee ruled, or was asked to rule, upon it, and no such question was considered or passed upon by the Circuit Judge, and therefore we do not see how we

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can consider it. There is nothing in the "Case," as prepared for argument here, to show that an order directing the proceeds of the first sale to be applied to the Kerr mortgage was ever applied for. Whether such an order should be granted, or whether Kerr has elected to ignore the first sale by bringing his action to foreclose his mortgage against the purchaser at such sale, and thereby lost the right to claim the proceeds, or whether the purchaser at that sale may not have equities which entitle him to be heard, are all questions upon which we do not desire to be understood as intimating any opinion, inasmuch as we do not think the question presented by this ground of appeal is properly before us.

The Circuit Judge based his decision upon the main point involved in these appeals, that is, as to the rank of the claims of Hopkins, Dwight & Co. and Kerr, clerk, upon a recent decision of this court in the case of Piester v. Piester (22 S. C., 139 [53 Am. Rep. 711]); and there can be no doubt that if that case applies to this, it fully sustains the decree of the Circuit Judge. The appellants, however, contend that the case of Piester v. Piester cannot be so applied, for the reason that to so apply it would impair the obligation of contracts or would divest vested rights, inasmuch as at the time of the death of the intestate, and at the time of the making of one of the contracts in question—that of Hopkins, Dwight & Co.—the law, as then declared by the case of Edwards v. Sanders (6 S. C., 316), required that the balances due on these two debts should be ranked as mortgages, and as such entitled to priority over specialty debts; and that the subsequent change in the law, as it is called, by the decision in Piester v. Piester, cannot have the effect of divesting the rights of these appellants which became vested at the time of the death of the intestate, under the law as it was then declared to be.

For a clearer understanding of the questions raised, it may be well to repeat here the dates of the several transactions and matters referred to. The date of the sealed note to Ratchford & Co., one of the respondents, is February 22, 1859; the sealed note to S. D. Melton, February 1, 1871; the sealed note to Wylie, May 3, 1872; the Kerr bond and mortgage, June 4, 1875; the bond and mortgage to Hopkins, Dwight & Co., May 19, 1876; the death of the intestate, July 9,

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1876: the decision *in the case of *Edwards v. Sanders* was filed October 14, 1875, though the book of reports in which it is found was not published until some time in the year 1877; and the decision in the case of *Piester v. Piester* filed January 10, 1885, and the decree appealed from May 20, 1885.

The construction which is now placed upon the statute prescribing the order in which the debts of a decedent must be paid is the same as that which was adopted by the law court in the case of *Tunno v. Hapoldt* (2 McCord, 188), as far back as 1822, and reaffirmed by the Court of Equity in the case of *Kinard v. Young* (2 Rich. Eq., 247), in 1846. Thus the law stood unquestioned, so far as we are informed, down to the year 1875, when the decision in *Edwards v. Sanders*, supra, was made, overruling the two former cases, and placing upon the statute the construction now contended for by the appellants. This last named decision does not seem to have been followed in a single instance; and from what is said in the case of *Piester v. Piester*, it would seem to have been never satisfactory to the profession, and that, at the first opportunity which was afforded, it was overruled, by the legislature, in the meantime, having, by the act of 1878 (16 Stat., 686), shown its dissatisfaction with the construction therein adopted by declaring: "That in the administration of the assets of a decedent, mortgages shall not be entitled to a priority over rents, debts by specialty, or debts by simple contract, except as to the particular parts of the estate affected by the liens of such mortgages. That after the property covered by the liens is exhausted, the grade of the demand shall be determined by the nature of the instrument which the mortgage was given to secure." It is true that in the case of *Piester v. Piester*, no express reference is made to the difference in the phraseology of the original act of 1789 and that adopted when it was incorporated in the general statutes of 1872, upon which stress seems to be laid in the argument of one of the counsel for appellants, but the whole subject was carefully considered before any conclusion was reached. Nor do we find in the case of *Edwards v. Sanders* that any allusion was made to such change in the phraseology as a reason for a change in the construction of the act.

The question, then, is, does the decision in

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the case of *Piester v. Piester* effect such a change in the law as would forbid its application to the case under consideration, because it would impair the obligation of a contract or would divest rights vested under the law as declared in the case of *Edwards v. Sanders*? As we have seen, the proper construction of the statute in question had been settled, for a long series of years, by decisions of both the courts of final resort in this State,

in accordance with the view now declared to be the proper construction of that statute; and it seems to us that it would be going very far to say that a single isolated decision, never recognized or followed in any subsequent case, and never recommending itself to the approval of the profession, should be regarded as having the effect of changing the law; on the contrary, whatever may be the opinions of individuals as to its correctness, it must be regarded as an erroneous declaration of what was the law, and as only the law of the particular case in which it was made.

We do not think that the case of *Herndon v. Moore* (18 S. C., 339), relied on by the appellants, is applicable here. In that case, there were many potential elements, such as long and universal acquiescence, sales made, and money paid, which are not found here. Moreover, it will be observed that the majority of the court concurred only in the result, and hence that case can only be regarded as authority on the precise question therein adjudged, as presented under the special circumstances therein stated.

It is true that the Supreme Court of the United States have, in numerous cases, held that where a contract is valid at the time it is made, under the laws of the State as then expounded, its validity or obligation cannot be impaired by any subsequent judicial decision giving a different exposition of the law; and this court has, in two cases (*The Bond Debt Cases*, 12 S. C., 282, and *Whaley v. Gaillard*, 21 Id., 572), deferred to the authority of that court in that class of cases which involve the question whether a particular law or decision is in violation of that clause of the constitution which forbids a State from passing any law impairing the obligation of a contract. But even in the Supreme Court of the United States this doctrine is confined to cases of contract, and even in such cases it is, at

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least, doubtful whether it would be *applied where, at the time the contract was made, the law had been declared only by a single isolated case, never recognized or followed, and overruled at the first opportunity presented. See the cases of *Ohio Life and Trust Co. v. Debolt*, 16 How., 432 [14 L. Ed. 997]; *Gelpcke v. Dubuque*, 1 Wall., 175 [17 L. Ed. 520]; *Lee County v. Rogers*, 7 Wall. 181 [19 L. Ed. 160]; *Butz v. City of Muscatine*, 8 Wall. 575 [19 L. Ed. 490]; *The City v. Lamson*, 9 Wall. 477 [19 L. Ed. 725]; *Olcott v. The Supervisors*, 16 Wall. 678 [21 L. Ed. 382].

Assuming, then, for the sake of the argument only, that there was a change in the law by the decision in the case of *Piester v. Piester*, before the doctrine above cited from the Supreme Court of the United States could be applied in this case, it must appear that this is a case of contract, and that to give effect to such change in the law would impair the obligation of such contract. We

do not see that the law, as declared in *Piester v. Piester*, impairs or in any way affects the validity or obligation of any contract. It does not purport to interfere in any respect with the validity or binding obligation of any contract set up by the appellants. It simply declares the proper construction of a statute prescribing the order in which the debts of a decedent are to be paid.

In *Harrison v. Sterry* (5 Cranch, 289 [3 L. Ed. 104]), the question was as to the right of the United States to priority under an act of congress. It was contended that as the contract was made with foreigners, in a foreign country, the law of the place where the contract was made must govern, and under that law no such priority was recognized. But the court held otherwise. Marshall, C. J., while recognizing the doctrine that the *lex loci contractus* governed in expounding the contract, adds: "But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers, not by the law of the country where the contract was made." This language is quoted with approval in the subsequent case of *Smith v. Union Bank of Georgetown*, 5 Peters, 518 [8 L. Ed. 212].

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*We do not see, then, how any change in the law prescribing the order in which debts of a decedent are to be paid can be said to impair the obligation of any contract by which such debts were created. But even if such should be the case, it seems to us that the practical result in this case would be the same as that reached by the Circuit Judge. For if, as we concede, parties are to be presumed to contract with reference to the law as it exists at the time the contract is entered, and if the law fixing the order in which debts of a decedent are to be paid enters into and forms a part of the contract by which such debts were created, then it follows necessarily that the respondents, *Ratchford & Co.*, *Dr. Wylie*, and *S. D. Melton*, whose debts were created at a time when, under the decisions of *Tunno v. Hapoldt* and *Kinard v. Young*, they were entitled to priority over the appellants, they could not be deprived of such priority by the subsequent change in the law, as it is called, by the decision in the case of *Edwards v. Sanders*, for the fact that the intestate did not die until after the so called change was made could not affect the validity of contracts made before that time; for certainly a circumstance occurring after a

contract has been made cannot be said to enter into or form a part of such contract.

But, as we have said, we do not see that any change in the law prescribing the order for the payment of the debts of a decedent can be properly said to impair the obligation of any contract; and, therefore, whatever other objection may be urged, it is not amenable to the charge that it violates those clauses of the constitution of this State and the United States which forbid the passage of laws impairing the obligation of contracts.

It is contended, however, that upon the death of a decedent, the rights of his creditors to the payment of their debts, according to the law then in force, become vested, and that such vested rights cannot be impaired or taken away by any subsequent change in the law. Applying this doctrine to the facts of this case, appellants insist that under the law, as it was declared to be by the case of *Edwards v. Sanders*, at the time of the death of the intestate, they were entitled to priority, and that any subsequent change in the law cannot deprive them of such priority. Without repeating here what we have said

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above (that we do not assent to the fundamental proposition upon which the doctrine contended for rests, to wit, that the law ever was as it was incorrectly announced to be in *Edwards v. Sanders*), we will, for the sake of argument only, assume the contrary, and proceed to consider the question whether the appellants can claim such vested right of priority as that it cannot be divested by any change in the law.

We do not understand that there is anything in the constitution of the United States which forbids a State from enacting a retrospective law, or a law divesting a vested right, provided in so doing the obligation of a contract is not impaired. *Watson v. Mercer*, 8 Peters, 88 [8 L. Ed. 876]; *Jackson v. Lamphire*, 3 Pet. 280 [7 L. Ed. 679]; *Satterlee v. Matthewson*, 2 Pet. 380 [7 L. Ed. 458]; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 [9 L. Ed. 773]; *Curtis v. Whitney*, 13 Wall. 68 [20 L. Ed. 513]. Nor is there any provision in the constitution of this State, as in some of the other States, forbidding the enactment of retrospective laws, or any provision which, in express terms forbids the enactment of a law divesting vested rights, though certain safeguards are thrown around such rights by the provisions of sections 14 and 23 of article I. of the constitution.

In the case of *Miles v. King* (5 S. C., 146), it was held that the act of 1866, which required all instruments in writing of which a record is required by law, and of which the record has been lost or destroyed, but the original preserved, to be again recorded within a specified time; otherwise, that they should not prevail as liens against subse-

quent purchasers or creditors without notice, was a constitutional and valid law. Now, in that case the plaintiff, by recording his mortgage, which was executed in 1855, under the law then of force, had acquired a vested right, so to speak, of priority over all subsequent purchasers and creditors, and yet it was held that such vested right was divested by his failure to comply with the requirements of the subsequent act of 1866. In delivering the opinion of the court in that case, Moses, C. J., uses this language: "The general assembly has power to divest vested rights, and to enact statutes retrospective in their action, provided they do not impair the obligation of a contract." And again: "A vested right may be divested by the legislature, unless it exists by virtue of or in the nature of a contract."

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*Now, while we are not prepared to indorse this language without some qualifications, as it would, in its unqualified form, imply that the legislature had power to divest a vested right of property: yet we agree that every vested right, so-called, is not beyond the reach of the legislature. It is very difficult, if not impossible, to define precisely those rights which are so vested as to be protected from legislative interference, as is shown in the discussion of this subject by that eminent author, Judge Cooley, in his work on Constitutional Limitations, and we shall not undertake to do so on the present occasion. It is sufficient for us to say, that the right of priority given to certain classes of creditors by the statute prescribing the order in which the assets of a decedent's estate shall be applied to the payment of his debts is a mere direction to the executor or administrator, as the case may be, as to the manner in which he shall administer such assets, which is at all times subject to legislative control, and does not confer any such vested right upon the creditors as to place it beyond such control.

This seems to have been the principle upon which the Supreme Court of the United States acted in *Bank of Hamilton v. Dudley*, 2 Peters, 492 [7 L. Ed. 496]. In that case, an act of 1795, which seems to have been of force at the time of the death of the intestate, and at the time letters of administration upon his estate were granted, authorized administrators to sell lands for the payment of debts. This act was repealed on June 1, 1805, and in August following the Court of Common Pleas granted an order authorizing the administrators to sell the land in controversy, who proceeded to do so, and the question was as to the validity of the sale. It was contended on the part of the plaintiffs in error that the interest of the administrators in the real estate, as trustees for the creditors, was a vested interest, which the repeal of the law could not divest.

But the court held otherwise, and Marshall, C. J., in delivering the opinion, used this language: "The repeal of such a law divests no vested estate, but is the exercise of a legislative power which every legislature possesses. The mode of subjecting the property of a debtor to the demands of a creditor must always depend on the wisdom of the legislature."

It is not to be denied that some of the lan-

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guage used by that distinguished jurist, Johnston, Ch., in the case of *Morton & Courteny v. Caldwell* (3 Strob. Eq., 161), when considered apart from the question then under consideration, does seem to support the view contended for by the appellants. But the question in that case was so wholly different from the one now under consideration, that to apply the language there used to a totally different question would inevitably lead us into error. The question there was, to what period of time must we look in order to ascertain the amount of a claim against a decedent's estate, in order to determine its pro rata share of the assets of such estate, and the question now before us, as to whether the law-making power could not change the direction previously given as to the manner of administering the assets of a decedent's estate, was not considered or even hinted at. We do not see, therefore, that there was any error, in any respect, in the judgment appealed from.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

[Writ of error dismissed, *Hopkins v. McLure*, 133 U. S. 380, 10 Sup. Ct. 407, 33 L. Ed. 660.]

24 S. C. 572

DIAL v. GARY AND TAPPAN.

(November Term, 1885.)

[1. *Mortgages* ⚭435.]

Where it appears, under a liberal construction of the complaint, that two mortgages sought to be foreclosed were given, one by A and B on one lot of land, the other by B on another lot, to secure a note of A and B, a demurrer that two several causes of action were improperly united, was properly overruled.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1288; Dec. Dig. ⚭435.]

[2. *Pleading* ⚭68.]

A statement in the complaint that plaintiff "is induced to believe, and does believe," a matter stated, is an allegation of fact upon information and belief, and is sufficient.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 140; Dec. Dig. ⚭68.]

[3. *Judgment* ⚭216.]

Where the judge is not furnished with the papers necessary to enable him to formulate a proper judgment of foreclosure, it is not error for him, after decreeing that the plaintiff is entitled to the relief demanded, to give to plaintiff

leave to move before the proper judge for such formal judgment as may be necessary to effectuate this purpose.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 393; Dec. Dig. § 216.]

4. Findings of fact by the Circuit Judge from written testimony submitted to him, approved.

[5. *Executors and Administrators* § 521.]

The mortgagor having died domiciled in another State, no assignee of his executor there could sue in the courts of this State; action on this note and these mortgages could be maintained only by the administrator in this State.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2337; Dec. Dig. § 524.]

[This case is also cited in *Moses v. Hatfield*, 27 S. C. 329, 3 S. E. 538, without specific application.]

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*Before Cothran, J., Richland, July, 1884.

This was an appeal from an order overruling a demurrer at October term, 1881, and from a subsequent decree by the same judge on the merits, which, omitting its statement, was as follows:

The contention seems to be still as to the discrepancy or incongruity between the recitals of the two mortgages of October 9, 1873, and the evidences of indebtedness actually produced. In the Circuit judgment overruling the demurrer, and not appearing in the abstract, as reported in the case, it is said: "But it is argued by the defendants' counsel that it does not appear but that the bonds" (recited in the mortgages) "have been paid, as they have not been produced, nor their loss accounted for. It is enough to say in answer to this hypothetical objection that if such be the fact, it should be made out as a defence upon the merits of the case." (See brief of case reported in 20 S. C., 167.)

The plaintiff's complaint is again very sharply criticised, and, as I have had cause to say already, not unjustly, but much allowance ought to be made for the circumstances of the case—the original transactions were between parties nearly related, uncle and nephews, the latter having been charged with the preparation of the papers, and are therefore the authors of the discrepancies of which they so loudly and persistently complain. The plaintiff, upon the other hand, is at great disadvantage. He became connected with this matter after the death of Asa Burke, by assignment from his administrator and widow in the State of Massachusetts, and from the very nature of the case cannot be very positive in his averments. He has stated his belief, and the defendants insist that such is not necessary or proper matter of denial on their part. This seems to me so. 2 Wait's Pr., 417.

Can the matter of one's belief be submitted as an issue to a jury? It appears that it cannot be. But in his extremity the plaintiff is greatly relieved by two potential facts

which appear in the case—the one furnished by the depositions of Philip Sowden, the foreign administrator, who was examined by commission. He says, "There was a note of three thousand dollars, signed by one of them (the defendants), and might have been

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signed by both, and *this note was secured by one or more of these mortgages. There was a note of three thousand dollars signed by said Tappan and Gary, secured by a life insurance policy upon the life of Elbridge Gary. The last named note and policy are in my possession, the others I sold to George L. Dial by assignment."

The other fact is that notwithstanding the indulgence given to the defendants to answer over; notwithstanding their abounding knowledge of this matter, they have not attempted, either by answer or by proof, to explain the discrepancy complained of, or to establish the pretence even that there are other outstanding evidences of indebtedness of theirs secured by the said mortgages. Upon this point they are profoundly silent, relying upon such technical defences as that they are not bound to deny the plaintiff's allegations of belief, nor to make out his case for him. To these technical defences, fortified, as the plaintiff's belief is, by the circumstance of the case and the depositions of Sowden, I have no hesitation in applying the aphorism that he who is silent when he should speak, should not be allowed to speak when he ought to be silent; and sometimes, at least, and even here *taciti clamant*.

At this stage of the decree I have been greatly delayed and its earlier filing prevented by the lack of necessary papers to formulate a proper judgment in the case, and that notwithstanding repeated requests made to the plaintiff's counsel to furnish the same. I am still embarrassed for the want of these.

Wherefore it is ordered and adjudged, that the plaintiff herein have the relief demanded in this complaint, and that his counsel have leave to move before the judge of the Fifth Circuit, or the judge in turn presiding for the County of Richland, for such formal judgment as may be necessary to effectuate this purpose.

[For subsequent opinion, see 27 S. C. 171, 3 S. E. 84.]

Messrs. Clark & Muller, for appellants.

Messrs. R. A. Lynch, and Bachman & Youmans, contra.

April 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The object of this action is to foreclose certain mortgages of real

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estate, alleged to have been given *by the defendants to the testator, Asa Burke, in his life-time. In the complaint it is alleged, sub-

stantially, as a first cause of action, that on October 9, 1873, the defendants made "their written obligation" to said Burke for three thousand dollars; that on the same day they executed their mortgage to said Burke on a certain lot on Gervais street, in the city of Columbia, which "purports on its face to be to secure the payment of a certain bond or obligation executed by the said defendants to said Asa Burke October 9, 1873, in the penal sum of four thousand dollars, conditioned for the payment of two thousand dollars;" that the defendant, Henry L. Tappan, at what date is not stated, executed his mortgage to said Asa Burke on a certain lot on Blanding street, in the city of Columbia, which "purports on its face to be to secure the payment of a certain bond or obligation executed by the defendant, Henry L. Tappan, to said Asa Burke, in the penal sum of two thousand dollars, conditioned for the payment of one thousand dollars," and after stating that the plaintiff has never had in his possession either of the bonds or obligations above referred to, alleges that he "is induced to believe, and does believe, that both the mortgages aforesaid were executed to secure the payment of the obligation mentioned in paragraph I. hereof," which we understand to be an ordinary note, and which will hereafter be referred to as such.

There is also a second cause of action set forth in the complaint, based upon a bond of defendant's to Asa Burke in the penal sum of eight thousand dollars, conditioned for the payment of four thousand dollars, bearing date December 1, 1874, secured by a mortgage on the Gervais street lot, bearing even date with said bond; but as there seems to be no controversy in regard to the second cause of action, it need not further be alluded to.

The defendants filed a demurrer to the complaint upon several grounds, all of which have been disposed of except the following: "Second. That several causes of action have been improperly united, in this, that one cause of action against the defendants, Edwin F. Gary and Henry L. Tappan, being to foreclose a mortgage by them executed to the testator, Asa Burke, of a certain lot of land in the city of Columbia, has been im-

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properly joined *with another cause of action against Henry L. Tappan alone to foreclose a mortgage by him executed to the testator, Asa Burke, of another lot of land in the city of Columbia." The Circuit Judge overruled the demurrer, holding substantially that, according to his construction of the complaint, the joint debt of the defendants represented by the note for three thousand dollars was secured by the joint mortgage of the defendants on the Gervais street lot for two thousand dollars, and the individual mortgage of the defendant, Tappan, on the Blanding street lot for one thousand dollars,

the two together making up the precise sum of the note. He, however, granted leave to the defendants to answer over. The defendants duly excepted to the ruling by which the demurrer was overruled, and filed their answer.

The case subsequently came on for trial on the merits, when judgment was rendered that the plaintiff have the relief demanded in his complaint, and that he have leave to move "for such formal judgment as may be necessary to effectuate this purpose," before the judge of the Fifth Circuit, or the judge in turn presiding for the county of Richland. From this judgment defendants appeal upon the following grounds:

1. That his honor, the Circuit Judge, erred in holding that the defendants went to trial upon the merits before Judge Witherspoon, were cast, and appealing from this decree, took up, at the same time, for review by the Supreme Court, the judgment upon the demurrer.

2. That his honor, the Circuit Judge, erred in holding that "the original transactions were between parties nearly related, uncle and nephews, the latter having been charged with the preparation of the papers, and are, therefore, the authors of the discrepancies of which they so loudly and persistently complain. The plaintiff, upon the other hand, is at great disadvantage."

3. That his honor, the Circuit Judge, erred in ordering and adjudging "that the plaintiff herein have the relief demanded in his complaint; and that his counsel have leave to move before the judge of the Fifth Circuit, or the judge in turn presiding for the County of Richland, for such formal judgment as may be necessary to effectuate this purpose."

This appeal, therefore, presents two lead-

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ing questions: First, *whether there was error in overruling the demurrer based upon the ground that several causes of action were improperly united. Second, whether there was error in the final judgment upon any of the grounds stated.

First, as to the demurrer. While it is quite true that the complaint is very inartistically framed, yet we think by a liberal construction of its terms enough appears in it to relieve it from the objection taken by the demurrer. To sustain the demurrer, it must appear upon the face of the complaint that the individual mortgage of Henry L. Tappan was in no way connected with the debt, the collection of which is sought to be enforced by the foreclosure of the two mortgages mentioned in the statement of the first cause of action. This, we think, does not appear, and on the contrary there is enough in the complaint to show that these two mortgages, though purporting to be given to secure the two bonds mentioned in them, were really given to secure the payment of the note for three thousand dollars,

described in the first paragraph of the complaint. The allegation made in the sixth paragraph of the complaint, "That this plaintiff has never had in his possession either of the bonds or obligations referred to in this paragraph, but is induced to believe, and does believe, that both the mortgages aforesaid were executed to secure the payment of the obligation mentioned in paragraph 1 hereof," was, doubtless, intended as an allegation of the fact that said mortgages were really given to secure the note for three thousand dollars, made upon information and belief, the only way in which it could be made by an administrator; and if it can be so construed, as we think it can, it would be sufficient.

The statement that one "is induced to believe" a certain fact necessarily implies that he has received reliable information that such was the fact, for it would be difficult to conceive how otherwise he could be induced to believe such fact. It is true that, speaking with the utmost strictness, an allegation of belief of a fact is not an allegation of the existence of such fact; and it is equally true that the ordinary allegation, frequently found in complaints, that the plaintiff is informed and believes that so and so is a fact is not, strictly speaking, an allegation of the existence of such fact, but simply an allegation that the plaintiff has been

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*informed and believes that such fact does exist, for it may be true that the plaintiff has been so informed and does so believe, and yet the fact itself may not be true. But to apply such strictness to a pleading under the code would violate its fundamental principles, for we are told in section 180 that "in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties." We cannot say, therefore, that there was any error of law on the part of the Circuit Judge in overruling the demurrer.

Next as to the appeal from the final judgment. We are unable to see the pertinency of the first ground of appeal. For even assuming that the Circuit Judge was not entirely correct in using the language imputed to him by this exception, it is perfectly manifest that it does not affect any question raised by this appeal. His honor was simply reciting what had occurred in the previous history of the case, and the only thing in it which could be regarded as objectionable, and that only by implication, was the statement that the Supreme Court had, in another case (*Dial v. Tappan*), sustained the judgment overruling the demurrer, which we have just been considering. This the Circuit Judge, manifestly, did not mean; and, even if he had, it cannot affect this case, as is conclusively shown by the fact that the question raised by the demurrer

which we are called upon to decide in this case was not, and could not have been, considered in the other case, and has now been considered and decided upon its merits, without reference to the former decision.

Whether the Circuit Judge was right or wrong in making the statement attributed to him by the second ground of appeal, seems to us so wholly immaterial to the questions raised by this appeal that we have not deemed it necessary to inquire into the correctness of such statement.

The only remaining ground is couched in such general terms, that, under the rule, it might well be disregarded. But, as we are always averse to deciding cases upon purely technical grounds, we propose to relax the rule in this instance. As well as we can judge from the argument presented in behalf of appellants, the object of this exception was to raise a question of fact—whether

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*the debt secured by the mortgages asked to be foreclosed was proved. There is no doubt that the note for three thousand dollars, as well as the execution of the two mortgages, were fully and properly proved; and if it was established that these mortgages, though purporting on their face to secure independent bonds, were really intended to secure the payment of the note for three thousand dollars, then the plaintiff's case was fully made out, and he was entitled to judgment of foreclosure. The intimation thrown out in the argument, that the Circuit Judge was himself in doubt as to the kind of judgment to which the plaintiff was entitled, is scarcely fair to that distinguished judge, in the face of his explanation, that it was owing to the failure of the plaintiff's counsel to furnish him with the papers necessary to enable him to formulate a proper judgment, and hence the necessity for him to render judgment in general terms. It is quite clear, as appellant has assumed, that the intention was to render judgment of foreclosure and sale under all of the mortgages, and that the only reason why such judgment was not rendered in a formal manner was the want of the necessary papers.

The only remaining question, then, is whether there was any error in the conclusion that the two mortgages were really intended to secure the payment of the three thousand dollar note. Under the view which we have taken of the allegations of the complaint, inasmuch as there was no denial in the answer of the defendants that such was the real intention, there was no necessity for further proof. But, waiving this, we think there was sufficient testimony to sustain the conclusion reached by the Circuit Judge. The papers all bear the same date, October 9, 1873, and the two mortgages make up the precise amount of the note, and this, with the testimony of Sowden, the administrator in Massachusetts, we think, was quite suffi-

cient to warrant the conclusion adopted by the Circuit Judge, especially in the absence of any denial or explanation on the part of the defendants in their answer.

It is not asserted or pretended that the testator, in his lifetime, had assigned the bonds mentioned in these mortgages to any one, and if his administrator in Massachusetts has, since his death, assigned them to a third person, such assignee, as has already been determined in *Dial v. Gary* (14 S. C.,

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573 [37 Am. Rep. 737]), could *not maintain an action on them here, but that such action could only be maintained by the administrator here, the plaintiff in this case; and, therefore, the judgment rendered in this case will be a complete protection to these defendants against any other suit on these bonds. We see no error in the judgment appealed from.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

24 S. C. 580

ROBERTS v. JOHNS.

(November Term, 1885.)

[1. *Equity* ⇨333, 403.]

Where the validity of an order of final discharge granted by a probate judge is a matter at issue, and he has become the master for that county, the Circuit Judge may refer the case to a special master to state the accounts; and as the order of reference conferred only the powers of a special master, it was not vitiated by designating the officer a "special referee."

[Ed. Note.—Cited in *Smythe & Adger v. Brown*, 25 S. C. 94.

For other cases, see *Equity*, Cent. Dig. §§ 852, 875; Dec. Dig. ⇨333, 403.]

2. The time when the statute of limitations began to run in favor of the administrator in this case has been already adjudicated in the case of *Roberts v. Johns*, 16 S. C., 184.

[3. *Executors and Administrators* ⇨516.]

From the time when a trustee should finally account to his cestuis que trust, the presumption begins to run in his favor and is complete at the end of twenty years; but upon settlement made or disavowal of trust (which is a claim of full accounting), the statute of limitation bars a reopening of such accounting after the expiration of six years.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2222; Dec. Dig. ⇨516.]

[4. *Executors and Administrators* ⇨470.]

An act done by an administrator manifesting to the beneficiaries an intention to throw off the trust, gives currency to the statute of limitations in his favor; but the returns made to the probate judge, showing a claim by the administrator to certain assets in his own right, do not charge the beneficiaries with notice of an adverse claim by the administrator, and the statute did not commence to run in his favor until his final discharge.

[Ed. Note.—Cited in *Montgomery v. Cloud*, 27 S. C. 192, 3 S. E. 196.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2016; Dec. Dig. ⇨470.]

[5. *Executors and Administrators* ⇨87.]

A compromise made by an administrator shortly after the war sustained, notwithstanding subsequent events show that the whole amount might have been collected; and under the same circumstances he was charged only with the amounts collected on two of the assets of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 323, 384 392; Dec. Dig. ⇨87.]

[6. *Executors and Administrators* ⇨109.]

An administrator allowed credit for the expenses of certain journeys made by him in good faith for the benefit of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 443; Dec. Dig. ⇨109.]

[7. *Executors and Administrators* ⇨500.]

An administrator is not entitled to commissions during the years that he neglected to make returns, there having been nothing to prevent it.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2134; Dec. Dig. ⇨500.]

[8. *Executors and Administrators* ⇨456.]

The costs of this case were properly charged against the estate in the hands of the administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1941-1967; Dec. Dig. ⇨456.]

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*Before Kershaw, J., Oconee, September, 1883.

In this case, the honorable T. B. FRASER, Circuit Judge, sat in the stead of Mr. Justice MCGOWAN, who had been of counsel.

This was an action commenced September 27, 1875, by the administratrix of a distributee of the estate of James Johns, deceased, against the administrator of said James Johns. The case has been in this court on appeal before. See 16 S. C., 184.

The case was referred to S. P. Dendy, Esq., who made an elaborate report, to which numerous exceptions were taken by both parties, most of which were finally disposed of by the Circuit decree. This decree passed upon these exceptions serially, and it will be necessary to furnish only the following portions of that decree:

The 5th exception related to the Reeder and Messer note. The defendant must account for what he might, by the exercise of reasonable care and diligence, have recovered on this note. The evidence shows that the note came to the hands of Col. J. J. Norton as his own property, and that he found it to his interest to compromise the same for \$550. There is no sufficient reason to believe that the defendant could have realized more for the estate which he represented than Col. Norton did in regard for himself. The prudence, learning, ability, and experience of Col. Norton as a lawyer and man of business sufficiently appear in this case to warrant the conclusion that, to require the defendant to come up to his standard, would be to exact of him even

more than will satisfy the demands of the law as to the prudence, care, and diligence required. The defendant's liability, therefore, will be limited on this note to the amount realized by Col. Norton, to wit, \$550.

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The 7th exception is also overruled. [Because the referee erred in his recommendation that the estate pay the costs of this action.] The spirit of the pursuit of this administrator has been very exacting, and I am impressed with the idea that his conduct has been viewed much more unfavorably than it would have been had this litigation terminated more recently after the reestab-

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lishment *of an orderly civil government in this State and the announcement of judicial decisions declaring void the constitutional provisions in regard to the invalidity of contracts for the purchase of slaves. Men are prone to forget that under the organic law of the State, supported by military force and expounded by courts fully in harmony with the revolutionary ideas then prevailing on this subject, such contracts were utterly and absolutely void and incapable of enforcement until the decision in *Calhoun v. Calhoun* [2 S. C. 283], heard at April term, 1870. To impute negligence to an administrator for not seeking, during that period, to enforce contracts of this character, is not only to ignore the history of the State in regard to the institutions, but to view the events of the past by the reflected light of the present day, as was felicitously said by the Chief Justice in support of the decision in *Calhoun v. Calhoun*.

I see no fraud in the dealing of the administrator with these securities up to the time of the sale. Even in regard to that, I can find no reason to impute fraud either to him or the court which ordered the sale. It was a mistake, and so far as defendant has profited by the assets thus disposed of, he is properly held to account for them. It was a mistake in him to insist on a right to retain the advantage thus secured to him. It was also a mistake in plaintiff, Mrs. Roberts, with the concurrence of her husband and through his agency, to settle with the administrator on the basis of the sale of the assets, and to give him a release and acquittance from further liabilities. But I do not find in the case anything to justify me in charging the defendant with all the costs of the litigation rendered necessary to ascertain and correct these mistakes.

Both parties appealed upon exceptions, which are sufficiently stated in the opinion of this court.

Messrs. Keith & Verner, for plaintiffs,
Mr. J. J. Norton, for defendant.

April 22, 1886. The opinion of the court was delivered by

Mr. Justice FRASER. A full statement

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of the facts will be found *in the "Brief" in this case. So much of the facts as will be necessary to explain the ruling of this court will be stated in connection with the consideration of the several questions raised by this appeal. Plaintiffs and defendant have excepted to the decree of the Circuit Judge, and the various questions raised cannot well be considered in the order in which they are presented in the exceptions. They will be taken up in what seems to be a more convenient, if not more logical, order.

I. The first exception is on behalf of the defendant, and is to the order of reference to a special referee, and not to the master for Oconee County. This action was commenced September 27, 1875. A demurrer to the complaint was overruled, with leave to answer; on appeal, the judgment of the Circuit Court was affirmed and the case remanded to the Circuit Court. By an order of the Circuit Court, all the issues of law and fact were referred to S. P. Dendy, as special referee, who made his report, March 11, 1879. This report was overruled by the Circuit Judge and the complaint dismissed. On appeal to the Supreme Court, this judgment of the Circuit Court was reversed, and the case was "remanded to that court for such orders and proceedings as may be necessary to carry into effect" the judgment of the Supreme Court. This judgment of the Supreme Court was filed November 11, 1881.

On June 27, 1882, the Circuit Judge made an order by which it was referred to S. P. Dendy, "as special referee, to state the accounts of the defendant, James A. Johns, as administrator of the estate of James Johns, deceased, in accordance with the principles enunciated in the decree of the Supreme Court in the above stated action." To this order of reference counsel for the defendant excepted. If this exception was in writing, it does not appear in the "Brief." It is stated in the argument of defendant's counsel in the following language: "Because the reference therein ordered is to S. P. Dendy, as special referee, instead of Richard Lewis, Esq., master for said county." This exception was renewed on the first reference held by S. P. Dendy as special referee; it was taken before the Circuit Court on the hearing of the exceptions to the report of S. P. Dendy as special referee; and is again presented to this court, and with much earnestness.

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*The exception raises two questions, one of substance and one of mere form. First as to substance. By section 781, General Statutes, which became law May 1, 1882, and before the date of this order of reference, it is enacted that "the office of referee and the practice of referring cases to referees as provided in the code of procedure

shall not exist or be used in the counties of * * * Oconee * * *." Section 782 provides for the appointment of a master for Oconee and the other counties named in section 781. Section 789 provides for the appointment of a special master in certain cases, in these words: "In case of a vacancy in the office of master during a term of the court, or in case of the disability of the master from interest or any other reason, the presiding judge may appoint a special master in any cause, who shall, as to such cause, be clothed with all the powers of master. The amendment by the act of February 19, 1880, by which cases under reference at that date were excepted from the operation of the master's act then in force, was not re-enacted in the general statutes, May 1, 1882.

The authority of S. P. Dendy as special referee, under the first order, ceased when his report was filed, March 11, 1879, and the special exception of cases under reference no longer existed when the general statutes became of force. The order of reference here called in question must, therefore, be valid under section 789, or then it was made without authority of law. By section 789 it is provided that in case of disability of the master "from interest or any other reason, the presiding judge may appoint a special master," who shall be "clothed with all the powers of the master." The words "any other reason" were intended to give to the presiding judge large discretionary power, not, however, to be exercised capriciously, as to what reason is sufficient to disqualify a master from acting in any given cause.

It appears from the brief in this case, that Richard Lewis, the master for Oconee County, was at one time judge of probate, and that an order of final discharge granted by him as judge of probate to the defendant in this case, as administrator of this estate, is one of the material matters sought to be investigated in these proceedings and the validity of which is the very foundation of his defence. It was, therefore, due, not only to

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the plaintiffs, but *to the master himself, that it should be referred to some one else besides himself to state these accounts. It was, therefore, proper that the presiding judge should have made this reference to some one other than Richard Lewis, master for Oconee County. There is nothing in the conduct of S. P. Dendy, the special referee, in the hearing of the case, in his report on the matters referred, or in any other way, outside of statements of counsel, which shows that he is in any way an improper person to hear the case under an order of reference. So much for the substantive features of this order of reference to S. P. Dendy, and in which, in the absence of any evidence to the contrary, it is fair to assume it was presented to the mind of the Circuit Judge by whom it was made.

The other objection is one of mere form. It is contended, if we apprehend correctly the position taken in arguments, that a reference may be made to a "special master," and not to a "special referee." An examination of the code will show that this officer is called "referee," and that the term "special referee" is nowhere used. If all orders in which the exact name by which this appointee of the court is called in the act is not used are void, then all orders of reference to "special referees," even before the passage of the master's act, were without authority of law. Yet our own reports will show that there have been a large number of such orders of reference, and that none of them have been, for this reason, called in question. It is true that "the office of referee, as prescribed in the code," has been abolished and the office of master substituted in its place, but an examination of the code and of the master's act will show that there is a substantial difference between the "office of master" and the "office of referee," and not a mere change in the name.

In the Fifty-four First Mortgage Bond Case (15 S. C., 304) and *Ex Parte Brown* (Ibid., 518), it is held that an order that "the president and directors of the Greenville and Columbia Railroad Company" should continue in the possession and management of the property of the company, and which conferred such powers and imposed such duties as are usually conferred on receivers, created the said president and directors receivers, although they were not so called and named

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in the order. In **Ex Parte Brown*, the court says: "Every essential feature of a receivership was created by the order of July 2, 1872, and the office ought to have been so called." It would, on the same principle, be proper to hold that an order of reference would be good if made to a person by name, without styling him either master or referee. To call him special referee in an order conferring the powers and imposing the duties of a special master, is at most a mere erroneous description of the person. *Falsa demonstratio non nocet*. "As soon as there is an adequate and sufficient definition, with convenient certainty of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it." Br. Leg. Max., *p. 606.

The order of reference complained of in this case conferred on S. P. Dendy, Esq., only certain powers of a special master and none of the prohibited powers of a referee, and it would be sacrificing the substance to the shadow to hold it void because he was there styled special referee and not special master. This exception of defendant must be overruled.

2. The exceptions of the defendant which raise the question of the statute of limitations will next be considered, because they

refer to certain items in the account to which the other exceptions do not relate, as well as to some of the items covered by the other exceptions. The 7th and 8th exceptions by the defendant are as follows: "7. Because it appears in the evidence that each and every item in the account accrued against defendant prior to the 1st day of March, 1870, although the statute began to run on the 7th day of March, 1870; yet the statute of force prior to the 1st March, 1870, governs and bars each and every item of said account before the commencement of this action. 8. Because the claim to the note of E. P. L. H., and D. D. Verner, as a part of James Johns' estate, is barred by the statute of limitations, the defendant having claimed it as his own property since 17th December, 1869."

The question raised by these exceptions is not whether the limitation of five or six years is applicable in this case, but when did the statute commence to run. It might be sufficient to say that this matter has already been adjudicated by this court in this case. See *Roberts v. Johns*, 16 S. C., 184. In that

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case this court uses the following language: "The statute of limitations did not begin to run against the plaintiff's right to an accounting until the administrator had done some positive act manifesting a clear intention to terminate his trust. This was never done till March 7, 1870, when he obtained from the Probate Court his final discharge, and within the statutory period from that date this action was begun."

It is insisted, however, that the statute may still be pleaded to each item in the administrator's account. In exception 7 it is said that each and every item in the account accrued against defendant prior to the first day of March, 1870. And in exception 8 it is claimed that defendant should not be charged with the Verner note, because he "claimed it as his own property since December 17, 1869." Assuming that the question is an open one, is there anything in the dealings of the administrator with this estate to give currency to the statute at the periods stated in these exceptions? In the consideration of claims against trustees, where lapse of time is the ground of defence, it is important to bear in mind the distinction between the bar of the statute and the presumption of payment from lapse of time. Whenever the period arrives at which, according to the terms of his trust, the trustee is required to make his final account, and there is no disability on the part of the beneficiary of the trust, the presumption commences to run against the latter and in favor of the former. At the end of twenty years, unless there is something to arrest or suspend the presumption, it becomes a complete protection against any further demand on him as trustee. Any failure to account for or pay over to the beneficiary according to

the terms of the trust is a cause of action, and the right of action accrues on such failure, and it is not barred until the presumption of payment has run its full course of twenty years.

The defence of the statute of limitations stands on a different footing. When a trustee has made a settlement by accounting and paying over, the liability under the original trust is *prima facie* at least at an end, and if it is proposed to open the settlement, it is necessary to allege and show errors in the settlement. It is this right to open a settlement which is barred by the statute of limitations which runs from the date of the set-

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tlement, or from the date of the discovery of the fraud, or other circumstance which invalidates it. When there has been no actual settlement, but "some positive act manifesting a clear intention to terminate his trust" has been done by the trustee, the statute begins to run from this act. Such an act amounts to a claim that the trustee has fully accounted, and the acquiescence in the claim for the statutory period is a bar to any reopening of what has been so long acquiesced in. It must be an act manifesting the intention to throw off the trust; manifesting it not to strangers, but to the beneficiary or *cestui que trust*.

The very liberal rule has been adopted by our courts, "that an act done in a public office, open for the information of parties, must be taken notice of by them." See *Moore v. Porcher*, Bail. Eq., 197; *Glover v. Lott*, 1 Strob. Eq., 79; *Coleman v. Davis*, 2 Id., 341; *Payne v. Harris*, 3 Id., 43; *Long v. Cason*, 4 Rich. Eq., 63; *Motes v. Madden*, 14 S. C., 492. In all of these cases the act by which the trustee was allowed to give currency to the statute was either actually known, or presumed to have been known, to the beneficiary. In the case before the court there is nothing to show that Mrs. Roberts either had notice, or was in any way affected with notice, that the defendant claimed that he was not liable to account to her for any of the items to which the statute is here pleaded, until the final discharge by the judge of probate, March 7, 1870. She was then bound to take notice of this claim, thus throwing off the trust, and has commenced her action within the statutory period from that date. These exceptions are, therefore, overruled.

3. The 1st exception on the part of the plaintiff, and the 5th exception on the part of the defendant, relate to the note of P. J. Miller. If the compromise of this note for \$205, at less than its nominal value, was a part of a scheme by which it was to be improperly converted by the defendant to his own use, he ought to be charged with its full value. If, however, at the time of the compromise he did, as he seems to have done, make such a compromise as a prudent man

may well have done, he ought to be charged only with what he received on it, even if subsequent events show that he might have collected the whole amount if he had chosen to take all the chances of those uncertain

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times. The interest on \$200, the amount of the Blair note, which was a part of the compromise, should run only from the day at which it became an interest bearing demand, May 1, 1870. To this extent the judgment of the Circuit Court must be modified in reference to this claim so as to make the interest on the Blair note run from May 1, 1870.

4. The 2d exception of plaintiff, as also the 2d exception of defendant, refers to the Mary Dalton note. This note was, with others, sold by the defendant December 17, 1869, to Sloan Dickson for a very small sum. This sale has been adjudged to be void, and defendant must account for the note in the same way as if the sale was never made. It is for the defendant to show the circumstances, if there are any, which may relieve him of his liability to account for this note in full. These appear in the testimony taken before the special referee. It is possible that the whole may have been collected. It seems, however, from the testimony, that the estate of Mary Dalton was small, and that some of her creditors received only a small percentage of their claims. Under all the circumstances of the times and the estate, it would be hard measure to hold this defendant liable for more than was received on this note, but for this amount, \$413.41, he should account; and this court concurs with the Circuit Judge as to the amount with which the defendant is chargeable on this note.

5. The 3d exception of the plaintiff, which is also the 3d exception of the defendant, refers to the Reeder & Messer note. For the reasons assigned in the Circuit decree, this court concurs with the Circuit Judge as to the amount for which the defendant is chargeable on this note.

6. The 4th exception of the plaintiff refers to certain allowances made to defendant for services and expenses of trips to Georgia and Texas for the benefit of the estate. Though it does not appear that much, if any, good resulted from them, these services seem to have been rendered in good faith, and the amounts allowed seem reasonable, and this court concurs with the Circuit Judge in reference to them.

7. The 4th exception of defendant is, that the plaintiff has been allowed one-half, instead of one-third, of the net balance of the estate. An examination of the award made

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by the arbitrat*ors appointed by the defendant, and S. H. Johns, one of the distributees of the estate, shows that the award did not contemplate a final settlement of that share as the matter to be effected by it. It involved some matters of a purely private nature, and only settled some of the principles upon which a final settlement of that share was to be made between these parties. This exception is therefore well taken. The proper mode of stating the account is to charge the defendant with all sums which either for negro debts, or otherwise, were due to the estate by S. H. Johns, or the defendant himself, and then give him credit for all valid demands held by S. H. Johns against the estate. When the balance is struck, to show the present value of the estate, the advancements made to all the distributees must be added. The sum thus made up is the amount for distribution. One-third of this, less payments and advances and commissions for paying out to the distributees respectively, is the amount now due and payable to them severally. This exception is, therefore, sustained, and the account must be restated according to these views.

8. The 6th exception of the defendant is, that certain commissions were not allowed by the Circuit Judge for years in which no returns were made. If there is anything in the distinction urged on the court between neglect to make returns and failure to make returns, there is nothing in the testimony in this case to show that the defendant is entitled to the benefit of it. There was nothing so far as appears to prevent him from making returns, and he did not make them. This is neglect. This exception is therefore overruled.

The exception as to costs is overruled for the reasons assigned in the Circuit decree.

It is therefore ordered and adjudged, that the judgment of the Circuit Court be affirmed, except as herein modified, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary to carry out the judgment of the Circuit Court as herein modified.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full

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*No. 1795. STATE v. THOMPSON. November Term, 1885.

[*Appeal and Error* ⇨807.]

This was a motion to restore to the docket an appeal which had been, on motion, previously dismissed by the court. The court, following the decision in *Clark Brothers v. Wimberly* (ante, p. 138), held that the matter was res adjudicata.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3177; Dec. Dig. ⇨807.]

Opinion PER CURIAM, January 25, 1886. W. J. Whipper, for the motion. J. B. Howe, acting solicitor, contra.

No. 1796. STATE v. SMALLS. November Term, 1885.

[*Criminal Law* ⇨759.]

Defendant was indicted for rape. The prosecutrix proved the offence, and said she recognized the prisoner as the offending person; that she had been brought up with him. The defendant denied the charge, and said he did not know the prosecutrix. The judge (Pressley) charged: "There is a matter in his testimony that bears upon that point [i. e. identity of the prisoner], and in my estimation it bears very seriously against him. She says she was brought up with him. He swears that he does not know her. Now, if she tells the truth, he tells a lie. If he tells a lie, he has a motive for it."

This court says: "We well know that it is not always easy to draw the line clearly between what is and what is not within the prescribed province of the judge. But as to the declaration here complained of, we can hardly doubt that it contained an expression of opinion on the facts, and was therefore in violation of section 26, article IV., of the Constitution, which declares that 'judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law.' It is true that the judge also said to the jury: 'If you have reasonable doubt; if her testimony leaves your mind in a state of reasonable uncertainty, then you will say not guilty.' But we do not think

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that *cured the matter." New trial granted.

[Ed. Note.—Cited in *State v. Anderson*, 26 S. C. 602, 2 S. E. 639; *State v. Addy*, 28 S. C. 13, 4 S. E. 814; *Norris v. Clinkscales*, 47 S. C. 513, 524, 25 S. E. 797; *China v. City of Sumter*, 51 S. C. 461, 29 S. E. 206.

For other cases, see *Criminal Law*, Cent. Dig. § 1790; Dec. Dig. ⇨759.]

Opinion by Mr. Justice MCGOWAN, February 13, 1886. Lee & Bowen, for appellants. Jervey, solicitor, contra.

No. 1812. MINTON v. PICKENS. November Term, 1885. Warren Minton brought this action against Polly Pickens and her husband, Paul, for the partition of a lot of land in the city of Columbia. Plaintiff claimed that under a declaration of trust from one Lee, trustee, in favor of Polly and her daughter, Jeannette (wife of plaintiff), and the subsequent death, intestate, of said Jeannette, he was entitled to one-fourth interest, and the defendant, Polly Pickens, to three-fourths interest. The defendants claimed that Paul Pickens paid for the lot and all improvements erected thereon; that Lee held as trustee for Paul; that the declaration of trust by Lee in favor of Polly and Jeannette was made upon the procurement and false assertions of plaintiff, without the knowledge of defendants; that Polly and Jeannette had paid nothing for the lot or its improvements, and that Lee was dead. Upon an issue submitted to the jury, they found that plaintiff had no interest in this lot. The Circuit Judge (Witherspoon) approved this finding, and dismissed the complaint. On appeal by plaintiff, *held*—

[1. *Appeal and Error* ⇨1009.]

The verdict of a jury upon an issue submitted to them in a chancery case, and its confirmation by the judge, approved, not being against the weight of the testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3970-3978; Dec. Dig. ⇨1009.]

[2. *Witnesses* ⇨150.]

Section 400 of the Code does not render a defendant to an action for partition incompetent to testify to communications between himself and a former trustee of the property, now deceased, under whom plaintiff claimed, the plaintiff not holding any of the relations to the deceased specified in this section.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 653; Dec. Dig. ⇨150.]

[3. *Appeal and Error* ⇨204.]

Testimony not objected to at the time is competent.

[Ed. Note.—Cited in *State v. Murphy*, 48 S. C. 7, 25 S. E. 43.

For other cases, see *Appeal and Error*, Cent. Dig. § 1280; Dec. Dig. ⇨204.]

[4. *Appeal and Error* ⇨1054.]

A new trial will not be granted for admission of testimony, which, even if incompe-

tent, was not considered by the Circuit Judge in reaching his conclusions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4186; Dec. Dig. § 1054.]

[5. *Trusts* § 72.]

Where a party takes a deed in his own name, but for the benefit of A, who paid the money, and afterwards declares a trust for the use of the wife of A and her daughter, who have knowledge of the trust, they can claim no interest in the land, but it is the property of A.

[Ed. Note.—Cited in *Miller v. Cramer*, 48 S. C. 285, 26 S. E. 657.

For other cases, see *Trusts*, Cent. Dig. § 102; Dec. Dig. § 72.]

Opinion by Mr. Chief Justice SIMPSON.

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*February 22, 1886. *Sawyer & Sawyer, John Bauskett*, for appellant. *J. P. Thomas, jr.*, contra.



No. 1813. *STATE v. TARRANT*, November Term, 1885. This was a prosecution against the defendant for official misconduct as a trial justice, tried before Aldrich, J., at Abbeville. Defendant appealed, and this court ordered a new trial, *holding*—

[1. *Criminal Law* § 381, 765.]

The good character of the defendant, if established to the satisfaction of the jury, is a circumstance to be considered by them in determining whether the acts done by defendant resulted from an honest mistake of law, or were prompted by an evil intent; but the judge could not charge that certain facts, as evidence of good character, "should weigh with the jury as a strong presumption of the defendant's innocence."

[Ed. Note.—Cited in *State v. Brown*, 34 S. C. 49, 12 S. E. 662.

For other cases, see *Criminal Law*, Cent. Dig. §§ 846, 1751; Dec. Dig. § 381, 765.]

[2. *Trial* § 261.]

Unless a request to charge is correct as a whole, a refusal to charge it cannot be assigned as error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 481, 660, 671, 673, 675; Dec. Dig. § 261.]

[3. *Justices of the Peace* § 30.]

The judge erred in declining to charge "unless the jury are satisfied that the evidence has proved beyond a reasonable doubt the evil and malicious intent of the defendant, the intent being the essence of the offence, no act of the defendant done because of mistake or misconception of the law, can establish a case of misconduct or oppression in office," he having submitted to the jury the requests to charge as containing correct principles of law in the abstract.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 68; Dec. Dig. § 30.]

[4. *Judges* § 38.]

Two elements must combine to constitute the offence charged—doing some act in an official capacity, in violation of law, and the evil intent with which such act is done.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 180-183; Dec. Dig. § 38.]

[5. *New Trial* § 72.]

The judge did not err in refusing to grant a new trial, where the motion was based upon the proposition, that "if in the judge's opinion the preponderance of evidence is on the side of the defendant, he is entitled to a new trial." It is the province of the jury, and not of the judge, to weigh the testimony.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. § 72.]

[6. *Criminal Law* § 1156.]

In assigning no reasons for refusing a new trial, the judge committed no error of law. If the motion was based upon matters of fact only, this court has no jurisdiction to review his judgment; and if based upon propositions of law, this court would assume that he had overruled them, and his ruling would be open to review on appeal.

[Ed. Note.—Cited in *State v. Haines*, 36 S. C. 514, 15 S. E. 555; *Webber v. Ahrens*, 36 S. C. 587, 15 S. E. 732; *State v. Hayes*, 69 S. C. 299, 48 S. E. 251.

For other cases, see *Criminal Law*, Cent. Dig. § 3068; Dec. Dig. § 1156.]

[This case is also cited in *McDowell v. Burnett*, 92 S. C. 478, 75 S. E. 873, without specific application.]

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Opinion by Mr. Justice McIVER, *February 22, 1886. *W. C. Benet*, for appellant. *Orr*, solicitor, contra.



No. 1823. *ATKINSON v. JACKSON*, November Term, 1885. A and B, tenants in common, executed a mortgage upon their land in 1882 to secure a debt, payable in four annual instalments. Afterwards A conveyed his interest in the land to another, and B also conveyed one moiety of his interest, and then died intestate in February, 1883. The widow and six children of B instituted this action for partition in 1885, making parties defendant the administrator of B, who was in possession, the other tenants in common, and the mortgagee. On oral demurrer the Circuit Judge (Aldrich) ruled that the complaint did not state facts sufficient to constitute a cause of action, inasmuch as the action was prematurely brought. *Held*—

[*Partition* § 14, 26, 44.]

That upon the death of B his title and interest descended eo instanti to the plaintiffs, who could therefore demand partition (Gen. Stat., § 1829), not of grace, but of common right; that difficulty in effecting partition does not bar the right; that the right exists even where there are outstanding debts or

liens upon the property, for the satisfaction of which provision may be made in the decree; and that if prematurely instituted, the proper practice is to suspend the proceedings, but not to dismiss.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 37, 71, 111; Dec. Dig. ⚭14, 26, 44.]

Opinion by Mr. Justice McGOWAN, February 26, 1886. *Moises & Lee*, for appellant. *Haynsworth & Cooper*, contra.

No. 1826. *PRICE v. WHITE*, November Term, 1885. This was an action for foreclosure, and the only issue was as to the payments on the debt. The Circuit Judge (Wallace) heard the testimony, adopted the version of plaintiff, and this court affirmed his judgment. Opinion by Mr. Justice McIVER, March 1, 1886. *A. S. Tompkins*, for appellant. *W. T. Gary*, contra.

No. 1827. *POPE v. MONTGOMERY*, November Term, 1885. This was an appeal from a decree of Hudson, J., refusing to set aside certain conveyances alleged to be invalid and to have been fraudulently obtained. The testimony was taken in open court.

[1. *Appeal and Error* ⚭1011.]

Findings of fact by the Circuit Judge affirmed, this court saying: "It is incumbent

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on the appellant to show that the conclusions of fact reached by the Circuit Judge are either without any testimony to support them, or are manifestly against the weight of the evidence. * * * The utmost that can be said is that there was conflict in the testimony, and in such a case this court rarely, if ever, interferes."

[Ed. Note.—Cited in *Young v. Young*, 27 S. C. 204, 206, 207, 3 S. E. 202.

For other cases, see *Appeal and Error*, Cent. Dig. § 3983; Dec. Dig. ⚭1011.]

[2. *Specific Performance* ⚭25.]

An informal paper, purporting to be an assignment of the maker's interest in a tract of land, witnessed by only one witness, but based upon a valuable consideration, is sufficient in equity to transfer such interest, and a proper conveyance could be enforced.

[Ed. Note.—Cited in *Trustees v. Bryson*, 34 S. C. 416, 13 S. E. 619; *Rush v. Hilton*, 83 S. C. 446, 65 S. E. 525.

For other cases, see *Specific Performance*, Cent. Dig. §§ 56-58, 60; Dec. Dig. ⚭25.]

Opinion by Mr. Justice McIVER, March 1, 1886. *Evans & Evans*, F. D. Bryant, for appellants. *Johnson & Johnson*, C. A. Woods, contra.

No. 1828. *HAYNE v. IRVINE*, November Term, 1885.

[*Courts* ⚭206.]

This was a controversy without action, involving the construction of a will, originally submitted to this court for adjudication. The court held that they had no original jurisdiction of the matter, and ordered the case to be stricken from the docket without prejudice.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 735; Dec. Dig. ⚭206.]

Opinion by Mr. Justice McGOWAN, March 1, 1886.

No. 1832. *GARY v. BARNWELL*, November Term, 1885. In this case the following points were ruled:

1. Findings of fact by the Circuit Judge (Pressley), who overruled the master, sustained.

[2. *Costs* ⚭13.]

This being a case in chancery, the matter of costs was for the judge as he saw proper to decree on that subject.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 21; Dec. Dig. ⚭13.]

Opinion by Mr. Chief Justice SIMPSON, March 6, 1886. *E. B. Gary*, for appellant. *Parker & McGowan*, contra.

No. 1838. *LEVY v. ZEALY*, November Term, 1885.

[*Appeal and Error* ⚭1022.]

This was a case in chancery, and the appeal alleged only errors of fact. This court affirmed the decree of the Circuit Judge (Witherspoon), saying: "It concerns the welfare of the country that there should be an end of litigation; and where the Circuit Judge concurs with the master on a question of fact, it will not disturb the finding, unless there is no testimony to support it, or it is manifestly against the weight of evidence."

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4015; Dec. Dig. ⚭1022.]

Opinion by Mr. Justice McGOWAN, March 10, 1886. *John McMaster*, for appellant. *Clark & Muller*, contra.

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No. 1840. *Ex parte VERNER*, November Term, 1885.

[*Judgment* ⚭314.]

This case simply decides that the petitioner, having been charged, under the principles declared in *Lay v. Lay* (10 S. C. 216), with one-sixth part of the note for slaves described in that case, and the amount of such

sixth part having been ascertained and adjudged by a decree of the Circuit Court, from which no appeal was taken, the petitioner could not afterwards have such amount reduced because of a compromise subsequently entered into between the parties to that note. Judgment of court below (Witherspoon, J.) affirmed.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 610; Dec. Dig. [314](#).]

Opinion by Mr. Justice FRASER (who sat in Mr. Justice McGOWAN'S seat), March 12, 1886. D. P. Verner, for appellant. W. C. Keith, J. J. Norton, contra.

No. 1862. FELDER v. WALKER, November Term, 1885.

[1. *Husband and Wife* [229](#).]

The code is very properly liberal in allowing amendments, but where no cause of action is stated in a complaint, it is not a case of insufficiency to be corrected by motion before answer; demurrer (as in this case) is the proper remedy.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 822; Dec. Dig. [229](#).]

[2. *Husband and Wife* [228](#).]

A complaint seeking to subject a wife's land to the payment of a debt due by her husband, upon allegations that this debt was assumed by the wife through her husband acting as her agent (without any direct allegations of agency), and that said husband had promised and agreed that said debt should be secured by a mortgage to be executed by his wife upon her land, does not state facts sufficient to constitute a cause of action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 816-843, 979, 980; Dec. Dig. [228](#).]

[3. *Frauds, Statute of* [16](#).]

Had the fact of agency and authority on the part of the husband been distinctly averred, the verbal promise to pay the debts of another is not binding.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 24; Dec. Dig. [16](#).]

[4. *Husband and Wife* [169](#).]

A verbal promise by a married woman to execute a mortgage on her land is not binding upon her so as to authorize the enforcement of the agreement by foreclosing it as an actual mortgage executed by her for good and valuable consideration in respect to her separate estate. Judgment of Circuit Court (Fraser, J.) affirmed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 660-670, 702, 949, 951; Dec. Dig. [169](#).]

Opinion by Mr. Justice McGOWAN, March 27, 1886. J. C. Davant, for appellant. Robert Aldrich, contra.

No. 1866. COLN v. COLN, November Term, 1885. This was an action to remove cloud from title by cancellation of a deed, which plaintiff alleged defendant had re-

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ceived with full knowledge of plaintiff's title, and had put upon record before plaintiff recorded his deed. All the issues of law and fact were referred to a referee, who made his report, stating his conclusions of law and fact separately. He found that plaintiff's deed had never been delivered, and that the complaint should be dismissed. The Circuit decree (Witherspoon, J.) was a simple order confirming this report. On appeal, *held*—

[1. *Deeds* [56](#); *Reference* [102](#).]

Where a decree confirms the separate findings of fact and law by a referee, it is not necessary that the decree should itself make separate findings.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 118; Dec. Dig. [56](#); *Reference*, Cent. Dig. § 185; Dec. Dig. [102](#).]

2. Findings of fact by referee and Circuit Judge, confirmed.

[3. *Deeds* [54](#), 194.]

Delivery is essential to the validity of a deed, and the mere fact of manual delivery, in the absence of intention by that act to pass the title, will not be sufficient. In the absence of evidence to the contrary, intention to deliver may be inferred from mere manual delivery.

[Ed. Note.—Cited in *Harrison v. Dunlap*, 96 S. C. 392, 80 S. E. 619.

For other cases, see Deeds, Cent. Dig. §§ 116, 574-583, 623, 634; Dec. Dig. [54](#), 194.]

[4. *Evidence* [413](#), 419.]

It is always competent to receive parol testimony as to the delivery of a deed; and when the question is as to the bona fides of a deed, such evidence may be received to show that the consideration named in the deed was not in fact paid.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1859, 1915; Dec. Dig. [413](#), 419.]

[5. *Evidence* [415](#).]

In testifying to a date of a debt different from the date appearing in a judgment on such debt, in evidence, the witness does not contradict such record, and is not incompetent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1863; Dec. Dig. [415](#).]

[6. *Appeal and Error* [273](#).]

An exception couched in general terms cannot be considered. Judgment affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. [273](#).]

Opinion by Mr. Justice McJYER, March 30, 1886. W. A. Sanders, for appellant. J. & J. Hemphill, contra.

No. 1867. *CLARK v. SCHIPMAN*, November Term, 1885. This was an action for specific performance. *Held*—

[1. *Appeal and Error* ⇨1011.]

Findings of fact by master and Circuit Judge, sustained. Where the testimony is conflicting as to the material questions involved, this court rarely, if ever, undertakes to interfere with the conclusions of the court below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3983; Dec. Dig. ⇨1011.]

[2. *Appeal and Error* ⇨854.]

The province of this court is simply to determine whether there is any error in the judgment appealed from, and not whether the reasons given to support such judgment are sound.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3408; Dec. Dig. ⇨854.]

Opinion by Mr. Justice McGOWAN, March 30, 1886. *Simons & Cappelmann*, for appellant. *Jervey & Jervery*, contra.

APPENDIX

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*In the case of *THE STATE v. PACIFIC GUANO COMPANY*, which will be found reported in 22 S. C. at page 50, there was a petition for rehearing by the State, alleging error in the ruling of the court as to the boundary line of the defendant on South Wimlee Creek and Bull River. Upon this petition, the court passed an order, dated January 7, 1885, which was inadvertently omitted in the publication of the case. The order was as follows:

PER CURIAM. We have carefully considered this petition. When the opinion is properly understood, we do not think there is any occasion for a rehearing. The part to which our attention has been called is as follows: "We do not see how the defendants can have in the bed of this boundary (South Wimlee) any greater right than they have in the beds of the other boundaries, viz., Coosaw and Bull Rivers, as to both of which, by the express terms of their own deed, they only claim down to low water mark. That is also the limit of their right in South Wimlee." It is manifest that nothing was intended to be, or was adjudged, as to the boundaries on Coosaw and Bull Rivers, which

were in no way before the court. South Wimlee Creek was referred to as one of the boundaries of Chisolm's Island, and as to that, the question as to the line of proprietorship, low or high water mark, was involved. Certain grants from the State (1869) covering marsh lands lying between high and low water mark were in evidence. The legality of these grants was not contested; but they had not been located, and it was not known to the court whether there were any marsh lands on South Wimlee Creek which these new grants did not cover. Being thus without information on that subject, this court could do no more than state the general rule as to the extent of private ownership in lands bounding on navigable tidal streams, and indicate "the limit" to which the grants, if located, could carry the title of defendants. That is to say, to declare the line to be an ordinary high water mark, except where the grants may cover the marsh; and where they do so, to declare the line of low water mark called for by them as "the limit of defendants' right," leaving, in either case, the bed proper, or bottom, below low water mark, as the property of the State. The petition for a rehearing is refused.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

REPORTS OF CASES

HEARD AND DETERMINED BY

THE SUPREME COURT OF SOUTH CAROLINA

VOLUME XXV

CONTAINING CASES OF NOVEMBER TERM, 1885, AND APRIL TERM, 1886

BY ROBERT W. SHAND

STATE REPORTER

COLUMBIA, S. C.

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1916

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(25 S.C.)

JUDGES AND OTHER LAW OFFICERS

DURING THE PERIOD COMPRISED IN THIS
VOLUME

JUSTICES OF THE SUPREME COURT.

CHIEF JUSTICE.

HON. WILLIAM D. SIMPSON.

ASSOCIATE JUSTICES.

HON. HENRY McIVER.

HON. SAMUEL McGOWAN.

CIRCUIT JUDGES.

FIRST CIRCUIT, HON. BENJAMIN C. PRESSLEY.

SECOND “ “ ALFRED P. ALDRICH.

THIRD “ “ THOMAS B. FRASER.

FOURTH “ “ JOSHUA H. HUDSON.

FIFTH “ “ JOSEPH B. KERSHAW.

SIXTH “ “ ISAAC D. WITHERSPOON.

SEVENTH “ “ WILLIAM H. WALLACE.

EIGHTH “ “ JAMES S. COTHRAN.

ATTORNEY-GENERAL.

HON. CLAS. RICHARDSON MILES.

SOLICITORS.

1st Circuit—W. ST. J. JERVEY.

5th Circuit—R. G. BONHAM.

2d Circuit—W. PERRY MURPHY.¹

6th Circuit—J. E. McDONALD.

3d Circuit—T. M. GILLAND.

7th Circuit—D. R. DUNCAN.

4th Circuit—H. H. NEWTON.

8th Circuit—J. L. ORR.

CLERK OF THE SUPREME COURT.

A. M. BOOZER.

Appointed December 9, 1885, in place of F. H. Gantt, deceased.

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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF SOUTH CAROLINA

JUSTICES OF THE SUPREME COURT DURING THE PERIOD COMPRISED
IN THIS VOLUME.

HON. WILLIAM D. SIMPSON, CHIEF JUSTICE.

HON. HENRY McIVER, ASSOCIATE JUSTICE.

HON. SAMUEL MCGOWAN, "

25 S. C. *1

*GRAVELEY v. GRAVELEY.

(November Term, 1885.)

[1. *Domicile* ⇨4.]

This court concurred with the master and Circuit Judge, that the domicile of testator at the time of the execution of his will and also at the time of his death, was in England, notwithstanding a previous residence for many years and denizenship in South Carolina, and the accumulation of property and investment of moneys here.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 15; Dec. Dig. ⇨4.]

[2. *Executors and Administrators* ⇨523.]

While a pecuniary legacy remains unpaid the executrix holds the residuum as assets of the estate, and not as bailee for trustees to whom the residuary estate is given.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. ⇨523.]

[3. *Executors and Administrators* ⇨523.]

The executrix of an English will who is also qualified here, holds the personal property of the testator situated here as assets of his estate, and subject to the claim of an unpaid legatee resident in this State.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. ⇨523.]

[4. *Executors and Administrators* ⇨518.]

If a testator have personal property in a foreign country, the executor of the domicile has not the right, by virtue of the will alone, to go into that foreign country, and possess himself of that property, without new letters from the jurisdiction in which the property is found.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2299-2309; Dec. Dig. ⇨518.]

[5. *Executors and Administrators* ⇨523.]

*2

*The new administrator may or may not be the same person as the executor of the domicile. But, inasmuch as the law of the domicile must control in the succession or distribution of the effects, whether or not the administration granted is deemed the principal one and that in the foreign country as ancillary, yet there is no privity between them, but they are independent of each other. Each portion of the estate must be administered in the country in which possession is taken and held under lawful authority.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. ⇨523.]

[6. *Executors and Administrators* ⇨523.]

The only mode of reaching such assets is to require their transmission or distribution after all the claims against the foreign administration have been duly ascertained or settled.

[Ed. Note.—Cited in *Stevenson v. Dunlap*, 33 S. C. 352, 11 S. E. 1017; *Jones v. Jones*, 39 S. C. 256, 17 S. E. 287, 802.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2329; Dec. Dig. ⇨523.]

[7. *Wills* ⇨746.]

Where the will of a testator domiciled in England gave two thousand dollars to his nephew in this State, and the executrix qualified both in England and here and paid all the debts and legacies except this one, and there were assets in this State standing in the name of the executrix more than sufficient to pay this legacy, the nephew might maintain an action against the executrix in this State to recover this legacy.

[Ed. Note.—Cited in *Hamilton v. Levy*, 41 S. C. 383, 19 S. E. 610.

For other cases, see *Wills*, Cent. Dig. § 1928; Dec. Dig. ⇨746.]

[*S. Executors and Administrators* ⚭303; *Wills* ⚭734.]

The English courts not having construed this legacy, this court holds: That this legacy of two thousand dollars could be demanded by this nephew on attaining his majority, with simple (but not compound) interest at the rate of four per cent. (the English rate) from one year after date of testator's death, less the English legacy duty, and was not satisfied by the purchase, by the executrix in 1873, of such an amount in English consols as American paper would then buy.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1229; Dec. Dig. ⚭303; *Wills*, Cent. Dig. § 1869; Dec. Dig. ⚭734.]

[*9. Costs* ⚭13.]

Costs in an equity suit are within the discretion of the Circuit Judge as a part of the relief granted.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 21, 25; Dec. Dig. ⚭13.]

Before Fraser, J., Charleston, November, 1884.

This is the second appeal in this case, the first being reported 20 S. C., 93. This appeal was from the following decree:

The questions involved in this case are very interesting and of considerable importance, and I would be glad to have more time to consider and discuss them than I am able to bestow on them on account of the pressure of other official engagements.

The action has been brought in this case by the plaintiff to recover a legacy of "two thousand dollars," "to be held in trust by the executors," and "paid with the accumulations of interest" on his arrival at the age of twenty-one years, given in the will of plaintiff's uncle, John Graveley, who died in England. The will was executed in England, in 1862, and testator died 31 March, 1865. Maria T. Graveley, the executrix, qualified

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on *the will in England, in May, 1865, where the original will was admitted to probate, and, in 1872, she qualified as executrix in Charleston.

There are, as alleged in the complaint, in this State, certain assets held by the said Maria T. Graveley, as executrix, and more than sufficient to pay the claim of plaintiff, even if allowed to the full extent demanded, and these assets not having been turned over to any trustees named in the will, or trustees substituted in their places, are still a part of the estate. By the advice of eminent counsel, the executrix, in 1873, in England, where she resided, laid aside and invested in English consols, such a sum of money as would, at that time, have purchased the sum of two thousand dollars in legal tender notes of the United States, and simple interest thereon at four per cent. per annum from 31 March, 1866, being one year after death of testator. This investment in consols was sold by the executrix when plaintiff arrived at age, and the proceeds, less the English legacy duty,

offered to him if he would sign a receipt in full for the legacy. This plaintiff refused to do, and now claims two thousand dollars, with South Carolina interest at seven per cent., payable annually from 31 March, 1866.

The testimony, amongst other things, shows that the testator was born a British subject, that he never became a citizen of this country, while, as a simple denizen, he held title to real estate in the city of Charleston, for business purposes, having never owned a dwelling house there; that he married in Charleston a Charleston lady, and accumulated there a handsome estate; that he went to England in 1859, leaving a large portion of his estate invested in bonds and mortgages and other securities in the city of Charleston. The weight of the testimony seems to me to be in favor of the view, that when the testator left Charleston, in 1859, the change was intended to be a permanent one. He was a British subject, and had no dwelling house here, and it was no uncommon thing for Englishmen residing in England to hold American investments.

While a good deal of the testimony of Mrs. Graveley is incompetent as "communications," under section 400 of the Code, it does not appear from anything in the testimony

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before me, that *the important statement made by Mrs. Graveley, that the testator voted in England, was made upon information derived by her from him, so as to have been founded on any "communications" between them. It was probably so, but she does not say so in her testimony. I, therefore, find that the testator was, at the time of his death, domiciled in England, and that the administration in England is the principal or chief, and that in South Carolina is the ancillary, administration.

I assume, therefore, in the further statement of my views, that Mrs. Graveley is properly before the court only in respect to her ancillary administration, and only in the same way as if some other person, who had no connection with the administration in England, was before the court as the ancillary executor or administrator. If the matter now stood before the court on the simple allegation that there were assets in the hands of the ancillary administrator or executor, and within the jurisdiction of the court, and no more, I do not see in any of the authorities before me any ground on which the court could exercise jurisdiction in the case. I take it to be well understood, that the primary purpose of an ancillary administration is to collect the assets and pay the debts, and then transmit the residuum for distribution, under the statutes or the will, to the administrator of the domicile; and the mere fact that some of the legatees or distributees resided in the ancillary jurisdiction, and assets were found there, does not give the

court jurisdiction. There must be something more.

There are, however, certain facts set up in the answer, and testimony in reference to them has been taken without objection, and it will be better to determine the questions thus raised than to order the proceedings to be amended so as to make the allegation of these matters in the complaint. With this view, then, I find in this case as matters of fact, that the executrix does not set up that there are any debts to be provided for either in the principal or ancillary jurisdiction, or that there are any legacies, either specific or of a general pecuniary character, except the one to be paid to the plaintiff in this case, which have not been provided for. It is admitted that there were funds in the hands of the English executrix, applicable

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to this legacy, and *that the funds for this purpose were invested in England, and that the assets in this jurisdiction are sufficient to pay this legacy, and are without any claim on them except in favor of the residuary legatees under the will. These circumstances make a very material difference, as I take it, in the matter of jurisdiction.

It was admitted in the argument that the authorities are in favor of the rule, that in some special cases residuary legatees can sue for their legacies in the ancillary jurisdiction. When it is considered that in the order of distribution and payment of legacies, pecuniary legacies stand ahead of and are payable before residuary legacies, it is not apparent what reason there should be for allowing the residuary legatees to sue, and not the pecuniary legatees. It requires an accounting by the executor before the court can determine whether there are any funds applicable to the pecuniary legacies, and it requires the very same accounting, and besides an accounting as to the payment of specific and pecuniary legacies, before the court can judicially ascertain that there is anything applicable to the residuary legacies. It is not, therefore, the liability of the domiciliary administration to account, which is the test of the jurisdiction of the court of the ancillary administration.

It seems to me that the true test to be gathered from all the cases on this subject is the fact that it is either admitted or clearly shown that no accounting is necessary in order to show that the funds in the ancillary jurisdiction are not necessary to meet demands against it in the country of the domicile. In *Cureton v. Mills* (13 S. C., 409 [36 Am. Rep. 700]), it is said that "courts of ancillary administration have undertaken to distribute the estate of a foreign decedent, but this is an exceptional jurisdiction, depending on special circumstances." In *Harvey v. Richards* (1 Mason, 381 [Fed. Cas. No. 6,184]), the jurisdiction was exercised in fa-

vor of "distributees." And in 1 Story Eq. Jur., § 589, it is said that such courts are not incompetent to decree a final distribution to and among "the various claimants" having equities or rights in the funds.

In *Whitehurst v. Whitehurst* (6 Va. Law J.), while the general doctrine was admitted that distribution must be according to the law of the domicile, it was said that this

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might be done in *the courts of the local administration when all the parties reside there. In *re Hughes, Adm'r., etc.* (95 N. Y. 55), the local administration was in New York, and all the parties next of kin resided there, and the Pennsylvania administrator, who was the domiciliary administrator, was allowed to intervene, and failing to show that there were any creditors in Pennsylvania, the New York court proceeded to administer the estate. In *Musselman's Appeal* (101 Pa. St., 165), it was held that no proceedings could be in that State, either by an administrator d. b. n. c. t. a., or by a legatee, or a cestui que trust under the will, until an account had been filed in the foreign state (where was the domicile) showing a balance in his hands. In *Leach v. Buckner* (19 W. Va., 36), it was held, that where a part of the heirs and distributees resided in Ohio, and a part in West Virginia, those in the latter State could there impeach for fraud the returns made in Ohio (the domicile), those returns being used for the purpose of diminishing the estate for which the administrator was liable in Pennsylvania.

In citing the above authorities, I have been compelled to rely on brief abstracts. They, however, lead me to the conclusion that courts of the ancillary jurisdiction have the right to order the payment of a legacy or the distribution of the funds to residuary legatees, or under the statute of the domicile, wherever it appears as a matter of fact that there are funds of the estate in the hands of the executor in the ancillary jurisdiction, unless it be made to appear that in good faith an accounting is necessary in the jurisdiction of the domicile, or that for some other purpose the equities of the parties require that the funds shall be sent there for distribution. I do not think that any such necessity has been shown here. The legacy, it is admitted, has been unpaid; the estate is amply able to pay it; no conflicting equities have been shown, requiring the control of the English courts, and there are ample funds in this jurisdiction to pay it.

The personal estate of a decedent, however, is to be regarded as having no other locality for the purposes of succession or distribution than his domicile, and the law of the domicile is also the law by which bequests of personalty are to be construed and paid, and the ancillary administrator it seems to

*7

me by a proper *inference, should not be held to any liability in reference to payments of principal or interest out of the estate, save those by which the administrator of the domicile is governed. 1 Story Eq. Jur., § 588; *Eells v. Holder*, 2 McCrary, 622 [12 Fed. 668]. This latter case, with several others above cited, are referred to in the American notes to the case of *Blackwood v. The Queen* (35 Moak Eng. R., 671), which itself goes to great length on this subject.

I think, therefore, that while the courts of ancillary administration have jurisdiction to order the payment of the legacy in a case like this out of the estate, that jurisdiction should be carefully exercised so as to give the legatee no more than he would be entitled to if he had sued for his legacy in the courts of the domicile. It is very important that our courts should exercise in this matter a wise discretion, especially when it seems to be the now settled policy of the State to invite all persons, whose domicile is, as to this question, foreign to this State, to invest here, in stocks and bonds and many important enterprises, capital so much needed to restore the waste places of the State. It does not seem to me wise to exercise such a jurisdiction if the effect is to be, as claimed here, to give out of the estate higher interest on legacies than can be claimed by the legatees living in the country of the domicile.

A very serious difficulty presents itself in principle, that the laws of other States and foreign governments are to be investigated in this court as matters of fact and not matters of law. The legacy is for "two thousand dollars." In ordinary cases the court is presumed to know the meaning of words, and the cases in which it is proper to resort to testimony of witnesses to explain and define their meaning are exceptional. The word "dollar" in this will is one which the court must construe for itself. All the contents of the will, I think, show that the word was used in the American sense. The will speaks at the death, but it is not material whether the word is to be construed as to its meaning then, or at its date. At the date of the will the legal tender act had not been passed, and that, as construed in *Lane County v. Oregon* (7 Wall., 79 [19 L. Ed. 101]), applies only to debts arising under contract.

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I cannot, therefore, accept the view of *the witness, that dollar meant United States legal tender notes, and not gold or other coin.

I am satisfied from the testimony that in England 4 per cent. was the amount of interest allowed on legacies. The investments here are not in interest-bearing securities, but are such as may or may not yield any interest, and there is no proof that any, much less larger, interest was made here. The case of *Bourke v. Ricketts*, in 10 Vesey,

330, does not seem to lay down any general rule, but depends on special circumstances, and it would not do in all cases to apply, between independent states, a rule adopted between England and her colonies.

The principle that this legacy under the English law, which is presumed to be the same as ours, was required to be invested at annual interest, is clearly deducible from the statements of the witness, and this accords with my view of the law in this State, and should therefore be applied here. Whatever benefit there may have been to the English executrix in making the investments in consols, even if, under any circumstances, that fact could be available here, has been lost because the investment in the consols themselves has been sold by her and only the proceeds offered to the legatee, and this solely in her capacity as English executrix. Besides this, there has been no good reason shown why in making that investment the interest was limited only as simple interest and not compound. The facts, therefore, on which this opinion of the English counsel is based are not before the court, and may not be those on which in fact the rights of the parties depended. I must therefore apply the principle, and allow compound interest from the 31 March, 1886.

I also think that the ancillary executrix should reserve sufficient funds to meet any expenses necessarily incurred by the executrix of the domicile, and that there should be reserved from this fund and remitted a sufficient amount to repay the English executrix the amount of legacy duty paid in England, with interest at the same rate and counted in the same way—amounting at the time of this decree to (\$95.28) ninety-five 28—100 dollars—leaving a balance to be paid to plaintiff of (\$3,947.61) three thousand nine hundred and forty-seven 61—100 dollars.

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*I do not think this a case for costs to be paid either by the executrix out of her own or out of the estate of the testator.

It is therefore ordered and adjudged, that the defendant, Maria T. Graveley, as executrix of John Graveley, deceased, in this county and State, do pay to the plaintiff out of the assets standing in her name in this State, as executrix, the said sum of three thousand nine hundred and forty-seven 61—100 dollars (\$3,947.61), each party paying his or her own costs. It is ordered that parties may apply at the foot of this decree for any order necessary and proper to carry out the same.

From this decree both parties appealed upon the several exceptions set forth in the opinion of this court.

Messrs. T. W. Bacot and Lord & Hyde, for plaintiffs.

Messrs. Simonton & Barker, for executrix.

April 22, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This case was once before in this court (see 20 S. C., 99), to which reference is made for a full statement of the facts. It will there be seen that the action was for a legacy with its accumulations of interest given to the plaintiff, John Graveley, by the will of his grand uncle, John Graveley, deceased, against Maria Torrens Graveley, the widow of the deceased, and the executrix of his will; that the testator, John Graveley, sr., though born an English subject, had lived many years in the city of Charleston, in this State, where he had married, reared a family, and acquired most of his property; but that several years before his death he took his family with him to England, and there, June 27, 1862, executed his will, and on March 31, 1865, died, leaving his will in full force. The executrix qualified on the will in England and also in South Carolina, where a large part of the property still remained, as it had been invested by the testator in his lifetime.

By the will the testator gave to his nephew, the plaintiff, who was, and is, a citizen of Charleston, South Carolina, a legacy in the following words: "I give and bequeath two thousand dollars each to John Graveley and

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Francis Porcher Graveley, the sons *of my nephew, Cowlam Graveley, to be held in trust for them by my executors, and paid them, with the accumulations of interest, as they respectively attain the age of twenty-one years." &c. John Graveley, the legatee, attained the age indicated on September 18, 1879, and upon making application for his legacy, was informed that the executrix, in 1873, by the advice of eminent counsel, had laid aside and invested in English three per cent. consols such a sum of money as would, on March 31, 1866 (one year after the death of testator), have purchased two thousand dollars in legal tender notes of the United States, and added to said consols a further amount, being the interest on said sum at four per cent. from March 31, 1866, to date of investment. That the dividends from such invested consols were reinvested by the executrix from time to time in consols producing interest or dividends, and that upon the plaintiff arriving at age, the said alleged investment was sold, and the proceeds, less the English "legacy duty," were offered to plaintiff, if he would sign a receipt in full for the legacy. This the plaintiff refused to do, and claiming two thousand dollars, with South Carolina interest at seven per cent., payable annually from March 31, 1866, instituted this action to recover the same against Maria Torrens Graveley, as executrix, in the State of South Carolina.

The executrix claimed that the English was the domiciliary administration, and that

of South Carolina was only ancillary, and that she could not be sued by a legatee for his legacy in the ancillary jurisdiction, even if the legatee were a citizen of that jurisdiction; and, in addition to this defence, on general principles that this action could not be maintained against her as executrix in any jurisdiction, for the reason that, as executrix, she had settled the estate in full, and invested the legacy of plaintiff in British consols, and if liable at all, she was only liable in the character of trustee, for the said consols, in which the legacy had been invested. In the first judgment in the case this court held that the defendant was not discharged from responsibility for the legacy of the plaintiff by the alleged voluntary *ex parte* investment in English consols, and that she might be sued and the fairness of the alleged investment inquired into "by a proceeding in equity against the executrix as such,

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in any court where the *executrix is amenable to account, in this country or in England." But inasmuch as it did not appear with sufficient clearness whether the domicile of the testator, at the time of his death, was in England or America, or whether at the time the action was brought there were assets of the estate still remaining in this jurisdiction, the court remanded the case, "with leave to the plaintiff, if so advised, to amend his complaint by making proper allegations, so as to make the question of the domicile of the testator at the time of his death, and as to the existence of assets, their character, and amount of the estate of John Graveley in the State of South Carolina when the action was commenced."

Accordingly the case went back, and it being referred without prejudice to master Sass to report the testimony, he reported on the question of domicile, "that when John Graveley, the testator, left Charleston in 1859 and returned to England, he did so with the intention of residing permanently in England, his native country, and without any intention of returning to America to reside there; and that he did reside in England from that time until his death, in 1865." And upon the question of assets within the State, he found "that there stood at and before the commencement of this action, and there now stands, in the name of Maria T. Graveley, as executrix of John Graveley, on the books of the State treasurer, State of South Carolina consol stock to the amount of \$10,000; on the books of the Bank of Charleston, National Banking Association, six shares Bank of Charleston stock (par value \$600); and on the books of the Charleston Gas Light Company, seventy-five shares (par value \$1,875). And that the dividends, interest, and income from the foregoing property have been, up to the present time, drawn and received by Maria T. Graveley, as executrix of John Graveley; and also that she, as such

executrix, received the insurance money of the buildings on said lot destroyed by fire, as aforesaid, and the purchase money for said lot," &c.

The cause came up on exceptions to this report, and the Circuit Judge held that the domicile of the testator at the time of his death was in England; and that, as a consequence, the estate, whether in England or still remaining in South Carolina, must be administered according to the English law.

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But as it abundantly appeared from the pleadings and facts admitted, that all the debts were paid, and that there are no legacies, either specific or of a general pecuniary character, except the one to be paid to the plaintiff, which are not provided for, and no further account for any purpose whatever is necessary, there could be no good and sufficient reason why the property here should be sent to England only to come back in the shape of a legacy to the plaintiff. And according to this view he proceeded to adjudge the rights of the parties, in obedience, however, to the English law. In doing so the judge held that the proper construction of the legacy for \$2,000 was that it should be paid in gold or silver coin, or its equivalent, and that this sum, together with the English interest of four per cent. compounded, was now the true amount of the legacy, which less by the "legacy duty" paid by the executrix, he decreed should be paid to the plaintiff by the defendant, as executrix of the will of the testator, John Graveley, viz., \$3,947.61, each party paying his or her own costs. The judge, however, dismissed the complaint as to William Watson, who was impleaded as original or substituted trustee under the residuary provision of the will, but denied ever having acted as such trustee; and also as to Isabella Emma Graveley and Anna Julia Graveley, daughters of, and interested in, the residuum with the defendant, Maria Torrens Graveley, with the costs of these defendants to be taxed against the plaintiff.

From this decree both parties appealed. The plaintiff also, because he was charged with the costs of the parties, as to whom the complaint was dismissed.

Plaintiff's Exceptions. 1. Because his honor found "that when the testator left Charleston in 1859 the change was intended to be a permanent one," and "that the testator was at the time of his death domiciled in England, and that the administration in England is the principal or chief, and that in South Carolina the ancillary, administration."

2. Because his honor found as follows: "I am satisfied from the testimony that in England four per cent. was the amount of interest allowed on legacies," and "the investments here are not in interest-bearing securities."

3. Because his honor found as follows: "I

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also think that the ancillary executrix should reserve sufficient funds to meet any expenses necessarily incurred by the executrix of the domicile, and that there should be reserved from this fund and remitted a sufficient amount to repay the English executrix the amount of 'legacy duty' paid in England, with interest at the same rate, and counted in the same way—amounting at the time of this decree to \$95.28—leaving a balance to be paid to plaintiff of \$3,947.61."

4. Because his honor found as follows: "I do not think this is a case for costs to be paid either by the executrix out of her own or out of the estate of the testator."

5. Because his honor ordered: "That the defendant, Maria T. Graveley, as executrix of John Graveley, deceased, do pay to the plaintiff * * * the said sum of \$3,947.61, each party paying his or her own costs."

And the plaintiff also appeals from the orders of Judge Fraser dismissing the complaint against defendants, William Watson, Isabella E. Graveley, and Anna Julia Graveley, with costs.

Defendants' Exceptions. 1. That his honor erred in holding that "there are, as alleged in the complaint, in this State certain assets held by the said Maria T. Graveley, as executrix, and more than sufficient to pay the claim of plaintiff, even if allowed to the full extent demanded, and these assets not having been turned over to any trustees named in the will, or trustees substituted in their places, are still a part of the estate."

II. This was only as to an unimportant error of fact which has been corrected in the foregoing statement.

III. His honor erred in holding that it is admitted "that the assets in this jurisdiction are sufficient to pay this legacy, and are without any claims on them, except in favor of the residuary legatees under the will," the defendant having throughout denied that the securities, now held by her in South Carolina, are in law "assets" of the estate of John Graveley, and having, in her answer and otherwise, insisted that these securities are not held by her as executrix, or as a part of "the estate" of John Graveley, but, on the contrary, are held as investments of the residue of the personal estate given by testator in his will expressly upon certain trusts, and are

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held by defendant, Maria T. Graveley, simply as bailee, subject to the demand of the trustees named in the will, or to the claims of their cestui que trust, the residuary legatees, who reside in England.

IV. His honor erred in holding that the circumstances that the executrix does not set up that there are any debts to be provided for, either in the principal or ancillary jurisdiction, or that there are any legacies, either specific or of a general pecuniary character, except the one to be paid to the plaintiff in this case, which have not been provided for:

and the circumstances "that there were funds in the hands of the English executrix applicable to this legacy, and that the funds for this purpose were invested in England, and that the assets in this jurisdiction are sufficient to pay the legacy, and are without any claims upon them, except in favor of the residuary legatees under the will," are circumstances which make a very material difference in the matter of jurisdiction, or are such circumstances as would justify the courts of South Carolina, as courts of an ancillary jurisdiction, in assuming, by reason of the mere presence of such property of foreign residuary legatees, accidentally within the territorial limits of this State, a jurisdiction over a foreign domiciliary executrix, to try such foreign executrix in South Carolina as for a breach of trust or failure to perform her duty as such executrix in England, or are such circumstances as would warrant a court of ancillary jurisdiction in seizing upon property of residuary legatees and appropriating it to pay the demands of a mere pecuniary legatee of the testator, or to make good to him such alleged default or breach of trust committed by the domiciliary executor in England.

V. His honor erred in holding that "it is not apparent what reason there should be for not allowing the residuary legatee to sue, and not the pecuniary legatees, in the ancillary jurisdiction," and should, on the contrary, have held that the residuary legatee, when allowed to maintain his action against an ancillary executor, under peculiar circumstances, sues in the ancillary jurisdiction, not for alleged breach of trust of the domiciliary executrix alleged to have occurred in his administration of the estate in the jurisdiction of the domicile, as is attempted by this plaintiff, but sues for "distribution" and for such

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distribution of "the *residue" as his own property, or as property in which he has an interest, or specific share, under the will; pursues the funds or property found within the ancillary jurisdiction as the rem—the subject matter of his suit—and sues the ancillary executor as the means of reaching and detaining the specific property held by him to be remitted to the domiciliary executor for distribution by him under the will, whereas the pecuniary legatee has no claim for "distribution": is bound by the will and by the law of the domicile: has no privity of estate in the assets: has no privity upon which to found his action as legatee, except through the executor of the domicile; has no claim on the property of the estate, except through such executor; has no claim as general legatee on the assets found in the ancillary jurisdiction: has no right to pursue such assets specifically, or to sue the ancillary administrator in respect of such assets, or for distribution, or as the subject matter of trust in his behalf; and has no claim whatever upon

"the residue" belonging to residuary legatees in such ancillary territory.

VI. His honor erred in construing the will so as to read two thousand gold dollars, or "two thousand dollars, payable in gold."

VII. His honor erred in holding "that this legacy, under the English law, which is presumed to be the same as ours, was required to be invested at annual interest, and that such principle is clearly deducible from the statements of the witnesses."

VIII. His honor erred in holding that the law of South Carolina as to investments should be applied here in the case of this legacy.

IX. His honor erred in holding that "whatever benefit there may have been to the English executrix in making the investment in consols, even if under any circumstances that fact could be made available here, has been lost, because the investment in the consols themselves has been sold by her, and only the proceeds offered to the legatee, and this solely in her capacity as English executrix. Besides this, there is no good reason shown why, in making that investment, the interest was limited only as simple interest, and not as compound." And in holding "that the facts, therefore, on which this opinion of the

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English counsel *is based, are not before the court, and may not be those on which in fact the rights of the parties depended."

X. His honor erred in holding that compound interest from March 31, 1866, is to be charged against the defendant.

XI. His honor erred in taking jurisdiction of the accountability of an English domiciliary executrix for insufficient investment in a suit brought in South Carolina against an ancillary executrix by a pecuniary or general legatee.

XII. His honor erred in entertaining the complaint as if it were an action brought against the ancillary executor.

XIII. His honor erred in entertaining the jurisdiction in this case, as if it were an action brought against the ancillary executor "in respect of assets."

XIV. His honor erred in adjudging "that Maria Torrens Graveley, as executrix of John Graveley, deceased, in this county and State, do pay to the plaintiff out of the assets standing in her name in this State as executrix the sum of three thousand nine hundred and forty-seven 61-100 dollars."

XV. His honor should have dismissed the complaint and referred the plaintiff, for his alleged grievance or accountability, to the English courts, to whom the executrix was and is accountable for her actings and doings as executrix of the domicile.

We will not follow the exceptions of plaintiff and defendant, but endeavor to consider them in order as they arise in connection with the subject matter.

First. As to the domicile of the testator at the time of his death. There is a great deal

of nice learning upon the subject of domicile, but we do not think it necessary in this case to go into it. Without reference to the distinction suggested between British and English born, there is no doubt that the testator came to Charleston as a foreigner, and there is no evidence that he was ever naturalized. For the purpose of enabling him to hold real estate and facilitating his business, he became a denizen under the South Carolina law, and nothing more. It is true that he immigrated to the State at an early age; that he prospered in business here, and accumulated a fortune, which was invested to a large extent in South Carolina stocks and securities; that he married and had a family

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of children in Charleston, where he resided and did business as a merchant. But it seems that, like most Englishmen, he longed to return to the mother country and enjoy his wealth and rear his family among his early friends. The master found "that he left Charleston in 1859 and returned to England with the intention of residing permanently in England, his native country, and without any intention of returning to America to reside there; and that he did reside in England from that time until his death." Upon this finding and consideration of the evidence, which is all in the brief, the Circuit Judge held that the testator, John Graveley, was domiciled in England, where he made his will and died, and we cannot say that such ruling was error. "A man's domicile is prima facie the place of his residence, but this may be rebutted by showing that such residence is either constrained or transitory." 1 Jarm. Wills, 20, and note; 2 Wms. Exrs. (6 Am. Ed.), 1517, and notes.

Second. As to assets remaining in the State. The master found "that there stood at and before the action, and that there now stand, in the name of Maria T. Graveley, as executrix of John Graveley, certain South Carolina bonds and securities (describing them to a large amount), and that the dividends, interest, and income have been, up to the present time, drawn and received by Maria T. Graveley, as executrix of John Graveley," &c. These South Carolina securities, still in the condition in which the testator left them, are in amount largely more than sufficient to pay the legacy (\$2,000) of the plaintiff, and are in the possession or under the control of the defendant, Maria T. Graveley, as executrix of John Graveley. But it is denied that these securities can properly be called "assets" of the estate, for the reason that the executrix has paid all the debts and all the pecuniary legacies (except that of the plaintiff, and having "set aside" certain consols in England in full payment of that legacy), the estate of the testator should be regarded as substantially settled; and these securities, although standing in her name as executrix, are really and equitably

the property of the trustees, named in the will, and are now held by the executrix "simply as bailee, subject to the demand of the trustees, or to the claims of their cestui que trust, the residuary legatees, who reside in England."

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"We cannot accept this view. These securities certainly were assets when the executrix took out letters testamentary in this State, by virtue of which alone she was enabled to control them. If so, when did they cease to be "assets"? They were never transferred to herself as executrix in England. We hear of no final settlement or receipt of the trustee or the discharge of the executrix. Mr. Adams says: "It is not until the debts and legacies are paid and the residue ascertained and appropriated, or until some legacy has been set apart from the general fund, that his representative character (executor) ceases, and he becomes a trustee of such residue or appropriated legacy, and is subject, in respect of it to the ordinary rules respecting trust property." Adams Eq., *251. It will be seen that the view suggested assumes that the defendant fully discharged herself as executrix by the purchase of a certain amount of consols in England, and the tender of "the result" of their sale, which is the very question in the case, if it was not decided by the former judgment in the case. As we understand it, an executor continues to hold his office until all his duties as executor have been performed. Dickerson v. Smith, 17 S. C., 289.

This may be the proper connection in which to make another remark. We do not regard this as an action in this jurisdiction to make the executrix personally liable for alleged wrong in making "an insufficient investment" in England as to the consols purchased and afterwards sold by her, but simply as an action to enforce payment of a legacy withheld, without noticing the transaction as to the consols or making any charge in regard to it, except to impeach its fairness and legality, when it is interposed as an obstacle in the way of his recovery. As we understand it, the action is for the legacy against the executrix in respect of assets within the State, precisely as a South Carolina creditor might bring his action here against the executrix. If she have no assets within the jurisdiction, she could plead *plene administravit*, but if she have such, the recovery would follow; to that extent, and in that manner, this action is "in respect of assets."

Third. This brings us to the most important question in the case. That is, the domicile of the testator being in England, and

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*his executrix having qualified on his will both in England and in South Carolina, whether the plaintiff, a citizen of this State, may, in the courts of this State, sue the ex-

ecutrix and recover a pecuniary legacy, there being ample assets here to pay the same: or whether his prayer for relief here must be refused, the assets transmitted to England, and he required to go there and make his claim in that jurisdiction. As said by Judge Story in the great case of *Harvey v. Richards*, 1 Mason, 408 [Fed. Cas. No. 6,184]: "This is a question involving the doctrines of national comity, or, what might be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason, then, exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person? I say, without injustice. It may be admitted that a Court of Equity ought not to be the instrument of injustice; and that if in the given case such would be the effect of its interposition, it ought to withhold its arm."

There is certainly some want of clearness in the authorities as to the liabilities and duties of domiciliary and ancillary administrators, and the precise line of demarcation between them. For the sake of brevity, we may assume several propositions as settled. We take it as settled: 1. That if a testator have personal property in a foreign country, the executor of the domicile has not the right, by virtue of the will alone, to go into that foreign country and possess himself of that property without new letters from the jurisdiction in which the property is found. *Dial v. Gary*, 14 S. C., 573 [37 Am. Rep. 737]. 2. That the new administrator may, or may not, be the same person as the executor of the domicile. But whether or not, inasmuch as the law of the domicile must control in the succession or distribution of the effects, the administration granted there is deemed the principal or primary one, and that in the foreign country as ancillary, yet there is no privity between them, but they are independent of each other. "Each portion of the estate must be administered in the country

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in *which possession is taken and held under lawful authority." 3 Wms. Exrs., § 1664. 3. That the only mode of reaching such assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled. "The residue is transmissible to the home administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law in the application and distribution of the assets found there." Story

Conf. Law, § 513; 3 Wms. Exrs. (6 Am. Ed.), 1664, and notes.

These points being taken as settled, it is manifest that the question of importance is, as to what claims may be asserted in the ancillary jurisdiction before the residuum is ascertained and transmitted. It is conceded on all sides, that the ancillary jurisdiction will not transmit the property found there until all the domestic creditors are provided for. But it is contended that the principle on which the creditors are paid, does not embrace domestic legatees; for the reason that they derive their claims from the bounty of the testator, and therefore, under all circumstances, must go to the home administration. We believe it is true that, as a rule, legatees go to the administration of the domicile, but, as it strikes us, not for the reason suggested. Although a legatee is a volunteer, the duty to pay him, if there are assets, is none the less obligatory on that account. But for the reason that there may not be sufficient assets, that his legacy may have to abate to pay debts, and that a general settlement and marshalling of assets may be necessary, it is considered to be safe, convenient, and orderly that, as a rule, the legatee should go to the home administration.

But there are well established exceptions to this rule, proceeding, as it seems to us, upon the principle that when the general estate has been settled, and there is no need of further account, an exceptional case has arisen, and the reason of the rule ceasing, the rule itself ceases. There are numerous cases in which the ancillary jurisdiction has entertained actions in behalf of citizens, who were mere volunteers. See *Harvey v. Richards*, supra; *Cureton v. Mills*, 13 S. C., 410 [36 Am. Rep. 700], and other cases cited by the Circuit Judge. It is not denied that these

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were cases of mere *volunteers, but then another modification is suggested, that in all these cases the parties were distributees or residuary legatees. If the fact be so, why should that make the difference, unless the circumstance of their being residuary was taken as evidence that the estates were already settled and no further account necessary?

If this is the feature which makes residuary legacies exceptional, the one before us—although demonstrative in form—is in character residuary, in the sense that, the estate being settled, it is the only liability remaining. The legacy is fixed in amount and there are assets, it must certainly be paid in full, and the only question is, where shall it be paid? Suppose the testator had given to the plaintiff, not two thousand dollars, but one of his South Carolina State bonds of the denomination of \$2,000, would this court, under the circumstances, be required to transmit that bond to England, really for no other purpose than to make the plaintiff go there

to receive it from the defendant in her character of domiciliary executrix? But without pursuing this, Judge Story in stating the rule makes no reference to any such distinctions between residuary and other legatees. He says: "Still, however, the new administration is made subservient to the rights of creditors, legatees, and distributees, who are resident within the country where it is granted; and the residuum is transmissible * * * only when a final account has been settled in the proper tribunal, where the new administration is granted, upon the equitable principles adopted by its own law in the application of the assets found there." Story *Conf. Law*, § 513, and notes.

We cannot say that the Circuit Judge erred in holding that "courts of the ancillary jurisdiction have the right to order the payment of a legacy or the distribution of funds to residuary legatees, or under the statute of the domicile, whenever it appears as matter of fact, that there are funds of the estate in the hands of the ancillary jurisdiction; unless it be made to appear that in good faith an accounting is necessary in the jurisdiction of the domicile, or that for some other purpose the equities of the parties require that the funds shall be sent there for distribution."

Fourth. As we do not feel authorized to

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dismiss the complaint, it is necessary to decide all the questions in the case. We would be pleased to escape this responsibility as the law of the domicile (England) must be applied. We undertake to do so with diffidence arising from a conscious want of familiarity with the English law. The terms of the legacy, however, are plain and simple. The bequest gave directly to the plaintiff two thousand dollars (\$2,000), to be held by the executors until he attained the age of twenty-one years, and then with the accumulations of interest to be paid to him. Both the amount and time of payment were fixed, and it would seem that no question could arise about it, except possibly as to the interest. But the executrix claims that in 1873, some seven years after the legacy had been in her hands, bearing interest under the English law at four per cent., she, under the advice of eminent English counsel, invested such a sum of money as would have purchased seven years before (1866) legal tender notes of the United States of the nominal value of \$2,000, but which at that time were considerably under par; and, adding the interest at four per cent. down to the time of the transaction, "laid aside" these three per cent. consols as the legacy of the plaintiff; and that when he came of age, these consols were not offered to him, but sold and "the proceeds," less the English "legacy duty," tendered to him in full payment.

It has never been decided by an English court, that the amount thus tendered was

the whole legacy of the plaintiff. If it had been, we would of course, with proper deference, conform to that judgment, but the matter is now before the court as an original question. As to the currency in which a legacy is to be paid, the intention of the testator must furnish the rule. 2 Wms. Exrs., 1433. This legacy was given by the testator to his nephew, an American born, though then under age and living with his father at Charleston. It was expressed in dollars, and not to be paid until the nephew reached the age of twenty-one years. The will was executed in England, before the national currency of the United States (which growing out of the late war was abnormal) had come into existence; and we are not at liberty to conclude that the testator foresaw that there would be such paper currency in the United States,

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or contemplated the possibility of his executrix satisfying the legacy in such currency at a discount, before the time indicated for its payment.

We cannot doubt that when the testator said "dollars," he meant real dollars in coin, or its equivalent, and not mere paper promises to pay dollars, rising or falling in value according to circumstances. If this is, in all respects, an English legacy, how could it be discharged by a purchase of consols with American paper currency which were never a legal tender in England? It does not seem consistent to consider it an English legacy as to interest, investment, &c., and yet allow payment in advance of the time, and in a depreciated paper currency not recognized in England. The plaintiff, when he reached full age, was not, as it seems to us, bound to accept what was tendered by the executrix as his legacy, and is now entitled to recover two thousand dollars in coin or its equivalent, with the proper accumulations of interest.

Fifth. Then as to the rate and manner of calculating the interest. It seems that the rate of interest upon a legacy allowed by the English law is four per cent., to be computed upon the principal only and not upon the principal and interest, but under particular circumstances the court will allow the legatee compound interest, as where there is an express direction in the will that the executor shall lay out the fund to accumulate, and he neglects to do so. 2 Wms. Exrs., 1433. The phrase "accumulations of interest" may seem to indicate somewhat vaguely the idea of interest on interest, but there is no express direction in the will that the executrix should invest the legacy in any particular securities, or indeed to invest it at all, and as we have proceeded on the view that in fact there was no valid investment, we hesitate to require compound interest. See *Robinson v. Robinson*, 1 DeG. M. & G., 247, cited and commented on in 3 Wms. Exrs., 1815. Our own court is also disinclined to charge executors or trustees

with compound interest. *Baker v. Lafitte*, 4 Rich. Eq., 392. Upon the whole, we think the plaintiff should recover two thousand dollars with simple interest thereon at the rate of four per cent., from one year after the testator's death (March 16, 1866) until paid, less whatever may be the proper "legacy duty" on the amount.

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*Costs in an equity suit are within the discretion of the chancellor as a part of the relief granted, and in accordance with this general rule upon the subject we will not interfere with his decree in that respect.

The judgment of this court is, that the judgment of the Circuit Court be affirmed, except as to the interest chargeable upon the legacy, and that the cause be remanded to the Circuit Court, in order that the exact amount may be ascertained and adjudged according to the conclusions herein announced.

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BRIDGER v. ASHEVILLE AND SPARTANBURG RAILROAD COMPANY.

(November Term, 1885.)

[1. *Depositions* ⇨107.]

Testimony taken by commission without objection may be objected to at the trial on the reading of the interrogatories.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 318; Dec. Dig. ⇨107.]

[2. *Evidence* ⇨519.]

A witness personally acquainted with the character and location of a turn-table may testify that it was dangerous for children to ride thereon.

[Ed. Note.—Cited in *Dent v. South Bound R. Co.*, 61 S. C. 338, 39 S. E. 527; *State v. Stockman*, 82 S. C. 395, 64 S. E. 395, 129 Am. St. Rep. 888; *Roberts v. Virginia-Carolina Chemical Co.*, 84 S. C. 290, 66 S. E. 298.

For other cases, see *Evidence*, Cent. Dig. § 228; Dec. Dig. ⇨519.]

[3. *Trial* ⇨159.]

Where there is an absence of all testimony as to any or all material points embraced in the issues between the parties, a non-suit should be ordered. If there is any pertinent testimony, whether weak or strong, the force and effect of which has to be weighed, the case must go to the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 360; Dec. Dig. ⇨159.]

[4. *Trial* ⇨165.]

On motion for non-suit, the judge can only determine whether there is any pertinent testimony; on motion for new trial, he may determine its sufficiency. Hence, a judge may grant a new trial to defendant where the same testimony would not permit a non-suit.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 373, 374; Dec. Dig. ⇨165.]

[5. *Negligence* ⇨136.]

There being testimony that the turn table was dangerous, was located in an exposed place, easily accessible, unfenced, unguarded, and unlocked; that the plaintiff was of an age when he could not understand that the turn-table was dangerous, and that he had no right to inter-

meddle with it—there was some pertinent testimony upon the issue of negligence, and a non-suit was properly refused.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 313; Dec. Dig. ⇨136.]

[6. *Negligence* ⇨17, 136.]

The judge declined to charge that "the degree of care required of defendant is only such as is exercised by well regulated railroads over their turn-tables, and that if defendant exercised such care in this case, there was no negligence"—saying that other railroads' negligence could not excuse negligence by this defendant, and that it was for the jury to say whether there was negligence here. In this there was no

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*error. What well regulated railroads do may be very different from what prudence would require them to do.

[Ed. Note.—Cited in *Bodie v. Charleston & W. C. R. Co.*, 61 S. C. 488, 39 S. E. 715; *Jones v. Seaboard Air Line R. Co.*, 67 S. C. 195, 45 S. E. 188; *Parsons v. Charleston Consol. Ry., Gas & Electric Co.*, 69 S. C. 307, 48 S. E. 284, 104 Am. St. Rep. 800; *Nickles v. Seaboard Air Line Ry.*, 74 S. C. 142, 54 S. E. 255.

For other cases, see *Negligence*, Cent. Dig. §§ 22, 307; Dec. Dig. ⇨17, 136.]

[7. *Negligence* ⇨139.]

The judge should charge the jury that negligence is the absence of ordinary care, but the jury must determine whether the facts proved amount to negligence.

[Ed. Note.—Cited in *Petrie v. Columbia & G. R. Co.*, 29 S. C. 322, 7 S. E. 515; *Quinn v. South Carolina Ry. Co.*, 29 S. C. 385, 7 S. E. 614, 1 L. R. A. 682; *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 19, 19 S. E. 206; *China v. City of Sumter*, 51 S. C. 400, 29 S. E. 206; *Pickens v. South Carolina & G. R. Co.*, 54 S. C. 509, 32 S. E. 567; *State v. Adams*, 68 S. C. 427, 47 S. E. 676.

For other cases, see *Negligence*, Cent. Dig. §§ 371-377; Dec. Dig. ⇨139.]

[8. *Negligence* ⇨136.]

The judge properly left it to the jury to say whether the plaintiff was of sufficient age, intelligence, and discretion to be brought within the rule of contributory negligence.

[Ed. Note.—Cited in *Tucker v. Buffalo Cotton Mills*, 76 S. C. 543, 57 S. E. 626, 121 Am. St. Rep. 957.

For other cases, see *Negligence*, Cent. Dig. § 347½; Dec. Dig. ⇨136.]

[9. *Negligence* ⇨141.]

An infant might know that it was wrong and improper for him to play on a turn-table, and yet not know that it was dangerous.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 333; Dec. Dig. ⇨141.]

[10. *Negligence* ⇨138.]

Where the incapacity from age of an infant plaintiff of eleven years is alleged in the complaint and denied in the answer, the judge could not charge, as matter of law, that plaintiff was sui juris and subject to the general law applicable to persons of acknowledged capacity.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 336; Dec. Dig. ⇨138.]

[11. *Trial* ⇨213.]

The law of North Carolina, applicable to an injury like the one here received, was not proved by the mere citation of a North Carolina decision declaring the law. The volume of North Carolina Statutes, or of North Carolina reports, should have been offered in evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 480; Dec. Dig. ⇨213.]

[12. *Trial* ⇐194.]

The charge in this case was not on the facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 466; Dec. Dig. ⇐194.]

[13. *Negligence* ⇐23.]

[Cited in *Franks v. Southern Cotton Oil Co.*, 78 S. C. 13, 58 S. E. 960, 12 L. R. A. (N. S.) 468, as to the point that recovery may be had for injury to an infant resulting from an unlocked and unguarded turntable.]

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1662; *Negligence*, Dec. Dig. ⇐23.]

[This case is also cited in *Matthews v. Seaboard Air Line Ry.*, 67 S. C. 513, 46 S. E. 335, 65 L. R. A. 286, without specific application, and in *Bridger v. Asheville & S. R. Co.*, 27 S. C. 458, 3 S. E. 860, 13 Am. St. Rep. 653, as to facts.]

Before Cothran, J., Spartanburg, March, 1885.

The case is sufficiently stated in the opinion of this court.

Messrs. Duncan & Sanders, for appellant.

Mr. J. S. R. Thomson, contra.

April 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, a youth under twelve years of age, while playing with other boys on the turntable of the defendant, located in Hendersonville, North Carolina, was badly injured, and he brought the action below through his guardian ad litem, in Spartanburg County, for damages, alleging negligence in the defendant, because said turn-table, being located in an open common near the highway, where the boys of the village were accustomed to play, &c., was yet not fenced or guarded, or locked, or secured, when not in use, but was negligently left exposed and accessible to children, who, not knowing the danger, made use of it as a means of amusement.

The jury rendered a verdict of \$5,000 in favor of the plaintiff, and judgment being en-

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tered the defendant appealed. The appeal involves, 1st, a question as to the admissibility of certain testimony introduced by the plaintiff; 2d, whether a non-suit moved for by defendant should not have been granted; 3d, in not charging certain requests of the defendant; and, 4th, in charging certain propositions claimed by defendant to have been error.

First. As to the admissibility of the testimony objected to. It seems that certain witnesses were examined by commission, who were asked in said commission if a turn-table was dangerous, no objection being interposed in the commission to this question. These witnesses were examined also generally as to the location of this turn-table, &c., and they stated that it was dangerous for children to ride thereon. It is stated that this testimony was objected to at the trial. Objection over-

ruled. We think the ruling of his honor was correct. The fact that no objection was interposed in the commission would not be sufficient to prevent objection at its opening on the ground that the testimony was already in the case without objection. *McBride v. Ellis*, 9 Rich., 269 [67 Am. Dec. 553]. But besides this, which is satisfactory, the opinion of the witnesses, as given, was not an abstract opinion, founded upon the evidence of facts testified to by other witnesses and given as the opinion of experts, but it was a statement based upon the witnesses' own knowledge of the character and location of this turn-table, and inferred from the facts to which the witnesses had testified in the course of their examination. That such testimony is generally received by the courts, see *Ward v. Charleston City Railway Co.*, 19 S. C., 526 [45 Am. Rep. 794]; *Seibles v. Blackwell*, 1 McMull., 56, and the general doctrine discussed in *Jones v. Fuller*, 19 S. C., 66 [45 Am. Rep. 761].

2d. Should the motion for non-suit have been granted? The law in reference to non-suits, as we have held in several cases, is this: Where there is an absence of all testimony as to any or to all material points embraced in the issue between the parties, a non-suit should be ordered. *Carrier & Harris v. Dorrance*, 19 S. C., 32; *Redding v. R. R. Co.*, 3 Id., 9 [16 Am. Rep. 681]; *Boykin v. Watts*, 6 S. C., 83; *Holley v. Walker*, 7 Id., 144. And this is, or may be, a preliminary question raised by the defendant before he enters upon his defense, and addressed to

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the judge. The judge is charged with the law involved, and it is his duty to determine what are the material points embraced in the issue; in other words, what points the law of the case requires the plaintiff to prove in order to recover. And while he cannot say whether these points, one or all, have been proved or not on a motion of non-suit, and while he cannot base his order upon such conclusion, yet he can say whether the facts proved or the testimony offered touch the issue; and if in his judgment they fail to touch the issue, or any material point thereof, being as to said issue irrelevant and non-pertinent, it would be proper for him to grant a non-suit. His judgment in this respect may or not be erroneous, but still it is his province—not final, it is true, but nevertheless his province, subject to review on appeal. On the other hand, where there is testimony in the case directed and pertinent to the issues involved, and to all material points thereof, whether weak or strong, yet pertinent, the force and effect of which has to be weighed in determining whether said points have been proved, the case must go to the jury, because, under our system of jurisprudence, whether the testimony bearing upon the issue (the facts alleged on the one side

and decided on the other) sustains said allegations is a matter with which the jury in a law case is exclusively invested.

It is sometimes urged that if the judge would grant a new trial in a case because a verdict in his opinion could not be sustained by the testimony, a non-suit would be proper before submitting it to the jury. The law, however, does not say so. The judge, as we have said, may determine in the first instance the absence of, or pertinency of, testimony, and may instruct the jury as to what is pertinent and what not, but he has no power to determine its sufficiency if it be pertinent, except after the jury has passed upon it; whereas upon a motion for a new trial he, too, may then judge of its force and effect, its sufficiency, and make orders accordingly. It will be observed that we are not discussing the wisdom of this doctrine. It may, or not, be well that judges have been denied the province of telling the jury that the evidence, although pertinent, has failed in sufficiency to sustain the allegations in the complaint, and of directing the verdict on the facts. Much might be said on either side.

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If this was an open *question, and raised before a legislative assembly, but in our courts it cannot be raised, as the law here has long since settled it, denying to the judges such power.

The question here, then, on the motion of non-suit is, was any pertinent testimony introduced by the plaintiff upon the point involved, to wit, negligence of the defendant? What is negligence? Negligence has been defined, in short, to be "the absence of due care." This is the usual and general definition. More fully explained, it may be said that it "is the omission to do something which a reasonable and prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do under all the circumstances surrounding and characterizing the particular case." There are several classes of cases in which the question of negligence, such as would make the party in default responsible, may arise, some of which are as follows: 1st. Where an injury is inflicted by one upon another by his direct act, or the direct act of his agent. 2d. Where the injury is inflicted by some instrumentality under the immediate control and direction of the party, or his agent, at the time of the injury; and 3d. Where the injury is inflicted by some instrumentality belonging to the defendant, not, however, at the time under the immediate direction of the defendant or his agent, but the injury is received by the party bringing himself in contact therewith, and in that way sustaining said injury. Cases of the first class will readily suggest themselves. Cases of the second may be represented by running a train of cars under the direction

of the defendant or his agent. And cases of the third, by the case before the court, where the plaintiff sustained his injury by going to the turn-table of the defendant when neither the defendant nor his agent was present, and there, of his own accord, attempting to use it as a means of amusement and play.

The question of the pertinency of the testimony offered as to alleged negligence in the two first classes would depend upon very different considerations than when raised in the third, or rather the facts constituting negligence would be of a different character in the third class from those in the two other classes, and the points to which the testi-

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mony should be directed, and *therefore its pertinency considered, would be different. In the third, whether the instrumentality was in itself a dangerous one; whether, being dangerous and capable of inflicting injury, it was located and left in an exposed place, unguarded and unprotected; and especially whether the party injured was mentally incapable of knowing and appreciating the danger, either from want of age or otherwise, and of the impropriety of his intermeddling with it, would all enter into the general question of negligence, and would have to be considered by the judge on the question of the pertinency of testimony arising on a motion of non-suit. And no doubt the Circuit Judge considered these in this case when he refused the non-suit. And we concur with him, that there was some testimony on all of these points. There was testimony that the turn-table was a dangerous machine; that it was left and located in an exposed place, easily accessible, unguarded, unfenced, and unlocked; and that the plaintiff was of that age when he was incapable of understanding that he had no right to meddle with it, or of appreciating his danger. Whether this testimony was sufficient to sustain these necessary ingredients of the issue, it is not for us to say, nor was it for the Circuit Judge to say. He was compelled to hold that it was at least pertinent, and so holding, he was compelled to say also, let the case go to the jury.

This brings us to the refusals to charge as requested. The appellant has presented nine (9) exceptions on refusals to charge. No argument, however, was made before us, except upon those numbered 5th, 6th, 7th, 8th, and 9th, we suppose because his honor charged in the main as appellant requested on the others.

In the 5th it is assigned as error, because his honor did not charge "that the degree of care to be required of defendant is only such care as well regulated railroads exercise over their turn-tables; and if defendant exercised such care to this turn-table, then it was not negligent, and the plaintiff cannot recover." The judge declined this, saying: "I cannot charge that as law, for the reason that all other railroads in the country may

have done exactly what this railroad did, and if all others were negligent in doing so, then this railroad would be negligent too; and, further, every railroad must be governed by the circumstances that surround it," &c., and, in substance, that it was for the

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jury to determine whether leaving the turn-table without a lock, and unfastened, under all the circumstances, was an act of negligence, &c. The request called upon him to charge whether a certain state of facts would constitute negligence, to wit: That if this road was doing as other well regulated railroads were doing in this matter, there was no negligence.

Negligence, as we have explained above, in one of its aspects, it is true, is the doing what other prudent and reasonable men would not do when governed by prudence under similar circumstances. But does it follow that the doing what other prudent and reasonable men are doing under similar circumstances would be proper care, and would negative negligence? Prudent and reasonable men may sometimes commit an act of negligence, as well as the reckless and imprudent. Humanity has seldom been found to be perfect, and it would not do to say that a man can shield himself from a negligent act, resulting in injury, by proving that prudent and reasonable men have done the same act. Such a doctrine could legalize the baldest act of negligence. Railroads, for instance, running through the streets of crowded cities might establish the practice of going at their utmost speed, regardless of human life. They might discontinue the custom of ringing the bell at crossings, and dispense with all the safe-guards now adopted to warn persons of danger, and thus change the meaning of negligence altogether. If the request had been that if the defendant exercised such care as well regulated and prudently managed railroads ought to exercise, such care as proper prudence demanded under the circumstances, then there would be no negligence, no doubt the judge would have so charged. But as to the request made, we think he properly declined it.

One of the most difficult questions that has come before our court, is this matter of negligence, and we have not been able to get much light from other courts nor from the text writers on some of the points involved. All agree as to the general definition—the absence of ordinary care. But who is to say whether the facts alleged and proved show this absence—the judge or the jury? The judge is required to charge the law, and the jury to find the facts. The law, however, does not state what facts proved will show the absence of ordinary care. It could not

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do so as applicable to every case which arises. The cases involving this question are

so different in their facts, so various, so complicated, and arising under so many different circumstances, that it would be utterly impossible to lay down any general principle of law, by which every special case could be measured and tested as to the fact of negligence, and which would enable a judge to say to the jury, as matter of law, such and such facts show the absence or presence of ordinary care.

The general rule on the subject seems to be that the charge of the judge must simply be, that negligence is the absence of ordinary care, and the jury must determine whether the facts proved before them amount to negligence. They must determine what facts have been proved, and then say by their verdict whether these facts amount to the absence of such care as ordinary and prudent men ought to exercise, when guided by prudence, but not what men may be doing under similar circumstances. This must of necessity be so, because, as we have said, the law has not, nor can it fix any precise standard which can be given by the judge to the jury and by which the facts in each and every case can be measured and weighed as applicable to the question, whether or not ordinary care was bestowed in the case. Besides, in many cases, the matter is of common knowledge, and the jury being supposed to be reasonable men, brought into the court from daily contact with the ordinary and usual business of life, can take notice of what ordinary care would require. In such cases they are supposed to have a standard for ordinary care in their own mind. In other cases, where the matter pertains to some special business beyond the range of common knowledge and about which the jury cannot be supposed to be informed, what ordinary care and prudence would require in such case may be proved by experts or by other parties who may know. And, perhaps, in a case of demurrer on the ground that the facts do not constitute a cause of action, the judge would be bound to decide from the standard in his mind.

The next exception assigns error "because his honor did not charge, that if defendant's turn-table was located in a place where persons were not likely to go, then it was not bound to take precautions against possible

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injury to trespassers." We think the judge charged this. He certainly charged the preceding request in terms, and that was the same as this, with the phraseology somewhat different, and after charging the former as law, he said, this one is included in a former request.

Next, "Even if defendant was negligent, yet if the plaintiff by the exercise of ordinary care could have avoided the injury and did not, then he was the author of his own injury." His honor said in reference to this, in substance, that if the jury found

that the plaintiff was possessed of sufficient intelligence and discretion to bring him within the operation of the rule, where he could be held responsible for his acts, and capable of contributing to his injury, then the jury could not find a verdict for him. And he submitted to the jury whether the plaintiff, whom they had seen and observed, and in reference to whose capacity they had heard testimony, was possessed of such capacity, notwithstanding his tender age of ten years and eleven months. This, it seems to us, was as far as the judge could have gone. He could not have charged in the language of the request, because that would have been assuming that the plaintiff was capable of exercising ordinary care, and in that way have avoided the injury, which was one of the very matters in controversy.

Next, in not charging, "that the plaintiff at the time of the injury was of sufficient age, intelligence, and capacity to make him responsible for his acts." His honor replied to this, that to charge that would be a clear invasion by the court of the province of the jury. And we concur in that opinion.

The next was very similar to the one just noticed, involving facts in reference to the capacity of the plaintiff and his contributory conduct, which his honor properly left to the jury.

The next two present the same idea, and complain that his honor declined to charge, that if the plaintiff was of sufficient capacity to know that it was wrong and improper to play upon the turn-table, especially after being told by his comrades not to do so, he was guilty of contributory negligence and could not recover. The judge charged this, with the slight qualification of inserting after the words, wrong and improper, the words, "because it was dangerous." This, it seems to us, was not such a modification as to make his charge legal error. A main

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question in the case was, did the plaintiff have sufficient capacity to contribute to his injury? This question the judge very fairly submitted to the jury, and the insertion of the words above, "because it was dangerous," if not absolutely necessary, was not improper, and could in no way have misled the jury. The plaintiff may have been told, and he may have had sufficient capacity to take in the idea, in a general way, that it was wrong and improper for him to be at the turning-table, and yet not of sufficient capacity to know that he might get hurt by attempting to ride upon it, and consequently not of sufficient capacity to exercise, or be required to exercise, ordinary care, so as to prevent injury. This was one of the points involved in the request, and the judge very properly brought it out, by inserting the words of modification referred to.

The appellant's counsel have earnestly pressed upon us the position, that it was the

duty of the Circuit Judge to charge as matter of law under the evidence, that the plaintiff from his age and sprightly character was sui juris, and therefore subject to the general law, applicable to those of acknowledged capacity. Where it is admitted that the party injured was of sufficient age, or had sufficient intelligence to be responsible for his acts, we do not say but that the judge might properly charge in such case, that he could contribute to his injury in such way as to exempt the defendant. So, too, where it is admitted that from his tender years or other infirmities he has not sufficient capacity, the judge might charge, that he could not contribute. But where these matters are matters of doubt, and are points in the issue, depending upon facts to be proved, then they become questions for the jury.

In accordance with these principles, we find cases in some of the States, cited by appellant, where the courts have ruled as matter of law in cases of children one, two, and three years of age, that the doctrine of contributory negligence could not be applied. In other cases, where they were eleven, twelve, thirteen, and fourteen, that it could be applied, and in others between these ages, that the jury should first determine the question of capacity, before considering the question of contributory negligence. In the case before the court the incapacity of the

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plaintiff from age *and undeveloped intellect was alleged in the complaint, and denied in the answer. It thus became one of the facts in issue, and in our opinion it properly belonged to the jury, as it was not so clear, or admitted either way, to such extent as to warrant the judge, even under the cases relied on by appellant, to charge upon it as matter of law.

Next, in not charging, "that the law of the place which gave rise to the liability must be the law of the case." Had it been proved, as required by section 2218, General Statutes, that the laws of North Carolina on this matter were different from those of this State, the common law having been altered by statute, or having been modified by the decisions of the highest court in that State, then the defendant, perhaps, could have requested this charge, or at least he could have raised the question whether or not the law of North Carolina should control; but until such testimony was introduced, the question raised was an abstract question and had no application to the facts. And in that view the charge of the judge would be immaterial. We do not understand from the statements in the "Case," that either a copy of the statutes of North Carolina, or a volume of the Reports of that State, or any parol testimony was offered as to the law there. In the argument for non-suit, appellant's counsel read from a case cited, and produced the 74th North Carolina Reports, but this

volume had not been offered or admitted in the progress of the trial up to that time, nor do we see that it was either admitted or offered afterwards. There being no testimony, then, that the law of North Carolina was different from ours, the charge of the judge, even if erroneous, would not call for a reversal of the judgment.

The exceptions not heretofore noticed assign error, in that the judge charged on matters of fact, in saying, "that the turntable under some circumstances was destructive and dangerous;" that it was patent and self-evident, that under some circumstances a turntable was a destructive and dangerous thing; "that it was an alluring and attractive place for boys." We do not think that these incidental remarks of the judge made in his charge, can be culled out and urged as a violation of the province of the jury. He did not instruct the jury that, as matter of fact, it had been proved in this case that the

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turn-table here was a destructive and dangerous thing. He said, that in some circumstances a turn-table was dangerous. Nor did he charge, as matter of fact, that the turn-table here was an alluring and attractive place for the plaintiff; he said, a turntable is an alluring and attractive place for boys. The purpose of the constitutional inhibition upon Circuit Judges, from charging on the facts, is to prevent the judge from leading the jury on the facts. Our system demands that the jury shall be left to their own findings, upon the facts, free from the opinion or suggestion of the judge. It can hardly be said that the judge here violated this principle by the incidental and general remarks excepted to.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 35

COVAR v. CANTELOU.

SAME v. BUTLER.

(November Term, 1885.)

[1. *Trusts* ⇨194.]

A testator gave a portion of his residuary estate unto and to the use of his executor and his heirs, "in trust for the sole and separate use of T. [a married woman], free and absolute from any rights of her husband, for and during the term of her natural life, and upon her death to be equally divided amongst her children and their heirs forever." Under order of the court, a part of this fund was invested in a tract of land, and afterwards, upon the petition of T. and her substituted trustee (her children then in esse not being parties), a portion of this land was sold by order of court. *Held*, that the rights and interest of these children in this land so sold were not divested by the proceeding to which they were not parties. *Moseley v. Han-kinson*, 22 S. C., 323.

[Ed. Note.—Cited in *Rice v. Bamberg*, 59 S. C. 507, 38 S. E. 209.

For other cases, see *Trusts*, Cent. Dig. § 249; Dec. Dig. ⇨194.]

[2. *Trusts* ⇨61.]

Whether these children were necessary parties to the proceeding under which money of the trust estate was invested in this land, need not be determined; for if they were, and are not therefore bound by the investment, still they could follow their funds into the land, and this they have elected to do by this action.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 84; Dec. Dig. ⇨61.]

3. This case distinguished from *Farr v. Gilreath*, 23 S. C., 502.

[4. *Trusts* ⇨61.]

Upon the death of T., the trusts were executed and the fee in the land vested absolutely in the children of T.; and they, having the legal title, could maintain this action in their own names to recover this land.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 84; Dec. Dig. ⇨61.]

[This case is also cited in *Faber v. Faber*, 76 S. C. 161, 56 S. E. 677, without specific application.]

Before Wallace, Jr., Edgefield, October, 1884.

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*The appeal was from the following decree, omitting its statement of facts:

The legal questions arising upon the facts in this cause were discussed with striking ability at the hearing. The case, I think, lies within a narrow compass. These plaintiffs certainly had an interest in the land sold by the trustee, and although alive at the time of the proceedings to procure authority to sell, were not made parties. If the statute of uses executed the use declared by the will, it was executed in the mother and children, and they had a legal estate. If the statute did not execute the use, the legal title remained in the trustee, and they had an equitable interest. I may say that in my opinion the statute did not execute the use for two reasons. One is that by the terms of the will of Ryan, a use was limited upon a use, and the statute will not execute such a use. Such a limitation was conclusive evidence that the testator intended that the legal title should remain in the trustee. The other reason is, that the trust was created for the benefit of a married woman. These children, then, at the time of the sale had an equitable interest in the land which could not be defeated by proceedings to which they were not parties.

This principle, according to my construction of the cases, has been expressly decided in the recent case of *Leroy v. Charleston*, 20 S. C., 71. In that case, land was sold by order of the court, when certain persons, grandchildren of testator, held to be contingent remaindermen, were not made parties to the proceedings, nor was the heir of the trustee, who held the legal title, a party. The court, after referring to and quoting from *Bofil v. Fisher* (3 Rich. Eq., 1 [55 Am. Dec. 627]) as to the power of the court to sell the estates of infants and remaindermen, whether vested or contingent, and referring

also to *Van Lew v. Parr*, 2 Rich. Eq., 331, and to *Trescott v. Smyth*, 1 McCord Eq., 301, uses the following language: "We think the grandchildren in this case, at least those whose names and residence are known, should have been made parties. We think, too, that the proceeding was defective, in the fact that the heir at law of the trustee was not summoned." In that case the sale was held invalid to convey a perfect title upon two grounds: First, that certain infant

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contingent remaindermen were not parties; and, second, because the holder of the legal title was not a party.

In this case the holder of the legal title was before the court, as was the life-tenant. All that they had was sold and enjoyed by the purchaser, but the rights of these remaindermen could not be sold under proceedings to which they were not parties, while they were living and known. The purchaser held all he bought, as the trustee and life-tenant held all they had subject to the rights of these plaintiffs. Upon the death of Mrs. Tillman, the fee would have passed to these plaintiffs if the land had not been sold. That was their right under Ryan's will. Under the principles above stated, that right remains unaffected by the sale made, and when Mrs. Tillman died, the fee in the land sold vested absolutely in these plaintiffs.

It is therefore ordered, adjudged, and decreed, that the plaintiffs are entitled to the possession of the land described in the complaint. It is further ordered, that plaintiffs have leave to apply at the foot of the decree for such orders as may be necessary to carry it out.

Messrs. Sheppard Bros., for appellant, who also submitted argument of Mr. B. W. Betts, jr., deceased.

Messrs. S. B. Griffin and Gary & Evans, contra.

April 22, 1886. The opinion of the court was delivered by —

Mr. Justice McIVER. By the eleventh clause of the will of John Ryan, who died many years ago, he directed as follows: "It is my will and desire that all the rest and residue of my estate, both real and personal, be divided into fourteen equal shares, and I devise and bequeath one of the said shares to each of my grand-nephews [naming them], to them and their heirs forever; and as to the remaining nine shares, I give, devise, and bequeath the same to my executors hereinafter named, and to the survivors and survivor of them, and to the heirs of the survivor, to the use of my said executors and the survivors and survivor of them, and to the heirs of the survivor, in trust, nevertheless, for the sole and separate use of my grand-nieces, Peggy G. Smith, wife of —"

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*Smith, Mary E. Tillman, wife of Benjamin

Tillman [and seven others, naming them], free and absolute from any rights or control of any husband they may now have or may hereafter have, one of said shares to each of my said grand-nieces, for and during the term of her natural life, and upon her death to be equally divided amongst her children and their heirs forever, the legal representatives of any child of my grand-nieces who may have died to be entitled to the same share as his or her parents would have been if living."

The testator appointed three executors, of whom Christian Breithaupt alone qualified and assumed the duties of the trust. It seems that the share of Mrs. Mary E. Tillman, under the above clause of the will, amounted to seventeen hundred and thirty-five dollars, and that, by an order of the Court of Equity, eight hundred dollars of this sum was invested in a tract of land containing about 367 acres, which was conveyed to the said Christian Breithaupt and the other executors as trustees under the will of the said John Ryan, the petition for leave to make such investment setting out in full the eleventh clause of said will. Subsequently Benjamin Gallman and William G. Gallman were, by an order of the Court of Equity, substituted as trustees for Mrs. Tillman, and soon afterwards, the appointment of William G. Gallman as trustee was revoked by an order of court, leaving Benjamin Gallman as sole trustee.

Sometime in the latter part of 1844, an ex parte petition was filed in the Court of Equity by Mary E. Tillman and Benjamin Gallman, praying that the said Benjamin Gallman, as sole trustee as aforesaid, be authorized to sell a portion of said 367 acre tract of land and reinvest the proceeds in other property, to be held on the same trust. To this petition the plaintiffs, who are the children of the said Mary E. Tillman, though all of them were then in esse and within the jurisdiction of the court, were not made parties. Under this petition an order was made, permitting the said trustee to sell a portion of said land, not exceeding one-third thereof, and reinvest the proceeds in other property, to be held by him on the trust declared in the eleventh clause of the will above set out.

In pursuance of this order, the trustee,

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Benjamin Gallman, sold and conveyed two portions of said land, and the same, by successive conveyances, have come to the defendants in the two actions above stated, who being now in possession, these actions are brought by the plaintiffs as children of the said Mary E. Tillman, who died in 1881, and, as remaindermen under the said eleventh clause of said will, to recover possession of said land. The Circuit Judge held that the plaintiffs were entitled to recover, and rendered judgment accordingly. From this judgment defendants appeal on the follow-

ing grounds: I. Because the court erred in deciding that the defendants, having purchased the lands described in the complaint under order of court, held the same subject to the equities of plaintiffs. II. Because the court erred in deciding that when the life-tenant, Mrs. Mary E. Tillman, died, the fee to the tract of land described in the complaint vested absolutely in the plaintiffs. III. Because the court erred in ordering, adjudging, and decreeing, that the plaintiffs are entitled to the possession of the land described in the complaint.

The two cases, involving, as they do, the same principles, were heard and will be considered together. It seems to us that the fundamental question raised by this appeal had been determined adversely to the view contended for by appellants by the recent case of *Moseley v. Hankinson*, 22 S. C., 323. There can be no doubt that the plaintiffs, as children of Mrs. Tillman, were, upon her death entitled as remaindermen under the will of John Ryan to the share given to her, or for her use, during her life, and when that share, or a portion of it, was invested in the land in question, they thereby acquired an interest in the land which could not be divested by a proceeding to which they were not parties. It is urged, however, that the original fund to which the plaintiffs were entitled in remainder, was not the land now in controversy, but was personal property which was invested in this land by the order of the court in a proceeding to which they were not parties, and, hence, that they have no claim upon the land, but only upon the fund invested. Whether they were necessary parties to the proceeding under which the investment was made, need not now be considered. For even conceding that they were (though we are not to be understood as intimating any opinion upon that question), and that not being parties they were not

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*bound by the investment, yet that cannot affect the present inquiry. If their funds were invested in land without authority, they had the election either to disavow the investment and pursue the fund, or to sanction the investment and claim the property in which the fund was invested; and they have elected the latter alternative by bringing these actions.

The case of *Farr v. Gilreath* (23 S. C., 502), relied on by counsel for appellants, differs materially from this case. There the land in question was not devised to the remaindermen at all, but only the proceeds of the sale of the land were directed to be divided amongst them, and the trustee was expressly empowered to sell. The remaindermen never had any interest in the land, and hence were not necessary parties to the proceeding for its sale. The real question in that case was whether the fact that the sale was made prior to the termination of the life es-

tate, when the will provided that it should be made afterwards, rendered the same invalid, and the court held that inasmuch as the postponement of the sale until after the death of the life-tenant was manifestly intended only for her benefit, and inasmuch as the life-tenant had herself applied for the order of sale as necessary for her interests, it should be sustained, even though made in advance of the time contemplated by the will. We are unable to see how that case affords any support for the position contended for by appellants in these cases now under consideration.

We think it clear, under the authority of the case of *Moseley v. Hankinson*, supra, that the sales made by the trustee, under a proceeding to which the remaindermen were not parties, could not divest their interests. Nor do we see any ground upon which the plaintiffs are estopped from now setting up their claim. When the sales were made, they could not have interposed. The life-tenant and the trustee being parties to the proceeding under which the order of sale was obtained, the sale of the life estate of Mrs. Tillman was valid, and no one had a right to interpose any objection.

Finally, it is urged by the appellants that in no event can the plaintiffs maintain these actions for the recovery of the possession of real estate, because they have not got the legal title, the same being in the trustee. We do not understand that the will created

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*any trust for the remaindermen. The trust was for the life tenants, and when those estates terminated, the several shares were given directly and absolutely to the children. There was no direction that the trustees should hold the property for the use of the children, or even that they should divide the same amongst the children, but upon the death of the life tenant, the property is "to be equally divided amongst her children and their heirs forever, the legal representatives of any child of my grand-nieces who may have died to be entitled to the same share as his or her parent would have been if living." It seems to us that this was a direct and absolute devise or bequest to the children, unencumbered with any trust.

It is true that the devise to the trustees and to their heirs would seem to import a devise of the fee to them, but it is well settled that, no matter how ample may be the terms in which a devise to trustees may be made, they will only take such estate as may be necessary to the complete execution of the trust created. Here the trust was only for the life of the grand-niece, Mrs. Tillman, and upon her death the trust terminated, and the absolute devise to the children in remainder was unaffected with any trust. We agree, therefore, with the Circuit Judge, that "when Mrs. Tillman died, the fee in the land sold vested absolutely in these plaintiffs," and

hence they were entitled to recover possession of the land.

The judgment of this court is, that the judgment of the Circuit Court, in each of the cases stated in the caption of this opinion, be affirmed.

25 S. C. 41

GARLINGTON v. COPELAND.

(November Term, 1885.)

[1. *Appeal and Error* ⇨90.]

An interlocutory order of injunction, made "without prejudice," restraining the defendant from enforcing his judgment against the plaintiff, until a decision is reached upon the merits, is not appealable.

[Ed. Note.—Cited in *State ex rel. Zimmerman v. Westmoreland*, 29 S. C. 4, 6 S. E. 847; *Trustees of Wadsworthville Poor School v. Orr*, 33 S. C. 275, 11 S. E. 830; *Du Pont v. Du Bos*, 33 S. C. 394, 11 S. E. 1073; *Ferguson v. Harrison*, 34 S. C. 172, 13 S. E. 332; *Latimer v. Latimer*, 42 S. C. 210, 20 S. E. 159; *South Carolina & G. R. Co. v. East Shore Terminal Co.*, 48 S. C. 316, 26 S. E. 613; *Alston v. Limehouse*, 60 S. C. 569, 39 S. E. 188; *Wright v. City of Columbia*, 77 S. C. 420, 57 S. E. 1096.

For other cases, see *Appeal and Error*, Cent. Dig. § 601; Dec. Dig. ⇨90.]

[2. *Appeal and Error* ⇨727.]

An exception in the words, "Because his honor erred in making said order, which is contrary to law," is too general to be considered.

[Ed. Note.—Cited in *Strom v. American Freehold Land Mortgage Co.*, 42 S. C. 103, 20 S. E. 16.

For other cases, see *Appeal and Error*, Cent. Dig. § 3019; Dec. Dig. ⇨727.]

Before Cothran, J., Laurens, February, 1885.

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*The opinion states the case.

[For subsequent opinion, see 43 S. C. 389, 21 S. E. 317.]

Messrs. Haskell & Dial, for appellant.

Mr. John W. Ferguson, contra.

April 23, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant herein having recovered a judgment against Geo. F. Young, one of the plaintiffs herein, which was entered up on August 30, 1884, and having under said judgment levied on the property of the plaintiff, Young, and being about to sell the same, this action was commenced (exactly when does not appear, though we presume on or about the 10th day of November, 1884, as the complaint was sworn to on that day), amongst other things for the purpose of obtaining from the defendant an account for the rents and profits of certain land in his possession, claimed to be the property of the plaintiffs, and a judgment for the sum which may be found due upon such accounting, and also for the purpose of enjoining the sale of the plaintiff, Young's

property under the judgment obtained against him by the defendant, Copeland. On hearing the verified complaint, Judge Pressley granted an order requiring the defendant, Copeland, to show cause why the injunction asked for in the complaint should not be granted, and restraining the defendant, in the meantime, from enforcing his judgment against the plaintiff, Young.

The rule to show cause was heard by Judge Cothran upon the pleadings and affidavits submitted, who granted an order, "that, without prejudice, the restraining order heretofore granted in this case be continued of force until a decision is made upon the merits, provided the plaintiffs enter into bond," &c. Amongst the affidavits submitted was one made by N. J. Holmes, Esq., one of the firm of Holmes & Simpson, stating that the said Geo. P. Copeland, on the 16th day of October, 1884, executed and delivered to the said firm of Holmes & Simpson a paper, of which they still retain the possession, in the following words: "I hereby authorize Messrs. Holmes & Simpson to collect the funds due me from George F. Young on judgment I have against him, and also the

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*amount due me on the note against Hasting Dial's estate by R. P. Todd, and apply the same to the oldest judgment against me, and I hereby assign the same to them for that purpose." Judge Cothran gave as his reasons for continuing the restraining order until the determination of the case on its merits the following: "1. It is apparent that the defendant herein is greatly embarrassed, if, indeed, he is not insolvent. 2. Improvident action on my part would, in one event at least, seriously affect the rights and interests of the plaintiffs. 3. The matters involved are important and very complicated, and it is hazardous to determine such on the perfunctory proceeding by motion. 4. No injury to the defendant, other than such as may result from delay, can occur to him, which is not comparable to that which the plaintiffs may sustain if their claim is found to be meritorious; that would be irreparable, the other may be amply provided against by bond and security."

The defendant gave notice of appeal from the order of Judge Cothran solely upon the ground: "Because his honor erred in making said order, which is contrary to law," no exceptions having been served designating wherein the order is erroneous or contrary to law.

The respondents' counsel contends in the outset, 1st. That the order is not appealable. 2d. If it is, then the ground of appeal is too general, and cannot, therefore, be considered. We will consider these points in their order. The code, in section 11, specifies the cases in which this court may review the action of the Circuit Court, or a judge thereof. It is

very manifest that the order appealed from here does not fall under either subdivision 2 or 3 of that section, for even granting that the order does affect a substantial right, that is not sufficient. For the order to be appealable, it must not only affect a substantial right, but it must also in effect determine the action and prevent a judgment from which an appeal could be taken, the language being, "An order affecting a substantial right made in an action when such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken," &c. Now, it is quite clear that the order from which this appeal was taken does not, in ef-

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fect, deter*mine the action or prevent a judgment from which an appeal might be taken.

So that if appealable at all, it must come under subdivision 1 of that section of the code, which, so far as this question is concerned, reads as follows: "Any intermediate judgment, order, or decree involving the merits * * * and final judgments." It certainly is not a final judgment, and therefore the only question is whether it is an intermediate order involving the merits. While the order in question undoubtedly is an intermediate order, we do not think that it involves the merits of the action in which it was made, and, therefore, it is not appealable. The order is nothing more in effect than an interlocutory injunction, made solely for the purpose of keeping the subject of the action in statu quo until the merits of the action can be considered and determined. It determines none of the rights of the parties to the action, but simply prevents any interference with the subject of the action until those rights can be considered and adjudicated. It does not even purport to pass upon any right claimed by either party to the action, and, on the contrary, in express terms it declares that it is granted "without prejudice," which we understand to mean that it is not to be regarded as even indicating what those rights may be, and it is to continue in force only "until a decision is made upon the merits." It will then have performed its office, and any order or judgment that may then be made or rendered will depend entirely upon the conclusion that may be reached by the court, after a consideration of the merits, wholly uninfluenced by the interlocutory order from which this appeal was taken.

Under this view of the case, the other questions which have been argued cannot arise, and need not be considered. But we may add that the appellant's single ground of appeal is too general in its terms, as has frequently been held by this court. There are no exceptions indicating any specific error in any conclusion of fact or law reached by the Circuit Judge; nothing but a general allegation that the order appealed from is "con-

trary to law," without designating in what respect it is contrary to law, which has always been held insufficient.

We desire to add, also, that we are not to

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be understood as *endorsing the propriety of the order appealed from, or as indicating any opinion as to the merit of the application for the interlocutory injunction. Whether the paper executed by the defendant, Copeland, to Messrs. Holmes & Simpson operates as an assignment of the judgment, which the order appealed from prohibits Copeland from enforcing, and whether the order of injunction can have the effect of restraining them, as assignees, from enforcing the judgment, inasmuch as they are not parties to this action, are questions which are not before us, and cannot and ought not to be considered in a case to which they are not parties. And whether any order of injunction should have been made until these gentlemen were made parties, is a matter which we are not at liberty to consider.

The judgment of this court is, that the appeal be dismissed for want of jurisdiction in this court to consider the same.

25 S. C. 45

ABERCROMBIE v. ABERCROMBIE.

(November Term, 1885.)

[1. *Descent and Distribution* ⚭143.]

A decree of settlement between distributees made by the ordinary will not be disturbed, after a lapse of nearly twenty years, and after payments and receipts thereunder.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 503; Dec. Dig. ⚭143.]

[2. *Descent and Distribution* ⚭143.]

And one of these distributees being a creditor, who neglected to present her debt at such accounting and settlement, and afterwards received a tract of land in part payment of the amount, ascertained to be due her as distributee under said decree, she cannot call upon the other distributees to contribute out of the sums so decreed to them, to the payment of a judgment by default, recovered by her against the administrator many years afterwards.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 503; Dec. Dig. ⚭143.]

[3. *Descent and Distribution* ⚭143.]

Under this judgment, the plaintiff might look to the administrator personally, and to the undistributed assets of the estate in his hands.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. § 503; Dec. Dig. ⚭143.]

[4. *Executors and Administrators* ⚭172, 453.]

But the administrator having been charged with the sale-bill, the amounts due thereon became his property, subject to the equity of this creditor, to have them applied to her judgment. This equity, however, is subordinate to the equity of the distributees to have judgments against them, or against their husbands, applied to the decree in their favor. This principle was extended even to the setting off of a decree in

favor of one distributee (the wife of A), against a judgment against the husband of another distributee, for whom A was surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 650½, 1905; Dec. Dig. ¶¶ 172, 453.]

[5. *Appeal and Error* ¶198; *Executors and Administrators* ¶318.]

The plaintiff had no right to require the

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other distributees to refund *for the purpose of paying her debt, and if so, she should be required to refund her proportionate part. A reference ordered for this purpose was, therefore, unnecessary, but no exceptions having been taken by the defendants, no ruling can be made upon this subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1248-1250; Dec. Dig. ¶¶ 198; Executors and Administrators, Cent. Dig. §§ 1319-1326, 1328-1331; Dec. Dig. ¶¶ 318.]

Before Cothran, J., Laurens, February, 1885.

The opinion fully states the case.

Messrs. Geo. Westmoreland and F. P. McGowan, for appellants.

Messrs. Holmes & Simpson, contra.

April 23, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Jonathan Abercrombie departed this life in 1862, intestate, possessed of a considerable estate both real and personal. He left as his heirs at law four sons and eight daughters, viz: (1) Jonathan, (2) Elisha, (3) Alexander, (dead) and (4) John; (5) Elizabeth, who intermarried with one Adams, (6) Hannah, wife of Babb, (7) Christie, wife of Austin Moore (now dead), (8) Harriet, wife of Rowland, (9) Mary, wife of John Armstrong, (10) Jane Hellams, (11) Clarinda, wife of Henry P. Johnson, and (12) Susan Abercrombie. Jonathan Abercrombie, jr., administered upon the estate, and in December, 1862, sold the personal estate. At the sale some of the distributees purchased property and gave their notes, and in the case of daughters, their husbands bought. On April 16, 1864, a statement for a settlement of the estate was made in the then ordinary's office, wherein the administrator was charged with the sale bill, and credited with all payments returned, and after taking an account of advancements, the amount due to each of the children was ascertained, varying somewhat, but generally over \$1,000. "Upon this accounting the ordinary rendered a decree directing the administrator to pay the several heirs the amounts found to be due them, in those cases where the advancements had not exceeded their shares; and that those of the heirs whose advancements had exceeded their share, should pay to the administrator the amount of such excess."

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*The lands of the estate consisted of three small tracts: No. 1 containing 170 acres, was

valued at \$8.20 per acre; No. 2, consisting of 114 acres, seems to have been sold; and No. 3, 70 acres, went in some way to John H. Abercrombie. Soon after this adjustment and decree in the ordinary's office, the administrator actually settled the amounts due to Elizabeth Adams, Jane Hellams, and Harriet Rowland, and to Hannah Babb, except a balance for which her husband gave his note with surety. Susan Abercrombie consented to take the No. 1 tract of land at the appraisement, \$1,394, which was nearly her full share. This was done by the consent of all parties, as she had received very little by way of advancement or purchase at the sale. She has been in possession of the land since 1864, and the other distributees in possession of the property purchased by them since 1862. No formal settlement was made with some of the distributees, but it lay over probably for the reason that in the case of married women their husbands had purchased largely at the administrator's sale. The decrees in the ordinary's office in favor of the wives stood open, while the notes for purchases at the sale stood unpaid against the husbands. The administrator sued to judgment John Armstrong and his sureties, on the note given by him for purchases at the sale; and he also sued to judgment the sureties of Austin Moore, on the note given by the said Austin for purchases at the sale; and also Henry P. Johnson and his sureties for purchases at the sale.

Matters stood in this condition until 1881, when Susan Abercrombie recovered a judgment for \$1,602.73 against Jonathan Abercrombie, as administrator, and immediately after instituted these proceedings against the administrator and all the distributees, praying for a final settlement of the estate, and as incidental thereto, that all the unadministered assets, including the aforesaid judgments, might be realized and applied to the judgment on the debt of the plaintiff, and the excess, if any, paid into court for future division among all the distributees.

Jonathan Abercrombie, the administrator, did not answer, but some of the distributees did. John Armstrong and Mary, his wife, and the heirs of Austin Moore, deceased, claimed that the decrees in the ordinary's

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office against Jonathan Abercrombie, as *administrator, in favor respectively of Mary Armstrong and Christie Moore, should be set off against the aforesaid judgments, recovered respectively against their husbands and their sureties. And besides, John Armstrong exhibited a written assignment of his wife, Mary, transferring all her interest "in the estate of Jonathan Abercrombie, deceased, to the extent of the judgment against them (John Armstrong, Lewis Abercrombie, and Thomas A. Paden), and I hereby empower and authorize the said John Armstrong and

Lewis Abercrombie to collect and receipt for so much of my said interest as will satisfy the said judgment." And the heirs of Christie Moore also executed a paper somewhat similar, giving John R. Hellams "power and authority to collect the decree in favor of the said Christie Moore, and to appropriate it to the payment of a judgment rendered against Austin Moore and John Hellams." These papers are in the brief. The defendants also insisted, if there was to be contribution among the distributees for the payment of the plaintiff's judgment, that all, including the said Susan herself, should contribute in proportion to the amount each received from the estate.

It was referred to the master, C. D. Barksdale, Esq., to state the account and decide the issues, who made a full and clear report. The cause came up on exceptions before Judge Cothran, who decreed: "That the judgment against John Hellams and Patilla F. Moore, as sureties of Austin Moore, is entitled to be credited with the amount reported as the interest of Christie Moore, by virtue of assignment; and that the judgment against John Armstrong and Lewis Abercrombie, and then the judgment against John Armstrong, as surety of H. P. Johnson, are entitled to be credited with the interest of Mary Armstrong, as ascertained in the master's original report; and that the remainder of the assets reported by the master be collected by him and applied to the payment of the debt and costs." He further directed, if the said assets were not sufficient to pay the said debt, that the master should inquire and report the amount which each distributee should contribute for the purpose of paying the remainder of plaintiff's debt.

From this decree the plaintiffs appeal on the grounds:

"First. It is submitted that his honor

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erred in decreeing 'that the judgment of Jonathan Abercrombie, administrator, against John Hellams, deceased, and Patilla F. Moore, as sureties of Austin Moore, is entitled to be credited with the amounts reported as the interest of Christie Moore by virtue of assignment.' I. Because said instrument is invalid and of none effect. II. Because said instrument, if valid, cannot operate as an assignment. III. Because the heirs of Jonathan Abercrombie, deceased, have no interest in the estate until debts are paid. IV. Because the plaintiffs, Susan Abercrombie and Clarinda Johnson, are distributees of said estate, and according to the decree of the court are entitled to distributive shares in the surplus, and no provision is made for them after debts are paid. V. Because the instrument, if valid, is not intended to protect P. F. Moore, but is simply a power of attorney to collect and apply to judgment against John Hellams.

"Second. It is submitted that his honor

erred in decreeing 'that the judgment against John Armstrong and Lewis Abercrombie should be credited with the interest of Mary Armstrong as ascertained in the master's original report.' I. Because Mary Armstrong would have no interest until the debts were paid. II. Because said judgments amount to more than her share in the estate after debts are paid, and no provision is made for meeting the interest to plaintiffs. III. Because said judgments had been satisfied by enforcement and the fund in court under a previous order of court.

"Third. It is submitted that his honor erred in decreeing that the judgment against John Armstrong as surety of H. P. Johnson was entitled to be credited with the interest of Mary Armstrong as ascertained in the master's original report. I. Because the instrument from Mary Armstrong to John Armstrong and Lewis Abercrombie does not authorize such credit. II. Because Mary Armstrong would have no interest in the estate until the debts were paid. III. Because, to allow such credit would be giving her an amount greater than the share of Mary Armstrong after paying the debts, and no provision is made to pay the interest of the other heirs at law as fixed by the decree."

There is a good deal of confusion in this case, arising principally from the fact that

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Susan Abercrombie claims in the double capacity of distributee and creditor. She was before the Court of Ordinary in 1864, when the estate was settled, but did not then, as she ought to have done, present her demand and have it provided for before division. She did not appeal from the decree, but, on the contrary, assented to it and received her share. Other distributees also received their shares, and now, after a lapse of nearly twenty years, it is too late to disturb that settlement. All the parties are bound by it, and if the administrator has failed to pay any of the distributees the amounts decreed to them, they may pursue him on his bond, but they have no right to a readjustment and contribution among themselves.

But the contention is that Susan Abercrombie is more than a distributee, she is a creditor of the estate, and as creditors must be paid before distributees, that debt must now be paid. There is no doubt about the principle which Susan Abercrombie should have invoked in the settlement in the ordinary's office, but having failed to do so, there is much difficulty in its application to the peculiar, if not extraordinary, facts of this case. We must assume that Susan Abercrombie was a creditor of her father at the time of his death. It does not appear that she presented her demand in the ordinary's office, but it would seem stood by and allowed the estate to be divided without taking any account of her debt, and she received her share enlarged by that omission.

After long delay, nearly twenty years, she sued Jonathan Abercrombie, the administrator, and recovered judgment against him in 1881. Whether the administrator in that action pleaded *plene administravit* or not, the judgment as to him imports assets, and if he does not pay it, the judgment creditor may pursue him as for a *devastavit*. *Trimmer v. Thomson*, 19 S. C., 247. It does not follow, however, that the judgment binds the distributees as to the shares already delivered or decreed to them. They were not made parties as heirs under the statute, calling upon them to contribute to the extent of assets received, to the payment of a subsequently discovered debt of the ancestor; and if such had been the character of the action, there could have been no recovery against them for the creditor, Susan Abercrombie, had notice of the former division and received her part under it. She could not hold under it herself, and at the

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same time disturb it *as to others, either as distributee or as creditor. Besides, the great lapse of time, which protects her in the possession of her land, also protects the others as to their shares. We do not understand that the complaint claims contribution, and as to the plaintiff's judgment, the question is not in the case. See *Gregory v. Rhoden*, 24 S. C., 90; *Brewster & Dickson v. Gillison*, 10 Rich. Eq., 435.

But under her judgment against the administrator it may be that Susan Abercrombie could ask for a final settlement and to have appropriated to her debt any remaining unadministered assets of the estate, in preference to having such assets divided among the distributees in a supplemental settlement. In this view, it is claimed that the judgments recovered by Jonathan Abercrombie upon notes for purchases at his sale, and standing in his name as administrator, are such general assets, and applicable as matter of right to her judgment. It does not strike us that these judgments are, in the proper sense of the word, assets of the estate. They were recovered on parts of the original sale bill which was accounted for by the administrator in the ordinary's settlement, and then became his property, subject to a strong equity that they would go to the distributees, whose decrees were, to a large extent, based on them. The liability of the administrator for these notes was changed into the form of decrees against him in favor of the distributees. The judgments might have been recovered by Jonathan Abercrombie without styling himself administrator, which was merely *descriptio personae*. *Rhodes v. Casey*, 20 S. C., 491; *Robinson v. Robinson*, *Ibid.*, 573. Being the property of Jonathan Abercrombie they were not, in the usual sense, assets of the estate and disposable as such. Susan Abercrombie having a judgment against the administrator, may

have an equity to ask that, as the property of her debtor they should be enforced and applied to her judgment.

But the distributees, who also have judgments against Jonathan Abercrombie, claim that they have a higher equity to have those judgments of Jonathan applied in payment of their decrees in the probate office against him. We think that purchases at an administrator's sale by a distributee of the estate are generally made in the faith that they

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are in part payment of the share of *such distributee. That is the natural course and is certainly the practice. Where the distributee himself purchases and the judgment for the purchases goes directly against him, his equity to have the decree for his share credited with the purchases is unanswerable; for in such case it would simply be the setting off of judgments between the same parties. When, however, the wife happens to be the distributee, and the husband making the purchases is sued to judgment, it seems to us that it is substantially the same thing. The husband in making the purchases acts also for his wife, and in the full confidence that they will be credited on the wife's share; when the wife so directs and gives up her individual and separate claim, as in this case, we think there is a high equity that the judgment for the purchases against the husband or his sureties should be set off, as payment in fact, against the decree in favor of the wife for her share. See *Falconer v. Powe*, Bail. Eq., 158, where Chancellor Harper said: "In this court (equity), we look to the parties really interested. The complainants are the parties to whom the proceeds of the land belong; and the advances made by the defendant were for their benefit. It is, therefore, a clear case of mutual demands existing in equity, between the parties to the suit, and they are to be adjusted in the same way as in other cases of discount," &c.

We have had some hesitation as to setting off any part of the share of Mary Armstrong on the judgment against Henry P. Johnson to which John Armstrong, her husband, was surety. We suppose that judgment was for the purchases of Henry P. Johnson, and according to what we have already said it should be set off *pro tanto* against the decree of Clarinda Johnson, the wife of the said Henry P. Johnson. It seems that the assignment of Mary Armstrong does not in express terms embrace that judgment. But in her answer she prays that her share may be set off "against the judgments that the representatives of Jonathan Abercrombie hold against John Hellams and John Armstrong;" and as it may enure to the benefit of Clarinda Johnson in relieving her husband, the decree of the Circuit Judge as to the credits or discounts is left unchanged.

In the view expressed, that Susan Aber-

crombie as judgment creditor, has no right to disturb the settlement in the ordinary's

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*office by making the other distributees refund and contribute for the purpose of paying her debt, so much of the decree as directed a reference for that purpose was unnecessary. But as there was no exception to the decree in that particular, we have no right to make a ruling upon the subject. If the plaintiff as creditor of the ancestor had the right to make the other distributees pay back what they had received in that settlement, the principle of course would include herself as distributee. But we do not think that she has that right as to any of the distributees.

With this explanation, the judgment of this court is that the judgment of the Circuit Court be affirmed.

25 S. C. 53

KAMINITSKY v. NORTHEASTERN RAILROAD COMPANY.

(November Term, 1885.)

[1. Railroads \hookrightarrow 350.]

In action against a railroad company for injuries sustained by plaintiff from a passing train of defendant at a highway crossing, prima facie proof of negligence on the part of the defendant is sufficient to compel the judge to send the case to the jury, and prima facie proof of contributory negligence on the part of the plaintiff is not sufficient to withdraw the case from the jury; because, whether the plaintiff contributed to the negligence or not is a fact which no judge should determine on prima facie evidence.

[Ed. Note.—Cited in *Quinn v. South Carolina Ry. Co.*, 29 S. C. 385, 7 S. E. 614, 1 L. R. A. 682; *Guess v. Same*, 30 S. C. 165, 9 S. E. 18; *Madden v. Port Royal & W. C. Ry. Co.*, 35 S. C. 383, 14 S. E. 713, 28 Am. St. Rep. 855; *Sanders v. Aiken Mfg. Co.*, 71 S. C. 63, 50 S. E. 679.

For other cases, see Railroads, Cent. Dig. § 1166; Dec. Dig. \hookrightarrow 350.]

[2. Negligence \hookrightarrow 122, 135.]

Contributory negligence is a matter of defence with the burden on defendant of proving it. To relieve the defendant from all liability, in this case, the proof of contributory negligence on plaintiff's part should have been clear and convincing.

[Ed. Note.—Cited in *Oliver v. Columbia, N. & L. R. Co.*, 65 S. C. 38, 43 S. E. 307; *Sanders v. Aiken Mfg. Co.*, 71 S. C. 62, 50 S. E. 679.

For other cases, see Negligence, Cent. Dig. §§ 221-223, 229-234, 274-276; Dec. Dig. \hookrightarrow 122, 135.]

[3. Appeal and Error \hookrightarrow 262.]

A failure by the Circuit Judge to grant a non-suit upon a point not brought to his attention can hardly be ruled as error.

[Ed. Note.—Cited in *Calhoun v. Port Royal & W. C. Ry. Co.*, 42 S. C. 137, 20 S. E. 30; *Sanders v. Aiken Mfg. Co.*, 71 S. C. 59, 50 S. E. 679.

For other cases, see Appeal and Error, Cent. Dig. § 1584; Dec. Dig. \hookrightarrow 262.]

[4. Railroads \hookrightarrow 312, 345.]

The requirements of the statute law as to signals at a railroad crossing, and to be given by an engine on approaching a crossing, did not supersede other proper signals, nor give a new cause of action under these statutes; therefore, in an ordinary action for damages, alleging negligence, the omission of these signals may be given in evidence, although not alleged in the complaint.

[Ed. Note.—Cited in *Spire v. South Bound R. Co.*, 47 S. C. 28, 30, 24 S. E. 992; *Burns v. Southern R. Co.*, 61 S. C. 409, 39 S. E. 567; *Hutton v. South Bound R. Co.*, 61 S. C. 500, 39 S. E. 710; *Sullivan v. Southern Ry.*, 74 S. C. 392, 54 S. E. 586; *Clifford v. Same*, 87 S. C. 328, 69 S. E. 513.

For other cases, see Railroads, Cent. Dig. §§ 1004, 1115; Dec. Dig. \hookrightarrow 312, 345.]

[5. Railroads \hookrightarrow 244.]

Sections of the General Statutes requiring a railroad engine to carry a bell of a certain weight and to give certain signals at a road crossing (§ 1483), and holding the company liable for all damages caused by the collision, if a failure to give such signals contributed to the injury, unless the person injured was guilty of

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gross or willful negligence, which contributed to the injury, or was acting in violation of law (§ 1529), are not unconstitutional.

[Ed. Note.—Cited in *Utsey v. Hott*, 30 S. C. 366, 9 S. E. 338, 14 Am. St. Rep. 910; *Drennan v. Southern Ry.*—Carolina Division, 91 S. C. 517, 519, 75 S. E. 45.

For other cases, see Railroads, Cent. Dig. § 755; Dec. Dig. \hookrightarrow 244.]

[6. Statutes \hookrightarrow 106.]

The codification of the statutes adopted in 1882 under the requirements of the constitution, and known as the General Statutes, is valid, notwithstanding it did not relate to but one subject, and was without a title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 119; Dec. Dig. \hookrightarrow 106.]

[7. Railroads \hookrightarrow 244.]

It is within the power of the legislature to enact laws regulating the running of railroad trains across public highways, and declaring the omission of prescribed signals to be negligence.

[Ed. Note.—Cited in *Drennan v. Southern Ry.*—Carolina Division, 91 S. C. 517, 519, 75 S. E. 45.

For other cases, see Railroads, Cent. Dig. § 755; Dec. Dig. \hookrightarrow 244.]

[8. Trial \hookrightarrow 253.]

Where the judge states to the jury only a part of the testimony, the verdict will not be set aside for that reason. In the conduct of a cause below, something must be left to the judgment and impartial discretion of the trial judge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 618; Dec. Dig. \hookrightarrow 253.]

[9. Railroads \hookrightarrow 351.]

It was not error to charge "that it is not material in law whether the injury results from direct collision, or the damage is done by the injured one being thrown under the train without actual collision with the wagon."

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1213; Dec. Dig. \hookrightarrow 351.]

[10. Judgment \hookrightarrow 364.]

Section 195 of the Code gives a defendant no right to ask relief from a judgment obtained against him after a trial at which he was present.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 706; Dec. Dig. \hookrightarrow 364.]

Before Pressley, J., Charleston, June, 1885. The opinion sufficiently states the case.

Messrs. Simonton & Barker, for appellant.
Messrs. A. D. Cohen and James Simons, contra.

April 24, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action against "The Northeastern Railroad Company" to recover damages for a personal injury. The plaintiff complained: "That on April 25, 1883, while traveling in a wagon drawn by one horse along the public highway leading to the city of Charleston, which public highway crosses the railroad at a place called the crossing of the Meeting street road, near the place known as the forks of the road, and as the plaintiff had reached said crossing, the defendant carelessly and negligently caused one of the locomotives, with a train of cars attached thereto, to approach said crossing, and then and there to pass rapidly over the track of the said railroad. That by reason of the said negligence of the defendant, the plaintiff's legs were injured by the said train of the defendant.

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rendering *the amputation of both necessary. That thereby he has been most seriously injured for the balance of his life, and debarred from following any active pursuit, to his damage thirty thousand dollars." The defendant corporation put in a general denial affirming that the train was not run negligently, as charged, and denying that, by reason of said negligence of the defendant, the plaintiff's legs were injured by the said train of the defendant, or that he was at any time or in any way injured by the negligence or carelessness of the defendant.

The cause came on for trial before Judge Pressley and a jury. There was much testimony, which need not be stated here, as it is all printed in the "Case." In brief, it appeared that the track of the Northeastern Railroad, in leaving Charleston, runs nearly north up the neck of land lying between the Ashley and Cooper Rivers, and a little beyond the city limits crosses a public highway at the same level, sometimes called the State Road, and at others the Meeting street road, along the centre line of which is a plank road running to the city. The crossing is at the point where the Magnolia avenue branches off from the Meeting street road, nearly at right angles, and runs eastward towards the cemetery, and probably for that reason called "Magnolia Crossing." The course of the railroad being nearly identical with that of the highway, the crossing is made very obliquely, creating two angles, one pointing towards the city and the other in the opposite direction, the railroad track constituting the long side of both. It will be seen at a glance that a train going towards

the city necessarily closes the eastern angle and widens the other, and vice versa. At the time of the occurrence complained of, there was a brick wall or abutment on each side of the Meeting street road just above the crossing, not leaving room enough between the eastern abutment and the track of the railroad for a vehicle to turn into the mouth of Magnolia avenue without coming very close, if not touching the railroad. The Enterprise Street Railroad also runs to this crossing and turns down Magnolia avenue towards the cemetery.

Seeing this state of things, the legislature, in 1878, passed an act to provide further security for persons and property at the thoroughfare into the city of Charleston at and

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near the fork of *the road on Charleston neck, as follows: "Whereas the only entrance by land into the city of Charleston is by a narrow neck traversed by one public road, which crosses at the same point the tracks of the South Carolina Railroad Company and of the Northeastern Railroad Company; and whereas the constant passage of persons and of vehicles over said thoroughfare makes this place more than usually dangerous; be it enacted, &c., That from and immediately after the passage of this act the South Carolina Railroad Company and the Northeastern Railroad Company shall each cause the place where each of their railroad tracks crosses the State road at and near the fork of the road on Charleston neck, to be constantly guarded by a person of care and discretion whose duty it shall be, in the day time by a flag and in the night time by a lantern, to give notice of the approach of a locomotive or train on the railroad guarded by him, and to continue giving such signal until the said locomotive or train has passed the crossing." 16 Stat., 363.

On the evening the plaintiff received the injuries of which he complains, he and another gentleman (Rubin) in a one-horse wagon, driven by a colored lad, about sun-down, or possibly a little later, were coming down the plank road towards the city, and just as they reached the point of the angle made by the plank road and the railroad track, opposite the entrance of Magnolia avenue, a long freight train passed rapidly down towards the city. In some way a collision occurred and the wagon was upset, the parties were thrown out, Rubin had his arm broken, and the plaintiff received the fearful injuries which rendered the amputation of both legs necessary, and for which he now claims damages. Some point was made as to whether the injuries were caused by some part of the train striking the right side of the wagon, or by the horse running away and striking the left wheel of the wagon against the brick abutment, as he endeavored to turn from the passing cars into the avenue; but the main question was, whether the injuries were

caused, as charged, by the carelessness and negligence of the defendant; and if so, whether there was such contributory negligence on the part of the plaintiff as to prevent his recovery.

At the close of the plaintiff's testimony the

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defendant moved *for a non-suit, on the ground that the evidence did not prove negligence on the part of the defendant, but, on the contrary, showed contributory negligence on the part of the plaintiff; and that section 1529 of the General Statutes, which, as it was alleged, places railroad corporations before the courts under a rule of evidence or of legal liability other than that applied to natural persons under like conditions, is unconstitutional and void. The judge refused the motion and the defendants made their defence.

The defendant proposed no requests to charge, but the plaintiff made several, some of which were refused and need not be stated, but the following were allowed:

I. "That by the act of 1878 the defendant is required to cause the place where its railroad track crosses the State road, at or near the fork of the road on Charleston neck, to be constantly guarded by a person of care and discretion, whose duty it shall be, in the day time by flag and in the night time by a lantern, to give notice of the approach of a locomotive or train on the railroad guarded by him, and to continue giving such signal until the said locomotive and train has passed the crossing.

II. "That if the testimony satisfies the jury that the requirements of the act were not complied with, or imperfectly complied with, and such failure contributed to the casualty, then from such failure the jury can find that the defendants were negligent.

III. "That by the statute law of this State the railroad company is required to have a bell of at least 30 pounds weight and a steam whistle placed on each locomotive engine, and such bell shall be rung or such whistle sounded by the engineer or fireman, at the distance of at least 500 yards from the place where the railroad crosses any public highway or street or travelled place, and be kept ringing or whistling until the engine has crossed such highway or street or travelled place. Gen. Stat., § 1483.

IV. "That if the testimony satisfies the jury that the plaintiff was injured in his person by collision with the engine or cars of the defendant at the crossing in question, and it appears that the corporation neglected to give the signals required by section 1483, and that such neglect contributed to the injury, the defendant corporation is liable for all damages caused by the collision * * unless it is

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shown that in addition to a mere *want of ordinary care the person injured was at the time of the collision guilty of gross or wilful

negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury. Gen. Stat., § 1529."

After a very full and clear charge, the jury, on June 27, 1885, rendered a verdict in favor of the plaintiff for \$7,500, and thereafter, on August 3, the defendant made a motion on the minutes of the court "for a new trial upon several grounds," alleging that parts of the charge, indicated and copied, were calculated to mislead the jury, and that the preponderance of the evidence was on the side of the defendant; and also "that the judgment upon the verdict be arrested on the ground that the complaint does not state specifically the facts required by the statute, to fix the liability of the defendant, and cannot therefore support the judgment." The judge refused the motion for a new trial, saying: "As to my charge I have read it most carefully, and it seems to me throughout to lean slightly to the side of defendant. It was not so intended." &c. He also refused the motion in arrest of judgment, saying: "The complaint contains allegations entirely sufficient to sustain the verdict; and when that is so, I do not know of any case which authorizes the arrest of judgment after verdict."

The defendant appeals to this court from the verdict and judgment and rulings of the presiding judge. The exceptions are long and numerous, containing 22 principal heads, with half as many more additional subdivisions. They are all in the brief and need not be restated here.

First. As to the alleged error in refusing to grant the non-suit. The judge held that "prima facie proof of negligence on the part of the defendant is sufficient to compel the judge to send the case to the jury, and prima facie proof of contributory negligence on the part of the plaintiff is not sufficient to withdraw the case from the jury, because whether the plaintiff contributed to the negligence or not is a fact which no judge should determine on prima facie evidence." It seems to us that this ruling was correct in principle, and in accordance with the decided cases in this State. "The defendant is entitled to a non-suit when there is a total failure of evidence to sustain the plaintiff's case; but if

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*there is any testimony, the force and effect of which must be determined, the case should go to the jury." *Carter v. C. & G. R. R. Co.*, 19 S. C., 20 [45 Am. Rep. 754].

In reference to that class of cases where damages are claimed for negligent injuries, this court in the case of *Couch v. C. C. & A. R. R. Co.* (22 S. C., 562), held as follows: "In considering such an issue is it necessary that every case in which there is any testimony as to facts should be sent to the jury? As we understand it, negligence is not a simple fact in itself, but is rather an inference

from facts. It is defined to be 'want of ordinary care,' and is generally understood to be a mixed question of law and fact. It is certainly the duty of the judge to define what it is; and it seems that it is also his right to determine as a preliminary question, whether there is any evidence to make a *prima facie* case, and if not he may grant a non-suit. *Carter v. C. & G. R. R. Co.*, 19 S. C., 23 [45 Am. Rep. 754]. In other words, as some one has expressed it, it is for the judge to say whether there are any facts in evidence, from which negligence may be reasonably and legitimately inferred, and it is for the jury to say whether from these facts, when submitted to them, negligence ought to be inferred. *Hooper v. C. & G. R. R. Co.*, 21 S. C., 541 [53 Am. Rep. 691]; *Pierce R. R.*, 313; *Pleasants v. Fant*, 22 Wall., 122 [22 L. Ed. 780]. This is the utmost extent to which we have gone or can go, in ruling that a judge may determine the force of testimony upon a question of fact. In this case the judge held that there was a *prima facie* case of negligence on the part of the defendant, and sent it to the jury. In that we see no error.

The question of contributory negligence is secondary, and does not arise until there is some proof of negligence on the part of the defendant. It is a matter of defence, and the burden of proving it is with the defendant. *Carter v. C. & G. R. R. Co.*, *supra*; *Crouch v. C. & S. R. R. Co.*, 21 S. C., 495. In the case of *Carter* the court say: "Where the plaintiff has contributed to the accident to the extent of furnishing a proximate cause thereof, the defendant is exempt from liability as matter of law, and the judge should so charge; but whether a particular fact, if proved, shall amount to such contribution, is a matter for the jury and not for the court. What is neg-

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ligence, is defined in the *books, and is a question of law, and it is the same whether it comes from the defendant or the plaintiff; but whether it is proved to be present in a special case, is a question of fact for the jury."

The plaintiff had the right to pass down the plank road, a public thoroughfare. It was not an illegal act to return home from his business; and if in doing so he was negligently injured by the defendant, we agree with the Circuit Judge, that the proof of contributory negligence on his part, in order to have the effect of dispensing the law and absolving the defendant from all liability, was required to be clear and convincing. It is not to be assumed that a man in his senses will heedlessly imperil his own life. The question of carelessness on the part of the plaintiff was stoutly contested, and after reading the testimony with great care we cannot say that the judge erred in declining to take it from the jury. "Culpable negligence of the plaintiff, properly so called,

which contributed to the injury, must always defeat the action, but the nature of the primary wrong has much to do with the judgment, whether or not the alleged contributory fault was blameworthy. If it was of a negative character, such as lack of vigilance, and was itself caused or would not have existed, or no injury would have resulted from it but for the primary wrong, it is not in law to be charged to the injured one, but to the original wrong-doer." *Walsh & St. L. R. R. Co. v. Central Trust Co. of N. Y.* [C. C.] 23 Fed. Rep., 738.

But subdivision *a*, exception 3, still further alleges error in refusing the non-suit, "Because the proof offered by the plaintiff attempted to show that defendant was liable because of the alleged omission of certain statutory signals, and was addressed wholly to these issues; whereas the complaint alleged no fact constituting a cause of action arising out of any one of such statutory requirements." The motion for non-suit was made at the close of the plaintiff's testimony, and this ground at that time was not taken. We could hardly rule it error in the judge because he failed to grant a non-suit on a point not brought before him. But we think the counsel for the defendant does himself injustice in the suggestion that the omission

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may have *been caused by his own oversight. If the point had been made, it could not have been sustained as a ground for non-suit.

We do not consider this as an action under the act of 1878, requiring a guard to be kept at the crossing, or under the provisions of the railroad law contained in sections 1483 and 1529 of the General Statutes; but as an ordinary action for damages, with the right to show in evidence the precautions on the part of the defendant required by the said statutes. The common law required the giving of such signals at highway crossings as were reasonable in view of the situation and surroundings "to put individuals using the highway on their guard." *Pierce R. R.*, 349, and notes. The signals required by the aforesaid statutes did not supersede these reasonable signals which were before necessary. They did not take away the common law right of action, by giving in lieu thereof a new cause of action under the statutes, but simply declared what were proper signals, and expressly made them "cumulative." See Gen. Stats., § 1545, and *Pierce*, 350.

The very circumstance that they are declared to be "cumulative" merely, makes this case essentially different from that of *Williams v. Hingham & Quincy Bridge & Turnpike Corporation* (4 Pick. [Mass.] 341), relied on in the court below and in the argument here. That was a case for damages on account of an injury at a toll bridge. The general turnpike laws of Massachusetts had the effect of repealing the common law upon the subject, and made the proprietors

of a toll bridge liable for damages only to those from whom toll was demandable. The plaintiff did not allege in his declaration that he was one of those from whom toll was demandable, but had a verdict for \$600. The court held that the judgment must be arrested, on the ground that the common law remedy had been repealed, and the plaintiff had not brought his action within the terms of the statute authorizing damages.

But in this case the exact opposite is true. The old remedy was not changed or repealed, but expressly affirmed with the additional precautions deemed necessary. It will not do to say that all other signals were dispensed with by those expressly directed, and if the complaint charging negligence does not

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refer specifically to them, there can be no recovery at all for a failure to give proper warning. If, considering the exceptionally dangerous character of the place, the signals required and habitually given were proper, the failure to give them might be negligence without reference to the statute, and in that view it was sufficient for the complaint to allege generally that the injury was caused by the defendant carelessly and negligently. &c. *Gibbes v. Beaufort*, 20 S. C., 213. The judge says: "No motion was made to exclude testimony. There was no request to charge the jury that the acts of negligence set forth in the statute were not applicable to the complaint. The case was contested in the proofs and arguments on both sides as if the case were under the statute; and after such waiver it is now too late to raise the point. If it had been raised at the proper time, and I had felt bound by the case cited from Massachusetts, I would still have sent the case to the jury as a question of fact, whether without the statute any omission of any of the signals relied on by plaintiff, if proved, was not a want of due care under the circumstances of the case." We cannot say that this was error, or that there was any error in refusing the non-suit.

Exception 3, b, c, d, e, as also 14, relate merely to facts and the preponderance of evidence, and, while they may have been proper before the judge on motion for a new trial, cannot be considered here.

Exceptions 4, 5, 6, 7, 8, and 9, in different forms, in effect make the question as to the constitutionality of sections 1483 and 1529, General Statutes (general railroad law). Section 1483 requires a bell of a certain weight and a steam whistle to be placed on each locomotive engine, and that such bell shall be rung and such whistle sounded by the engineer or fireman at the distance of at least five hundred yards from the place where the railroad crosses any public highway, &c. Section 1529: "If a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing, and it appears that the corporation neglected to give the signals re-

quired by this chapter (chap. XL, general railroad law), and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the col-

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lision, * * * unless it is shown *that, in addition to a mere want of ordinary care, the person injured or the person having charge of his person or property, was, at the time of the collision, guilty of gross or wilful negligence, or was acting in violation of the law; and that such gross or wilful negligence, or unlawful act, contributed to the injury," &c.

The judge said: "The question of the constitutionality of that act is raised, and the argument upon that point would impress me very deeply if this were a matter of business which the railroad company had the right to carry on without the license of the legislature. If they were conducting a business as individuals do, without any license from the legislature, this thing of special legislation would not be allowed; but I hold that where the business was carried on by license of the legislature, and could not be carried on without that license, the legislature is not guilty of special legislation when it attaches conditions to that license. One of the conditions attached in this case is, that if it fails to do certain things, to give certain signals, it shall be responsible for the consequences, unless it proves gross negligence on the part of the party injured," &c. Was this error?

No weight is to be given to the objection that the provisions assailed are obnoxious to section 20, art. 2, of the Constitution, which requires that "every act or resolution having the force of law shall relate to but one subject, and that shall be expressed in the title." This court has held that the codification of the statutes adopted in 1882 under the requirements of the constitution is valid, notwithstanding it did not relate to but one subject, and was without a title. *Woodside v. McDaniel*, 19 S. C., 114.

Nor do we think that the objection to the word "license" is well taken. It was used in giving the reasons for the ruling, and was not the ruling itself. But the word was forcible, and calculated to convey the idea with clearness. It is manifest that the judge meant precisely what was said in the case of the *C. & G. R. R. Co. v. Gibbes*, 24 S. C., 60, "that corporations are artificial bodies, creatures of the State, and as the State may or may not call them into existence, so she may limit their existence and mould and form them in precise accordance with her view of what is right or politic." If by the phrase

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"special legislation" is *meant simply legislation which does not apply to all, then the grant of every charter is an act of special legislation. But if it is intended to express the idea of unjust discrimination in establishing a rule of law for incorporations dif-

ferent from that under which other "persons" are judged "under like conditions." It seems to be assumed that as soon as a corporation is created it necessarily has the same rights in all respects as a natural person, when, in fact, it has only the rights, more or less, which are consistent with its charter. The provision does apply to all "under like conditions," to all railroads, whether owned and operated by individuals or corporations. *State v. Berlin*, 21 S. C., 292 [53 Am. Rep. 677].

The franchise cannot exist without the authority of the State, and in granting it the State may, for the protection of the public, reserve the right of future control; and in such case, when that right is exercised, it cannot be held to be oppressive or unconstitutional. The Northeastern Railroad Company was chartered in 1851, subject to the 41st section of the act of 1841, which provided: "That it shall become part of the charter of every corporation, which shall at the present, or any succeeding session of the general assembly receive a grant of a charter, or any renewal, amendment, or modification thereof. * * * that every charter of incorporation granted, renewed, or modified, as aforesaid, shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." The constitution of 1868 (sec. 5, art. XII) also provides that the laws "shall regulate the public use of all franchises which have heretofore been, or hereafter may be, created or granted by or under the authority of the State." So that there can be no doubt whatever that the company accepted its charter subject to amendment by the legislature.

But it is said that the provision in regard to the proof of negligence was not really an amendment of the charter, but a change in the law of evidence. If this were so, it would not make it unconstitutional. "The right to have one's controversies determined by existing rules of evidence is not a vested right. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the legislature." *Coel. Con. Lim.*, 452, 453. We do not, however, consider that by the aforesaid provision the main object of the legislature was

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to *make a change in the law of evidence, but to induce compliance with the previous requirement as to signals. The rule of evidence as to negligence was made to apply only in case of failure to give the required signals, and it is manifest that the purpose was to give an additional sanction to the provision requiring the signals to be given.

Besides the matter of charter and vested right, Mr. Pierce says: "A railroad company, although no power is reserved to amend or repeal its charter, is nevertheless subject, like individuals, to such police laws as the legislature may from time to time enact for

the safety and health of citizens and the general convenience and good order. Its property and essential franchises are, indeed, protected by the constitution; but the company itself is not thereby placed above the laws. It was not the design of that instrument to disarm the States of the power to pass laws to protect the lives, limbs, health, and morals of citizens and to regulate their conduct towards each other, and the mode of using property so that different owners may not injure each other. Such laws may incidentally impair the value of franchises or of rights held under contracts, but they are enacted *diverso intuitu*, and are not within the constitutional inhibition." *Pierce on Railroads*, p. 460, and numerous authorities. *Cooley Con. Lim.*, 710; *People ex rel. Kimball v. B. & A. R. R. Co.*, 70 N. Y., 570; *State v. Berlin*, 21 S. C., 292 [53 Am. Rep. 677]; *Messenger v. Penn. R. R. Co.*, 36 N. J. Law, 407 [13 Am. Rep. 457].

In the case last cited Chief Justice Beasley, of the Supreme Court of New Jersey, expressed it thus: "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation, they are still sovereign franchises, and must be used and treated as such. They must be held in trust for the general good." We do not think it was error in law to hold that the sections aforesaid were constitutional.

Exceptions 10 and 11 allege error only in disconnected parts of the charge, which are

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cited. They are too general. We have *read the charge as a whole with care, and we must say that we agree with the judge, that it "leaned slightly to the side of the defendant." At least, we have not been able to discover wherein the defendant has a right to complain of it.

Exceptions 12 and 13, a, b, c, allege that the judge, undertaking to state to the jury the facts of the case, confined his statement to only a part of the testimony, which was misleading. We cannot consider such matters as good cause for setting aside a verdict. In the conduct of a cause below, something must be left to the judgment and impartial discretion of the trial judge. *McPherson v. McPherson*, 21 S. C., 261.

Exceptions 15 and 16 complain that the judge committed error in suggesting a hypothetical case. He charged, "that it is not material in law whether the injury results from direct collision or the damage is done by the injured one being thrown under the train, without actual collision with the wagon." We cannot say that this was entirely hypothetical or erroneous. See *Dyer v. Erie Railroad Co.*, 71 N. Y., 228; *Prescott v.*

Eastern R. R. Co., 113 Mass., 370. "If the neglect of the duties incumbent on the defendants caused the plaintiff to approach so near the passing train that his horse took fright from it, and the injury thereby occurred, he being in the exercise of due care, the defendants' negligence was such a proximate cause of the injury that they are liable therefor, although the circumstances of the rush of the train and the fright of the horse intervened between the negligence and the injury."

Exceptions 17, 18, and 19 are aimed at certain reasons assigned by the judge for refusing to grant the motion for a new trial. The judge did not refuse the motion on the ground that he had not the power to grant it, but on the merits: and whether the views he expressed as leading him to that conclusion were or were not satisfactory, they are no part of the case upon appeal in this court. *Warren v. Lagrone*, 12 S. C., 51.

Exceptions 20, 21, and 22 substantially complain that the judge erred "in suffering judgment to be entered on the verdict when the proof of negligence was confined to the alleged omission of certain statutory signals, and the complaint did not allege the fact of the omission of either of the said statutory

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signals, which *constituted the cause of action." We think it a misapprehension to suppose that the omission of the statutory signals was alone relied on as the cause of action, or that the proof of negligence was "confined" to them. The complaint alleged that the defendant "carelessly and negligently" caused the injury to the plaintiff, and the defendant, making no objection to the form of the complaint, answered, denying that "at any time or in any way the plaintiff was injured by the negligence or carelessness of the defendant." This made the issue. This is a civil action for damages, and there was no necessity for the same reiteration and specification in detail which is required in an indictment for a criminal offence. "In actions for negligence a general allegation is necessarily allowable, the ultimate fact pleaded, i. e., the fact to be established by evidence is negligence. Facts and not evidence of them must be pleaded." *Bliss Code Pl. § 211; 2 Thomp. Negl. § 22.*

But in considering the grounds for a nonsuit we have already determined the nature of this action, and we will not repeat what was there said. In the view there expressed, "the complaint contains allegations entirely sufficient to sustain the verdict," and that being the case we know of no principle or practice which would have justified the judge in directing that it should not be entered. Section 286 of the Code provides that "upon receiving a verdict, the clerk shall make an entry in his minutes, specifying * * * the verdict, and either the judgment entered

thereon or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict." It was certainly proper to withhold the judgment until the motion for a new trial was heard, but that was refused, and the judge declining to give a different direction, the judgment was entered in conformity with the verdict, which, as we have held, is supported by the record.

We cannot consider this as a motion within a year under section 195 of the Code to relieve a party from a judgment taken against him through mistake, inadvertence, surprise, or excusable neglect, &c. The relief allowed by that section "is only given to parties who, by reason of some mistake

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or inadvertence, may *have lost the opportunity to be present at the trial. In this case the defendants were ably represented at the trial and made vigorous defence." *Steele v. C. & A. R. R. Co.*, 14 S. C., 331. So we say in this case. The defendants were present at the trial, and their defence has been conducted with industry, ability, and indomitable perseverance. The point is purely technical. There has been no surprise whatever. The defendants were not ignorant of the requirements of the statutes; indeed, were properly acting in obedience to them, and the case from the beginning to the end was conducted in all respects as if the complaint had referred in express terms to the aforesaid statutes and their requirements. We conclude in the words of Chief Justice Parker in delivering the judgment of the court in the case of *Williams v. H. & Q. Bridge and Turnpike Corp.*, supra: "It is always unpleasant to arrest the course of judicial proceedings on account of (alleged) defects, which have nothing to do with the real merits of the matter in dispute."

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 68

SITTON v. MACDONALD.

(November Term, 1885.)

[Reported and annotated in 60 Am. Rep. 484.]

[1. *Damages* ⇨ 40.]

In action for damages for failing to repair a cotton-tie punch, the loss of stock on hand rendered valueless by the detention of the punch, may be considered as a measure of damages, but not the profits which might have been realized from the use of the punch, unless the peculiar circumstances were known to the defendant, and his contract to repair was made with reference thereto.

[Ed. Note.—Cited in *Hays v. Western Union Tel. Co.*, 70 S. C. 19, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Traywick v.*

Southern Ry., 71 S. C. 85, 50 S. E. 549, 110 Am. St. Rep. 563; *Spears v. Fields*, 72 S. C. 338, 52 S. E. 44.

For other cases, see *Damages*, Cent. Dig. § 76; Dec. Dig. ¶ 40.]

[2. *Damages* ¶ 22.]

The difference between the profits realized and the profits which might have been realized, is not recoverable as damages. The rule making the difference in price at two different dates the measure of damages in certain cases, does not apply to a case where there is a mere difference in profits, where profits are excluded as too remote to be recovered as damages.

[Ed. Note.—Cited in *Gentry v. Richmond & D. R. Co.*, 38 S. C. 289, 16 S. E. 893; *Mood v. Western Union Tel. Co.*, 40 S. C. 528, 19 S. E. 67; *Wallingford & Son v. Same*, 53 S. C. 413, 31 S. E. 275; *Lewis v. Same*, 57 S. C. 330, 35 S. E. 556; *Harmon v. Same*, 65 S. C. 492, 43 S. E. 959; *Colvin v. McCormick Cotton Oil Co.*, 66 S. C. 66, 71, 44 S. E. 380; *Hays v. Western Union Tel. Co.*, 70 S. C. 16, 48 S. E. 608, 67 L. R. A. 481, 106 Am. St. Rep. 731; *Welborn v. Dixon*, 70 S. C. 114, 49 S. E. 232; *Ellison & Co. v. Johnson & Co.*, 74 S. C. 204, 54 S. E. 202, 5 L. R. A. (N. S.) 1151; *Standard Supply Co. v. Carter & Harris*, 81 S. C. 183, 62 S. E. 150, 19 L. R. A. (N. S.) 155.

For other cases, see *Damages*, Cent. Dig. § 59; Dec. Dig. ¶ 22.]

Before Cothran, J., Greenville, July, 1885.

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*This was an action by J. W. Sitton against R. M. Macdonald, commenced September 24, 1884. The opinion states the case.

Messrs. Nix, Shuman & Nix, for appellants.
Mr. A. C. Welborn, contra.

April 27, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for damages under the following circumstances: The plaintiff made a business of buying old cotton-ties and manufacturing them into new ties. He alleged that in this business he had occasion to use a peculiar "punch," worth some ten dollars, which could neither be made nor repaired by an ordinary blacksmith; that this punch getting out of repair, he, in July, 1882, engaged the defendant, who is the proprietor of the "Greenville Machine Works and Iron Foundry," to repair it, which he undertook to do, and return it on a given day; that on the day named he called for it, but it had not been repaired; that this occurred several times until the season of 1882 was lost, for which he claimed damages \$350. That the defendant promised to have the punch repaired by July, 1883, but the same disappointments followed, until he lost the season of 1883, for which he claimed damages, \$450. The same was repeated until he had lost half the season of 1884, when he purchased another punch, and sued the defendant for damages, \$1,000. The defendant put in a general denial and special defence "that the cotton-tie punch was broken and useless when left at the shop of defendant."

Upon the trial, the plaintiff offered to prove

"as damages the amount of profits he would have earned in the ordinary employment of the punch during the time it was detained by the defendant, viz.: during the seasons of 1882, 1883, and half of 1884. Defendant objected on the ground that such damages were too speculative, remote, and contingent. Objection sustained." The presiding judge then turned to the plaintiff, who was on the stand, and said, "If you can show that you laid in a stock of ties, &c.: if you can prove that you had made contracts to repair ties for others, or to furnish ties when repaired,

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&c.; if you can prove *that hands were employed by the plaintiff, &c., he would be entitled to be re-imbursed their wages actually paid." The plaintiff, in accordance with this announcement, testified that "he had laid in about nine (\$9,000) dollars worth of old ties to manufacture in 1882, from which he would have realized one hundred dollars profit if defendant had repaired his punch according to his promises. He kept this stock on hand until he got his new punch in 1884, after the commencement of this action, when he manufactured it into new ties, realizing from said nine dollars' worth of stock twenty-seven dollars profit." The judge charged the jury that if they believed this testimony, they should find for the plaintiff the difference between the profits he would have made out of the stock of 1882 and the profits he did make out of said stock in 1884; and that it was a question of fact for them to determine whether plaintiff, by his negligence, contributed to the loss thus sustained.

The jury found for the plaintiff \$42. The defendant made a motion for a new trial, and that being refused, he appeals to this court upon the ground "that his honor erred in ruling that plaintiff could offer evidence, and the jury find as damages the difference between the profits made on material manufactured during the fall of 1884, which the plaintiff had on hand in July, 1882, with a view to manufacturing and selling it in that year, but which he did not manufacture and sell in consequence of the alleged breach of contract, and the profits which the plaintiff would have made if he had manufactured and sold such material during the fall of 1882," &c.

We do not understand that this was an action on the case for vindictive damages, for intentional misrepresentation, deceit, or fraud, but simply an action for damages for the breach of a contract. The rule as to the proper measure of damages is not always free from difficulty. It is not the same under all circumstances, but necessarily varies to meet the varying cases as they arise. It is different in actions *ex contractu* from those in tort. In the former it is more restricted, the fundamental principle being that the damage must be "the primary and immediate

result of the breach of contract." Wood's Mayne Dam., § 12; Tappan & Noble v. Harwood, 2 Speers, 536; D'Orval v. Hunt, Dudley, *71

ley, *180. In this latter well-considered case it was held that "for the breach of an executory contract, without fraud or imposition, the jury can only give such damages as fairly and naturally result from it, and which can be measured by a pecuniary standard; remote and consequential damages cannot be allowed."

This is undoubtedly the rule, but it is not always easy to fix the exact limit between what is primary and secondary, or what is immediate or consequential and remote. If the breach is merely in the tardy delivery of property intended for sale, it is obvious enough that ordinarily the damage would be the difference in the price realized from that which might have been obtained at the proper time. But if the breach is in the non-delivery of an article not intended for sale, but for use in some particular business, other considerations intervene, and the matter is not so clear. In this class of cases the courts have endeavored to lay down certain rules to assist in fixing the damages upon proper principles. In Hadley v. Baxendale (9 Exch., 341), which seems to have been considered a leading case both in England and America, the following rules are indicated: "First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable. Second, that damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract." See Wood Mayne Dam., § 14, and notes.

Now, apply these rules to this case. It is not perfectly clear, but possibly the loss of the stock on hand (nine dollars' worth) rendered valueless for the time by the detention of the punch, might be reasonably considered as naturally arising from a breach of the contract to repair the punch within a certain time. But, surely, the very remarkable profits which in the opinion of the plaintiff might have been realized from the use of the punch, could not be so considered. It certainly was not "in the usual course of things, but peculiar to the special case," that damages to the extent of hundreds of dollars, should result from delay in repairing a punch entirely out of order, and never worth more

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than ten dollars; *and if so, according to the second rule above stated, such damages could not be recovered against him, unless these peculiar circumstances were known to the defendant and his contract to repair was

made with reference to them, which was not made to appear. In this view, the first ruling of the judge was correct that such possible profits "were too speculative, remote, and contingent."

But subsequent to this general ruling, the plaintiff (who was on the stand) stated that he had on hand stock to the value of \$9, and after he got a new punch in 1884, he worked up that old stock at a profit of \$27; whereas, if he could have used it in 1882, his profit would have been \$100, and the judge then charged that the jury might give the difference as damages. Was this error? We are not able to see how this difference (although arising out of the old stock) ceased on that account to be profits. As it seems to us it was still speculative profits, and as such not recoverable as damages. We are aware that there are circumstances under which one who, by a breach of contract, has delayed a sale until there is a fall in the marketable value of the property, may be charged as damages with the difference in price; but we do not see that such principle applies to a case where the only question is as to more or less profits, which as a whole, as profits, are excluded as too contingent, remote, and speculative.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

25 S. C. 72

SALE v. MEGGETT.

(November Term, 1885.)

[1. *Jury* ⇨13.]

Where a defendant in an equity cause sets up a title to land, the subject of the action, which title, if sustained, would defeat the action, he is entitled to a trial by jury of his claim of title; but if the title asserted be not paramount to the title alleged in the complaint, but only incidental thereto, it may be adjudicated by the judge.

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 33 S. C. 397, 400, 11 S. E. 1073; *Loan & Exchange Bank v. Peterkin*, 52 S. C. 237, 29 S. E. 546, 68 Am. St. Rep. 900; *Brock v. Kirkpatrick*, 69 S. C. 234, 48 S. E. 72; *Lancaster v. Lee*, 71 S. C. 282, 51 S. E. 139; *Poston v. Ingraham*, 76 S. C. 169, 56 S. E. 780; *Windham v. Howell*, 78 S. C. 191, 59 S. E. 852; *Jenkins v. Jenkins*, 83 S. C. 544, 65 S. E. 736; *McCown v. Rucker*, 88 S. C. 183, 70 S. E. 455.

For other cases, see *Jury*, Cent. Dig. §§ 35-83; Dec. Dig. ⇨13.]

[2. *Executors and Administrators* ⇨454.]

A purchaser of a testator's land at sheriff's sale under a judgment against the executor, has title paramount to the claim of a prior mortgagee of the devisees, unless such devisees had been in the exclusive possession of the land before the judgment was obtained.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1909-1928; Dec. Dig. ⇨454.]

[3. *Mortgages* ⇨459.]

Under an allegation of title from a testator

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by sale under execution *against his executor, evidence may be introduced to prove the facts necessary to make such sale operate as a conveyance of the testator's title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1343-1347; Dec. Dig. ⇨459.]

[4. *Equity* ⇨378; *Jury* ⇨13; *Mortgages* ⇨427.]

In action for foreclosure of a mortgage given by devisees on their testator's land, K. was made defendant, who claimed title paramount under judgment against the executor and a sale thereunder. Held, that K. was a proper party, and that the issue of title raised by him should be passed upon by a jury on the law side of the court, and then the matters of equitable cognizance determined by the court, but all in the same case.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 799; Dec. Dig. ⇨378; *Jury*, Cent. Dig. § 42; Dec. Dig. ⇨13; *Mortgages*, Cent. Dig. § 1278; Dec. Dig. ⇨427.]

[5. *Jury* ⇨28.]

A party entitled to a jury trial cannot waive it except as provided in section 288 of the Code. There is no such thing as a waiver of jury trial by conduct.

[Ed. Note.—Cited in *Trenholm v. Morgan*, 28 S. C. 277, 5 S. E. 721.

For other cases, see *Jury*, Cent. Dig. § 179; Dec. Dig. ⇨28.]

6. When a jury trial is waived in a law case, can the judge refer the case to the master or a referee?

[7. *Reference* ⇨6.]

The issues in a cause cannot be referred except upon the written consent of the parties.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 6; Dec. Dig. ⇨6.]

Mr. Justice McIver dissented as to K.'s right to a jury trial.

Before Pressley, J., Charleston, July, 1885.

This was an action by W. W. Sale, as clerk of the court, to foreclose a mortgage. It was commenced in November, 1881, in Colleton County, and afterwards transferred to Charleston County by order of the court. On motion of plaintiff's attorney, the order of reference, stated in the opinion, was passed, the brief not stating whether the defendant, Klinck, assented or objected, but it would seem that it was done without his knowledge.

Upon the matters considered by this court, the master's report was as follows:

It will be necessary to dispose first of a question which lies upon the threshold of the case. It is claimed by the defendant, Klinck, that he cannot be called upon to meet or answer the allegations of his co-defendant, Susan Meggett, her answer never having been served upon him; that the affirmative relief claimed in her said answer could only be obtained by her filing a cross-bill in the cause, making the proper allegations and prayer for relief, and serving the same on Klinck; that the bringing of the action in the name of a clerk is a covert at-

tempt on the part of the Meggetts to avoid showing their hands; that the effects of the bill and the answer of Klinck is to raise an

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issue on his plea *in bar, viz., that the mortgage cannot be foreclosed against him, being in possession under a paramount title, which issue cannot be tried in a foreclosure suit; and that the bill must be dismissed as to Klinck, and the parties left to their action at law upon the question of title.

If this position be sound, there is of course an end of the case. But it seems to me to be based upon a fallacy. The only point necessary to be determined here is: Was Klinck a proper party to these proceedings? To this question there can, I apprehend, be but one answer. As is said in *Cruzer v. Daniel*, McMull. Eq., 196, "The tenant in possession of the land is always a proper party to a bill for foreclosure." Of course, if he holds by a paramount title, he can plead it. But in what is Klinck's title "paramount" to that of the mortgagor's? Both claim under the common ancestor, and the judgment is admitted to have been subsequent to the mortgage.

The case of *Cruzer v. Daniel*, supra, really decides this whole point. As was said by Chancellor Harper in that case: "This is not, as suggested, an action to try title in the Court of Chancery. Both parties concur in the title of David Murray, and claim under him, and upon equitable principles the defendant cannot avail himself of any title subsequently acquired. If defendant claimed by a title paramount to that of complainant's intestate, as that David Murray, or any one under whom David Murray claimed, had conveyed to him, or any one under whom he claims, before the mortgage to Charles Murray, he would have had a right to have this question tried at law. But he alleges no such title, and he was bound to allege it if any such existed."

This disposes of Klinck's contention as to his "paramount title." It is true that he alleges his title to be paramount, but the very statement of his claim shows that whatever title he may have was acquired subsequently to the mortgage.

I think it is clear, without multiplying authorities, that Klinck was a proper party, and that his plea in bar must be overruled. As to the question with relation to the regularity of the proceedings under which the judgment was obtained, the defences that might have been pleaded against the note, &c., which are raised in the answer of Susan

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Meggett, it is sufficient to observe *that, whatever their value may be, they cannot properly be raised or considered in the present proceedings. All such defences should have been pleaded by the executor, and the issues raised were concluded by the judg-

ment, which cannot be impeached in a collateral proceeding. *Fraser & Dill v. City Council of Charleston*, 19 S. C., 384; *Huggins v. Oliver*, 21 Id., 147. So far, therefore, as the judgment of Klinck is concerned, its validity cannot be attacked in this case.

All other matters necessary to a proper understanding of the case are stated in the opinion.

Messrs. Rutledge & Young, for appellants.
Messrs. Mitchell & Smith, contra.

April 27, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The purpose of this action was to foreclose a mortgage, executed by the Meggetts, defendants, devisees of James C. Meggett, late of Colleton County, and covering a certain tract of land located in said county. G. W. Klinck, among others was made a party defendant, because he was in possession of the land, claiming as purchaser at sheriff's sale, under an execution issued on judgment obtained against the executor of the said James C. Meggett, deceased. The plaintiff demanded judgment of foreclosure, that Klinck be required to account for rents and profits, and that the rights of the parties be adjudged. The Meggetts answered, admitting most of the allegations in the complaint, and joining in the prayer thereof; also alleging that Klinck's judgment and execution was null and void and should be set aside. Klinck answered, stating that James C. Meggett during his lifetime was indebted to Klinck, Wickenburg & Co., and that after his death his executor gave his promissory note for said debt, amounting to \$231.15, as acknowledgment of said debt, upon which judgment had been obtained, and under execution issued thereon he had purchased the land in question, and to perfect his title he had also purchased said land at a tax sale, and now claimed that he was seized in fee, and prayed that he might be dismissed with costs.

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*It was not proved that the answers of the other defendants, or any of the papers in the case except the summons and complaint, had ever been served on Klinck.

The case was referred by his honor, Judge Cothran, to the master to take the testimony and report upon the issues of law and fact involved in the pleadings, with leave to report any special matter. The reference was made on motion of the plaintiff's attorney. The attorneys of the parties, including those of Klinck, appeared at the different references, with evidence and argument. It is stated by the referee that Klinck, through his attorney, objected to being called upon to meet the allegations in the answer of Mrs. Meggett, claiming affirmative relief against him, as said answer had never been served upon him; and also, as he claimed the land by paramount title, that the question of title

could not be tried in a foreclosure suit, and that the parties should be left to their action at law upon the question of title. These objections were overruled by the master, and he made his report upon the whole case, stating the facts fully, which will be found in the "Case," concluding with a recommendation that the mortgaged property be sold, the proceeds to be applied to the mortgage after the payment of costs, &c., and that Klinck be decreed to account for rents and profits from November 30, 1881, to be applied to the deficiency of the mortgage debt.

His honor, Judge Pressley, heard this report upon exceptions from Klinck. He decreed that Klinck, claiming as he did a paramount title under a judgment against the executor of defendants' (Meggetts) ancestor, his title was good if the heirs were not in exclusive possession at the time, but bad if they were in such possession, which he held was a question of fact, upon which "Klinck was entitled to a trial at law, which he could not try, though all the facts were before him under the master's report." He therefore "ordered, that the case be dismissed as to Klinck without costs, he being a proper party, but dismissed only on his claim of trial at law. Further, that the remaining parties have leave to apply for such further order as may be necessary for foreclosing said mortgage."

The plaintiff has appealed, denying Klinck's right to a trial by jury, and claiming that the question of title raised by Klinck was

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*a mere incidental question raised in a case of acknowledged equity jurisdiction, which the judge had the right to try, and that he erred in not so holding. Besides, that Klinck by his conduct had waived a jury trial. And further, that the judge erred in not deciding that Klinck had no title, as appeared from the record, proved by himself, in reference to the sealed note taken from the executor in payment of Klinck, Wickenburg & Co.'s account against the deceased, which he had sued to judgment and under which he had purchased the land. And in holding that whether the possession of the heirs was exclusive possession of such a character as to prevent the sale on a suit against the executor, was a question of fact, &c. And further, in not deciding the questions of law and fact raised in the master's report, and especially whether Klinck had not lost all claim against the estate, by his own inexcusable neglect in not pursuing the assets in time, &c.

It will be seen at once that the main and the first question in the case is, whether Klinck was entitled to a jury trial, as to the title set up by him. There is no doubt of the fact that the title of Klinck to the land is involved here, and it is equally clear that where title to land is involved, the parties

litigant have the right, as a general rule, to demand a jury, if they so desire: therefore, unless the position of the appellant is tenable, that this is an equity cause in all of its prominent features and purposes, and being so, it draws within the jurisdiction in which it is heard all questions arising therein and incidental thereto, like the one here, or unless a jury trial has been waived, then the law suggested above must apply.

The doctrine as to the first question seems to be this: where a title is set up which, if proved to exist as alleged, would be superior to the plaintiff's title, then, in such case, the existence of such title is a matter for the jury, under the instruction of the judge as to the law involved; but where, even admitting the title claimed by the defendant, as alleged, yet if it is inferior to that of the plaintiff, and as matter of law would not defeat his claim if sustained by the verdict of the jury, then there is no necessity for the judge trying an equity cause to submit the title to a jury, for the reason that, in fact,

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the title is not really involved, as the *defendant can claim nothing under it, and therefore it would be wholly useless to encumber the proceeding with a separate trial in reference thereto; the judge himself may adjudicate the rights of the parties. *Cruger v. Daniel, McMull. Eq., 157.*

The question, then, of Klinck's right to a jury trial, independent of the question of waiver, depends upon the fact whether he has set up a superior title to the plaintiff, or rather a title which, if proved to exist, as alleged by him, would in law defeat the plaintiff's claim or right to a foreclosure. Now, he founds his title upon a purchase under judgment and execution against the executor of the deceased, whose land it is admitted was sold upon a debt which he alleges was a debt of the said deceased. Can the lands of a decedent be sold under judgment and execution obtained against his representatives on a debt of his? They can under certain circumstances—briefly, where the lands have not gone into the possession of the heirs; otherwise they cannot. When they have gone into the exclusive possession of the heirs, although they do not escape liability for the debts of the ancestor entirely, yet they can then be reached only by a direct action against said heirs; before alienation a judgment against the representative having no effect, except to establish the debt against the personal assets.

In the case before the court it is true that Klinck has not alleged that at the time of his judgment against the executor and the sale thereunder the land in question had not gone into the hands of the heirs, and was therefore liable to the debt, yet he alleges that it was sold under an execution obtained against the said executor on a debt of the ancestor, and he claims to be seized in fee by

virtue of his purchase under a sale made under said execution. And has he not the right to show by evidence all the facts necessary to his claim of seizin in fee, under the allegation of such seizin? Whether his title would be good under that sale, would be a question of law applicable to the facts when found, but whether the evidence would show the necessary facts to bring his title under said law, would be a question of fact, upon which as it appears to us, he would have the right to demand a jury. For instance, whether the note given by the executor was intended as

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payment of the *account, or a mere acknowledgment thereof, and whether the heirs were in exclusive possession of the land at the time of the sale, &c., would involve to some extent questions of fact for the jury, determining under the law whether or not Klinck's title is superior or subordinate to the mortgage. Because if the judgment, as matter of fact, was obtained on a debt of the ancestor, and the sale made before the heirs had taken exclusive possession, then it would be paramount to the mortgage of the heirs.

But these questions of fact cannot be tried by the judge. He could say what effect they would have as matter of law on the title, but before applying the law he must have the facts, and they can be solved only by a verdict. We do not think that this case falls under that class of cases where the title raised is a mere incidental question to the main issue and may be adjudged by the judge; but it is a case where a party has interposed a title, which if sustained (and that must depend upon the facts in reference thereto), will defeat the opposing claim altogether. And it is therefore a question of paramount title, which if so, as the appellant admits, belongs to a jury.

Next, did Klinck waive his right of trial by jury? Under the code a party may waive a jury trial in one of three ways: 1. By failing to appear at the trial. 2d. By written consent in person or by attorney, filed with the clerk; and 3d. By oral consent in open court, entered on the minutes. Code, § 288. In such waiver the court is authorized to try the case. There is no admission in the "Case" that Klinck waived his right by either of these modes. The position is that he waived it by "conduct." The code does not provide for such waiver. But, besides, the judge did not try the question of title, which would have been his duty in case of a proper waiver, because the effect of such waiver is to throw the trial upon the judge. The judge here referred to the master all the issues of law and fact involved in the pleadings, for his report with leave to report any special matter. It is not necessary to determine here when a jury trial has been waived whether the judge could refer such a case to the master or a referee, because we have seen that there was no waiver here.

But independent of a waiver it may be said

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that all and any *issues in an action may be referred by order of the judge. See Code, § 292. This is true with the limitation that such reference can be ordered only on the written consent of the parties, or where they do not consent, in cases involving a long account on either side where said accounting is necessary for the information of the judge, or where a question of fact other than upon the pleadings shall arise in any stage of the action. It cannot be contended that Klinck's right of trial by jury was lost under either of the provisions above.

The question now arises, admitting that Klinck had not lost his right to a jury, does it follow that the case should have been dismissed as to him? We think not. Under the code an equitable issue and a legal issue may be involved in the same action. The plaintiff may combine an equitable cause of action and a legal one in the same suit, and the defendant may set up a legal or an equitable defence to one or both, and they may be all tried—true, not on the same side of the court, but tried without the necessity of separating the causes and ordering a dismissal as to one with leave to bring separate action in reference thereto, if so advised. But the equity cause can be heard by the judge, and the legal cause or defence by the jury, as in a regular case at law. Now, how does this principle apply to the case before us? The plaintiff instituted his action upon a cause of equitable cognizance on the equity side of the court, the defendant was made a party, perhaps under that provision of the code which enacts that any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, &c. And any persons claiming title or a right of possession to real estate may be made parties in an action to recover real estate. Code, § 139. See *Donthit v. Hipp*, 23 S. C., 205; *Adger & Co. v. Pringle*, 11 Id., 545.

The defendant claimed title adverse to the plaintiff. He was made a party defendant, he appeared and answered without protest or objection, and in his answer he set up a legal defence. Thus the issue was made up and was on the docket for trial. Why could not that issue be tried under the practice and principle suggested above, by simply withholding for the time the equitable cause and entering upon the legal defence, with a jury,

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as *in cases at law? *Adickes v. Lowry*, 12 S. C., 108; *Smith & Co. v. Bryce*, 17 Id., 544; *Chapman v. Lipscomb*, 18 Id., 232; *McGee v. Hall*, 23 Id., 388. This mode of the trial of causes and defences is claimed to be one of the excellences of the code practice, as it dispenses with multiplicity of actions and economizes in matters of costs and expenses.

We think under the section of the code referred to above (139), Klinck was legitimately made a party defendant. In fact, under the old equity practice being in possession, and claiming title adverse to the plaintiff, he was a proper party, so that the land, if ordered to be sold, might be sold free from a cloud overhanging it.

Appellant's other exceptions involving errors assigned as to the facts, such as whether the heirs were in the exclusive possession, &c., we think are untenable for the reason, as we have already said, while the judge might charge the law upon such facts, the existence of such facts was a matter of evidence—they were probative facts involved in the question of title, and should go to the jury.

The Circuit Judge seems to have passed upon all matters so far as the plaintiff and all other defendants, except Klinck, are concerned, in his order that the remaining parties have leave to apply for such further orders as may be necessary for foreclosing the mortgage, and the only matter left open is the title of Klinck, and his accountability for rents and profits. We concur with the Circuit Judge that Klinck's title is a jury question, of course under the charge of the judge as to the facts necessary to constitute title in a case of this kind; but we do not see why the case should be dismissed as to Klinck, in order to give him the right he demands. It would involve unnecessary expense and delay to proceed with the foreclosure and then let the purchaser contest Klinck's title in a separate action for possession. The parties are now all before the court, all questions at issue can be tried under the procedure allowed by the code, without violating Klinck's right to a jury.

It is the judgment of this court, that so much of the judgment of the Circuit Court as dismissed the complaint as to Klinck be reversed, and that the case be remanded for trial by jury of the question of title raised

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by Klinck, and the amount *of rents and profits, if the judge should hold him accountable therefor.

Mr. Justice McGOWAN concurred.

Mr. Justice McIVER. I dissent. I cannot concur in the conclusion reached by the majority of the court as to the right of the defendant, Klinck, to demand a trial by jury, but upon this point concur in the view taken by the master. The pressure of other more imperative official duties forbids my entering into any discussion of the question, and I must, therefore, confine myself to a simple dissent. As to the other points involved I concur with the majority.

New trial granted.

25 S. C. 82

BOOZER v. WEBB.

(November Term, 1885.)

[Partnership \S 77, 183.]

The managing member of a partnership, whose books were open to the inspection of the other partners, purchased in his own name a house and lot and paid for the same in largest part with a check on the bank drawn by him in the firm name, and in part with a debt due to the firm by the vendor. At that time the firm was solvent. Shortly afterwards the purchaser conveyed this house and lot to himself as trustee for the benefit of his daughter. This voluntary deed was drawn by another member of the firm, who was also the attorney for the firm. In these transactions there was no concealment or conspiracy. *Held*, that the partner might appropriate the partnership funds to the purchase of property and take title thereto in his own individual name; that he thereby became a debtor to the partnership to the extent of the money drawn out by him; but upon subsequent insolvency and dissolution of the firm, the receivers could not recover this property as partnership assets. *Maybin v. Moorman*, 21 S. C., 346.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. \S 145, 323; Dec. Dig. \S 77, 183.]

Before Kershaw, J., Newberry, July, 1883.

In this case Hon. W. H. Wallace, Circuit Judge, sat in the place of the Chief Justice.

The facts of this case are stated in the opinion of the court. The Circuit decree, omitting its findings of fact, was as follows:

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*The object of this action is to set aside this conveyance of Webb, and subject the property to the debts of the said copartnership. The case was argued on the Circuit chiefly on the ground of fraud. It was contended by the plaintiffs that the voluntary deed of the defendant, Webb, creating a trust in the lot of land in favor of his daughter and her children, was fraudulent and void, as against creditors, under the statutes of Elizabeth. It, however, presents another aspect. In so far as the property was paid for by Webb from the assets of the firm, a trust resulted in their favor, and the property may be made liable to that extent to the demands of these plaintiffs.

The other doctrine, if applicable at all, would apply to the transaction only as a case of the voluntary conveyance of property in derogation of the rights of existing creditors, inasmuch as I find no actual fraud in the case. Regarding it as a case of constructive fraud of this character, the plaintiffs here would have no right of action. A voluntary deed is not void per se, but voidable as against existing creditors whose debts have not been paid. Such a creditor could not bring an action to set aside a deed, and subject the property to the payment of his debt, without having first exhausted his legal remedies. He must first have sued the debt to judgment, taken out execution, sold all the property liable to the same, and pro-

cured a return of nulla bona before he could bring such an action. *Hall v. Joiner*, 1 S. C., 186; *Suber v. Chandler*, 18 Id., 526; *Verner v. Downs*, 13 Id., 450; *Ragsdale v. Holmes*, 1 Id., 96; *Eigleberger v. Kibler*, 1 Hill Ch., 113 [26 Am. Dec. 192]; 2 Story Eq., 1521.

At law the deed is considered as a mere nullity. Creditors whose demands exist at the date of the deed may so regard it. Having obtained judgments, they may levy their executions and sell the lands conveyed by the deed. The purchaser under such sale may bring his action of ejectment and recover the land. In such an action it would be wholly immaterial whether the debtor was, at the time the deed was made, solvent or insolvent. It would only be necessary for the plaintiff to show that the deed was voluntary, that his debt existed at the time it was made, and that his debt remains unpaid. *Richardson v. Rhodus*, 14 Rich., 96.

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*I will now proceed to apply these principles to the case in hand. If when the defendant, Webb, drew the money from the firm, which he invested in the lot in question, he left eight thousand dollars to his credit in the concern, he did not use the money of the copartnership to make the purchase. But to the extent that he reduced the amount below eight thousand dollars, he did so use the money of the firm. The balance to his credit on that day, January 6, 1873, as shown by the books of the firm, of which he was the managing partner, was \$5,780.55.

Though the burden of proof was upon the plaintiffs to show, affirmatively, that Webb did use the money of the firm in making said purchase, yet, prima facie, they have established this fact by showing from the books that he had reduced the balance to his credit below eight thousand dollars, which sum it was his duty to contribute to the capital stock of the business. If any proper credits were omitted from this account, it devolved upon the defendants to show them. This they attempted to do by testimony tending to show that Webb had not received credit for the real estate contributed by him, estimated at twenty-five hundred dollars in value. But the complaint alleges that the sum of \$11,315.68, for which Webb was allowed credit, included the real estate and all the answers admitted this allegation.

Defendants also insist that Webb should be allowed an additional credit on the account of \$1,000 for his services as manager. Though the year had not expired, the demand seemed to me reasonable, since it was not said in the agreement that he should not draw his salary at any time during the year. With this exception no other credit has been made to appear in Webb's favor. It might be that a different state of the accounts would have been shown had the whole part-

nership account been taken before a referee. But it was upon the defendant's own motion, against the insistence of the plaintiffs, that the trial proceeded without this accounting.

From what has been said, it appears that the amount to the credit of Webb January 6, 1873, was only \$6,780.55, and consequently Webb had no money in the firm which he had a right to apply to the purchase of property on his own account. To the extent, therefore, of the amount drawn from the firm

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and so *applied, the property purchased is charged with a trust in favor of the firm, and is liable for their debts. These plaintiffs, as receivers, are charged with the duty of collecting the assets and paying the debts of the copartnership. The resulting trust in favor of the firm is cognizable only in equity, and, therefore, could only be enforced by an action of this character. The plaintiffs, therefore, are properly in court, so far as regards that fund.

But a further question arises, whether they are entitled in this action to anything beyond the amount of \$1,500 belonging to the firm, and applied to the purchase of the property. If the property should sell for more than fifteen hundred dollars, the overplus might be regarded as a gift by Webb to his daughter, void under the statute as a constructive fraud, as against existing creditors. In that view of it that balance would be equitable assets for the payment of the debts of W. H. Webb, but not copartnership assets, and, therefore, these receivers, as such, could not have an action to recover them. They are charged with the collection of the assets of the copartnership only, and have no authority to pursue the individual assets of the members of the firm in order to subject them to the debts of the copartnership. As to such balance, therefore, the plaintiffs would have no right of action, and would be entitled to no relief here. The creditors are not parties, and must be left to pursue such remedies as they may be advised that they have otherwise, if any.

As I do not find any fraudulent intent on the part of W. H. Webb, and the parties beneficially interested in the property are innocent of any wrong, the recovery here will be limited to the sum paid from the funds of the firm, without arrears of interest, and the defendant, Margaret E. Harrington, will be allowed to redeem, if she so desires, within a reasonable time.

It is ordered and decreed, that the defendant, Margaret E. Harrington, or W. H. Webb, as trustee, be at liberty to redeem the said lot of land, with the appurtenances, by paying to the plaintiffs the sum of fifteen hundred dollars, with interest thereon from the date of this decree, and the costs of this action. And in case of their failure so to redeem, that the master proceed, on the first Monday of January next, or some other

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convenient *salesday thereafter, to sell the said lot of land for cash and pay the proceeds thereof, first, to the costs of this action and the expenses of sale, and any taxes due on said property at the time of sale. Next, that he pay therefrom to the plaintiffs the sum of fifteen hundred dollars, with interest from the date of this decree, and that he hold any balance which may remain after such payments, subject to the trusts declared in the said deed of W. H. Webb in favor of the defendants, Margaret E. Harrington and her children, until proper orders be made by the court in respect of the fund, upon the application of Mrs. Harrington and her children, or any other person duly authorized on their behalf, and such orders may be taken here-in at the costs of said applicants.

From this decree defendants appealed upon several exceptions; but they need not be considered, as this court considered only one point.

Mr. Geo. Johnstone, for appellants.

Messrs. Y. J. Pope and Geo. S. Mower, contra.

May 1, 1886. The opinion of the court was delivered by

Mr. Justice WALLACE. On the first day of April, 1872, W. H. Webb, W. C. Parker, and L. J. Jones entered into a contract of partnership for the purpose of carrying on the business of tanning leather, making and selling saddles, harness, and shoes and of selling buggies, guano, corn, and other articles of merchandise. It was stipulated between them and stated in the memorandum of agreement signed by each of them, that each should contribute the sum of eight thousand dollars to the partnership capital, and that each should share equally in the profits and losses of the business, and that the business should be managed by Webb, with the consent of the other partners, and that books, exhibiting the business, should be kept by him which at all times were to be subject to inspection by the other partners.

When the partnership was entered into Webb was engaged in manufacturing, buying, and selling leather and leather goods. His stock on hand, tools of the trade, and the real estate owned, occupied, and used by him in

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the conduct of his business, were *transferred to the new concern at an agreed valuation, as his contribution to the capital stock. He was credited upon the books of the firm with the sum of eleven thousand, three hundred and fifteen dollars and sixty cents. For the amount of the excess in value, contributed by Webb, over the eight thousand dollars which he had agreed to contribute to the capital stock he was to receive the note of the firm. Jones and Parker, too, were engaged in the business of tanning leather. It was agreed that all their stock, fixtures, and real

estate owned and used by them in their business should be transferred to the new concern at an agreed valuation, as their contribution to its capital. Accordingly Jones and Parker were credited with the agreed value of this property, to wit, with the sum of twelve thousand, eight hundred and forty-four dollars, and they, too, it was agreed, should receive the note of the firm for the sum of any excess in value contributed by them over the eight thousand dollars to be contributed by each partner. Parker owned an interest in the property contributed by him and Jones, estimated at about twenty-five hundred dollars. That all the property turned over to the concern by Webb is covered by the credit of eleven thousand, three hundred and fifteen dollars and sixty cents, is denied by Webb. The determination of this question is not necessary to the decision of the case according to the view we take of its essential issues.

In pursuance of the agreement between the partners, the firm entered upon the prosecution of its objects and transacted a large and flourishing business under the management, mainly, of Webb, who, it was agreed, should receive for his services as manager the sum of one thousand dollars per annum. Taking the statement of the books of the concern as to the amount of capital actually contributed by Webb as correct (and it may be assumed to be so for the purposes of this case), on January 6, 1873, Webb had reduced this credit to the sum of five thousand, seven hundred and eighty dollars and fifty-five cents. On that day there is nothing to show that the firm was not perfectly solvent. On that day Webb drew a draft on the account of the firm in bank for the sum of fifteen hundred dollars. This draft was cashed by the bank and charged to the firm. It was drawn and

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delivered *by Webb in part payment of the purchase money of a house and lot. The contract of purchase had been previously made for the sum of two thousand dollars. Other payments on the purchase had been made by Webb. One of these consisted of supplies furnished the vendor out of the partnership goods. At the time of the purchase Webb caused the conveyance to be made to himself, and he put his daughter, Mrs. Harrington, into possession of the property. On September 23, 1873, Webb conveyed this house and lot to himself as trustee for his daughter. This latter deed was drawn by L. J. Jones, one of the partners.

The partnership of Webb, Parker & Jones was dissolved by an order of this court, made in a proper proceeding before it on February 16, 1874, and receivers were appointed to administer the assets of the firm. At the date of this order the concern was insolvent. The receivers have brought this action to set aside the trust deed and to subject the property conveyed by it to sale for the payment pro tanto of the partnership debts. This re-

lief is sought upon two grounds: First, Because this deed was a voluntary conveyance to the prejudice of creditors. Second, Because the property was paid for with partnership funds.

The first ground is decided against the plaintiffs by the Circuit Judge, and from this part of the Circuit decree no appeal has been taken. This question is not, therefore, before this court. It may be added, however, that this court concurs with the Circuit opinion upon this point, on the case as made on the trial below.

The second ground questions the right of a partner to acquire individual title to property paid for with funds drawn from the partnership. The law upon this question in this State has been stated in the recent case of *Maybin v. Moorman*, 21 S. C., 346. The Circuit decree in this case was filed before the opinion in the case of *Maybin v. Moorman*, was delivered. A brief statement of the facts of that case will show that it is conclusive of this. *Moorman*, *Maybin*, and *Chick* were partners in a mercantile business. *Moorman* was bookkeeper. The other partners had access to the books. *Moorman* was paid a salary for keeping the books. He took one thousand dollars of partnership funds

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*and paid for bank stock with it and took the stock in his own name. There was no intentional fraud or wrong doing of any sort. *Moorman* and *Chick* died, and the firm proved to be insolvent. *Maybin*, the surviving partner, brought an action against the executor of *Moorman* to recover the bank stocks as partnership assets to pay debts. This court decided that *Moorman* had acquired individual title to the stock and was indebted to the firm for the one thousand dollars paid for it.

With reference to the case in hand, nothing appears in connection with the original purchase of this property or the subsequent change in the nature of Webb's tenure of it which points to any purpose to prejudice the rights of creditors or partners. There was no concealment, for the check for fifteen hundred dollars was charged on the books of the firm to Webb on the day of its date. The conveyance to himself as trustee was drawn and approved by Mr. Jones, his partner and the attorney of the firm. There is no evidence of conspiracy, for at that time both Jones and Webb were men of means, and, as far as appears, able to respond individually to any existing liability of the firm. Under these circumstances the case of *Maybin v. Moorman*, supra, clearly decides that a partner may appropriate partnership funds to the payment of the purchase money of property for his own use, and become a debtor to the partnership for the money so used while he acquires individual title to the property so purchased.

It is, therefore, the judgment of this court that the judgment of the Circuit Court be reversed and the complaint dismissed.

25 S. C. 89

SMYTHE & ADGER v. BROWN.

(November Term, 1885.)

[1. *Reference* ¶50.]

In an action of foreclosure brought by the assignees of the mortgagee, the mortgagor denied the assignment and alleged, that if made, there were certain equities between the assignors and himself, binding upon the assignees. The cause was referred to the clerk of the court, as referee, to compute the amount due and report upon the questions of law and fact arising on the pleadings. Pending the reference, the referee, on defendant's motion, passed an order,

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giving defendant leave *to amend his answer and requiring the plaintiffs to make the original mortgagees parties. Plaintiffs at once appealed to the Circuit Court, and the judge, having no report from the referee but on the pleadings alone, reversed the order of the referee. *Held*, that the reference here not being for trial in its full sense, the Circuit Judge had the power to revoke the referee's order and require him to proceed with the case. The proper practice is by motion, but this was in substance what was done here. It may be different where all the issues are referred.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 79; Dec. Dig. ¶50.]

[2. *Mortgages* ¶427.]

There is nothing in the pleadings to show that the original mortgagees were necessary parties to the action.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1279; Dec. Dig. ¶427.]

[This case is also cited in *Cartee v. Spence*, 24 S. C. 554, and distinguished therefrom.]

Mr. Justice McIver and Mr. Justice McGowan concurred in the result, under the terms of section 791 of General Statutes.

Before Wallace, J., Lancaster, March, 1885. The opinion fully states the case.

Messrs. Ira B. Jones and M. J. Hough, for appellant.

Messrs. Wylie & Wylie, contra.

May 4, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. These two actions between the same parties, were brought each on a separate note and to foreclose a mortgage in each case. These notes and mortgages had been executed by the defendant to Twitty & Connors, in 1882 and in 1883. Both mortgages had been recorded in due time. The said notes and mortgages were afterwards assigned, as alleged, to the plaintiffs, who brought the actions. The defendant answered, admitting the execution of the papers, but denied the assignment, and also the amount claimed, and for further defence upon the supposition that an assignment had been made, he interposed certain equities as against Twitty & Connors, the as-

signors, growing out of their transactions as factor and customer, and payments made to the said Twitty & Connors, both in their own right and as agents of the plaintiff. He further claimed, that if the assignments were made, they were made as collaterals with other collaterals to a large amount, which he urged should be made to bear a portion, at least, of the debt of plaintiff.

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*When the case came up for trial, his honor, Judge Aldrich, by consent of all attorneys, ordered it to the clerk of the court, to compute and ascertain the amount due; and, further, to report upon the questions of law and fact arising on the pleadings. Pursuant to this order Mr. Williams, clerk of court, held a reference and had taken the testimony offered by the plaintiff, when the defendant's attorneys moved said clerk for leave to amend defendant's answers, and to make Twitty and Connors parties defendant, which motion was granted by order directing the summons and complaints to be amended by adding H. D. Twitty and Connors as defendants, giving them twenty days after service of summons within which to answer. From this order the plaintiffs served notice of appeal to the Circuit Court, on the ground that Twitty and Connors were not necessary parties.

This appeal was heard by his honor, Judge Wallace, who upon the pleadings alone (the referee not having made any report, either as to his conclusions or the testimony taken), granted an order rescinding the order supra of the referee, with ten dollars costs to the plaintiffs. From this order the defendant has appealed to this court, upon two grounds: 1st. Because his honor had no jurisdiction to hear the appeal from the order of the referee in the absence of a report by said referee to the Circuit Court. 2nd. Because Henry D. Twitty and Charles T. Connors are necessary parties to a complete determination of the issues in said actions, and the Circuit Court erred in holding the contrary.

The order of Judge Wallace, as already stated, was made upon the pleadings, the testimony taken by the referee not being read, nor requested to be read by either party. The questions raised then come before us as they came before Judge Wallace. Could he hear an appeal from the referee as to an intermediate order like the one under consideration before the whole report came in? Did it appear, from the pleadings, that Twitty and Connors were necessary parties to a complete determination of the issues raised therein? The first is a question of practice, under the code, and it involves the powers and duties of referees appointed by the court, and also the control over said referees reserved to the court after appointment.

We have no decided case upon the precise

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point raised here in *our own reports*—at least, we have found none, nor have the appellants referred us to any. There is a case, however, found in 53 Barbour [N. Y.] 532 (Ford v. Ford), where the practice pursued here, in substance, was adopted and sustained. In that case, after the case had been referred to a referee, the referee on the trial granted an order to the defendant to amend his answer by adding the defence of the statute of limitations. Previous to the final hearing of the cause, the plaintiff, on notice, applied to the court by motion to set aside the order of the referee, and for a direction that he proceed to hear and determine the case upon the issues referred to him. This motion was granted, the court saying: "That it was perfectly clear that the referee had not authority to make the order: * * * but it is insisted (says the court) that the plaintiffs have mistaken their remedy; that they cannot have relief by motion before verdict, but must except to the referee's ruling, and appeal to the general term after judgment. It is no doubt true that the order of the referee was subject to exception, and might doubtless be reversed on appeal from any judgment that might be entered on his report. But the plaintiffs were not restricted to that course of redress; they had the right to seek a more expeditious and less expensive mode. The special term, in my judgment, possesses the power to set aside any order made by a referee, in the progress of the cause, which he had not authority to make, and also to compel him to proceed to the trial of the issues referred to him for his determination. Such was, in substance, the decision of the court in *Union Bank v. Mott* (18 How. Pr. [N. Y.] 506), and in my judgment that ruling should be followed."

This case, it is true, is not authority with us, but it comes from a State where the code has prevailed longest, and its reasoning seems sound, and especially applicable in a case like that before the court, a case in chancery, where it is evident that the reference was made not for trial in the full sense of that term, but to give the court information as to the amount due on the notes in suit, and to report to the court upon the questions of law and fact arising on the pleadings. The code, it is true, provides a mode for reviewing the actings and doings of referees (§ 294), which may be adopted where the report has been made; but whether

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*this mode may also be adopted upon some intermediate order of the referee, and whether the order here is one of that character, it is not necessary for us now to determine, as we think the principle and practice pursued in the case of *Ford v. Ford*, supra, is proper here, the reference here being simply to compute the amount due, and to report on the

questions of law and fact arising on the pleadings, and not for trial. Under that principle there was no necessity for the plaintiff to appeal; his remedy was a motion to set aside and vacate the order of the referee. This in substance he did do, although in form his notice and motion was presented as an appeal.

It is not intended to announce here that the actings and doings of a referee, as to all matters referred to him and properly under his jurisdiction, can be reviewed by the Circuit Court by piecemeal, and before the final report, nor that all intermediate orders of his can be at once reviewed, in advance of the final report. These questions must depend upon the application of section 294, to the case when made. They are not involved here, the question here being whether the Circuit Judge had jurisdiction in this case to hear the motion made before him in the absence of a report by the referee. We think he had such power whether the reference here was made by the Circuit Judge to aid him in reaching a conclusion, or as special master during the vacancy of the office of master under the recent act providing for said office in Lancaster and other counties; and, therefore, there was no error in hearing it.

Next, Does it appear from the pleadings that Twitty and Connors were necessary parties? We think not. The complaint was an ordinary complaint by plaintiffs claiming as assignees of Twitty and Connors of the notes and mortgages sued on, and we can see no necessity, so far as the plaintiffs were concerned, why Twitty and Connors should be made parties. The plaintiffs claimed nothing from them, nor was their presence necessary as parties in order to enable the plaintiffs to enforce their rights against the defendant under the assignment. Nor do we see anything in the answer, or in the defences set up by the defendant, which required the presence of Twitty and Connors as parties defendant, to protect the other defendant. No

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doubt, their *presence was necessary as witnesses, but as parties we can see none.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

The other Justices concurred in the result for the reason stated in a separate opinion herewith filed, as follows:

This action was pending in the County of Lancaster, and it seems that the provisions of the code as to the appointment of referees have been repealed so far as that county is concerned. See act of December 24, 1880, Gen. Stats., § 782. It does not appear whether a master has been appointed for Lancaster under the above provision. If so, and the reference had been to him, he would have had the power given by it, "to grant leave to amend pleadings and make new parties. * * * But all such orders shall be subject

to the revision of the presiding judge at the next succeeding sitting of the court, or of the resident Circuit Judge, at chambers," &c. Gen. Stats., § 791. The reference in this case was not made to the master, but, by consent of parties, to D. A. Williams, clerk of the court, and as the office of referee and the practice of referring cases to referees as provided for in the code, no longer exists in the County of Lancaster, it seems to us, that in this case the clerk was not invested with the powers of a referee under the code, but that all his orders under the act were subject to the revision of the presiding judge, without an intermediate appeal in form, precisely as if the reference had been to a master. See the last judgment of this court in the case of *Roberts v. Johns*, 24 S. C., 580. For this reason we concur in the result.

Judgment affirmed.

25 S. C. 94

YOE v. HANVEY.

(November Term, 1885.)

[*Homestead* ⚭ 141.]

Upon the petition of the widow of an intestate, a tract of land belonging to the intestate's estate was assigned to her as a homestead in 1879. She had no children of her own, but

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there were children of the intestate by a former marriage. These children being all of age, and none of them residing with the widow on this homestead, two of them instituted this action against the others and the widow for partition. *Held*, that the widow was entitled to retain this homestead during life, and that therefore the complaint was properly dismissed.

[Ed. Note.—Cited in *Glover v. Glover*, 45 S. C. 55, 22 S. E. 739; *Broughton v. Broughton*, 93 S. C. 28, 75 S. E. 1027, overruled in *Ex parte Worley*, 54 S. C. 208, 213, 32 S. E. 307, 71 Am. St. Rep. 783.

For other cases, see *Homestead*, Cent. Dig. § 267; Dec. Dig. ⚭ 141.]

Mr. Chief Justice Simpson concurred in the result, and Mr. Justice Melver dissented.

Before Cothran, J., Abbeville, June, 1885.

The opinion states the case.

Mr. Samuel C. Cason, for appellant.

Mr. M. P. DeBruhl, contra.

May 12, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Edward Hanvey died intestate in 1877, leaving a widow, Sarah J. Hanvey, and the plaintiffs and other defendants, his children, who, with the widow, were his heirs at law. Sarah J. was a second wife and had no children of her own. The intestate was indebted and was seized and possessed of very little personal property and a small tract of land containing 150 acres and valued at \$500. Soon after the death of the intestate, the widow, Sarah J.,

filed her petition for homestead, and on January 31, 1879, the entire tract of 150 acres, set down at the value of \$500, was assigned to her as homestead, after publication of notice in the county paper as required by law. No other notice was given. All of the children of Edward Hanvey are of age, and none of them live with Sarah J. Hanvey. The probate judge, in the settlement of the estate of Edward Hanvey, stated that "various claims were presented, but this sum (namely, \$126.48, which constitutes the personal estate) is to be divided among the medical accounts for last illness and funeral expenses." Those claims amounted to \$214.

Two of the children of Edward Hanvey by his first wife, instituted this proceeding against the widow, Sarah J., for partition of the little tract of land which had been assigned to her as homestead. They claimed

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that as heirs at law of Edward Hanvey, *deceased, they were entitled to have partition of the same. The cause, by consent, was heard by Judge Cothran at chambers, who held, "That to partition the land now among the children of the intestate, Hanvey, would entirely deprive the widow of all interest in it (as the act allowing partition of homestead is limited expressly to 'the children of the head of the family'). The time for partition has not come. It is therefore ordered and decreed that the complaint be dismissed," &c.

From this decree the children of Edward Hanvey appeal to this court, on the ground. "That his honor erred in holding that the land described in the complaint was not now subject to partition among the parties to this suit, but that the said Sarah J. Hanvey had the right to hold the same as a homestead against the other heirs during her life."

Appellants' counsel is perfectly correct in saying that there has been some want of clearness and consistency in relation to the multitudinous points, arising in different forms out of the question of homestead. It is comparatively a new subject, as to which the laws, not always consistent with each other or the constitution, have been frequently changed; and the right itself, being in its nature somewhat peculiar, is, in some of its aspects, not at all free from difficulty. This is shown by the fact that the provisions of law in the different States, and the decisions of the different courts upon the subject, are not at all in accord. We may, however, take it as settled in this State, that homestead creates no new estate; that neither the constitution nor the laws in conformity to it, undertake to do the impossible thing, of taking property from one and giving it to another. On the contrary, homestead is not, and cannot be, anything more than an exemption, under certain circumstances, of specified property from sale by creditors, for a particular purpose of policy and humanity.

The facts of this case do not require us to consider whether the exemption from creditors allowed, is, or was intended to be, temporary merely—lasting only, like dower, as long as the particular state of facts exist which called it into existence; or is unlimited and permanent in its nature, authorizing an absolute sale or partition in fee of the property so exempted. See *Chalmers v. Turnipseed*, 21 S. C., 138.

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*In the case at bar the homestead was not assigned to the debtor, Edward Hanvey, in his life time, thereby giving rise, after his death, to questions between the widow and children under the assignment to the husband and father. But after his death it was assigned to his widow, Sarah J., in 1879. This was before the late amendment of the constitution in relation to homestead (1880), and therefore the assignment must have been made under section 4 of the act of 1873, 15 Stat., 371. But that section was re-enacted verbatim, in the General Statutes of 1882, section 1997, which is as follows: "If the husband be dead, the widow and children, if the father and mother be dead, the children living on the homestead, whether any or all of such children be minors or not, shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living; and the homestead so exempted shall be subject to partition among all the children of the head of the family in like manner as if no debts existed: provided, that no partition or sale in that case shall be made until the youngest child becomes of age, unless, upon proof satisfactory to the court hearing the case, such sale is deemed best for the interest of such minor or minors," &c.

Although the assignment of homestead under this act to Mrs. Hanvey exempted the premises from the debts of her deceased husband, Edward Hanvey, it was, to all intents and purposes the homestead of the widow, Sarah J., as the then head of the family, whether any of her step-children did or did not live with her, or indeed, whether she or her husband ever had any children. *Bradley v. Rodelsperger*, 3 S. C., 227, and 17 Id., 9; *Moore v. Parker*, 13 Id., 486. If Edward Hanvey had left no widow, it may well be doubted whether his children, none of whom were minors, or "living on the homestead," could have claimed the exemption in his lands against his debts. At all events, the widow alone applied and the homestead was set off to her as the head of the family, taking the place of her husband. But for the interposition and establishment of her claim, the creditors probably would have sold the land for their debts; and it seems to us that it would really be a strange result if the homestead, which could only be exempted

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in favor of the widow, *could after exemp-

tion be destroyed by others through a sale or partition of it.

We agree with the Circuit Judge that the adult children of Edward Hanvey have no right to partition at this time the land assigned as homestead to the widow; that the widow is entitled to enjoy it like dower during her life and at her death a new question may possibly arise, as to whether it then goes to the unpaid creditors of Edward Hanvey, or may be partitioned among his heirs, as to which we give no opinion.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Mr. Chief Justice SIMPSON concurred in the result.

Mr. Justice MELVER, dissenting. I am unable to concur in the conclusion reached by the majority of the court, because it appears to me to be in conflict with the principles upon which at least three of the former decisions of this court rest, viz., *Elliott v. Mackorell*, 19 S. C., 242; *Ex parte Ray*, 20 Id., 246; and *Chalmers v. Turnipseed*, 21 Id., 136; and not in accordance with the proper construction of the homestead law. The intestate having died in 1877, the rights of his heirs then vested, and the question involved in this case must be determined by the law then of force. It is conceded that the 4th section of the act of 1873 (15 Stat., 371) furnishes us with the law, and it reads as follows: "If the husband be dead, the widow and children, if the father and mother be dead, the children living on the homestead, whether any or all such children be minors or not, shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living; and the homestead so exempted shall be subject to partition among all the children of the head of the family in like manner as if no debts existed: provided, that no partition or sale in that case shall be made until the youngest child becomes of age, unless, upon proof satisfactory to the court hearing the case such sale is deemed best for the interests of such minor or minors."

Now, it will be observed that this section contains no restriction upon the general right to partition except in the single instance of there being minor children interested, and

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then the right to *have partition made is only postponed "until the youngest child becomes of age." But as there are no minor children in this case, I can find nothing in the law which in any way interferes with or postpones the ordinary right which the heirs of the intestate have to demand partition of his real estate. It having been determined in the cases above cited, that the homestead laws do not create any new estate, and certainly do not undertake to divest any previous estate, and that they were not designed

"to alter or in any way affect the statute for the distribution of intestates' estates," it seems to me to follow necessarily that when Edward Hanvey died intestate, the title to his real estate immediately descended to and vested in his heirs at law, charged only with a liability for the payment of his debts; and that when relieved of this charge, as it has been by the homestead law, it became subject to partition just as if there had been no debts, there being, as we have seen, no provision in the homestead law which would defeat, or even postpone, this right to partition.

It does not seem to me that the mere fact that the widow, and the widow only, could invoke the protection afforded by the homestead laws, should affect the question in this case. The only obstacle to the right of the heirs to demand partition being the liability of the land to be subjected to the payment of the debts of their ancestor, whenever that obstacle was removed, no matter by whose agency, the real estate of the intestate became at once subject to partition amongst his heirs at law, of whom the widow was one, under the provisions of the act of 1791, in the absence of any legislation modifying or postponing such right to partition. The homestead laws operate simply as a shield to protect the exempted property from the grasp of creditors, leaving the title to such property, with all its incidents, just where it was before such shield was interposed.

It seems to me, therefore, that until the legislature sees fit to modify or postpone the right of partition secured to the heirs of an intestate under the laws, as I understand them now to be written, the right to demand partition of real estate exempted from the payment of debts under the homestead law cannot be denied.

Judgment affirmed.

25 S. C. *100

*STATE ex rel. MYERS v. APPLEBY.

(November Term, 1885.)

[1. *Mandamus* ⚡10.]

Mandamus only issues when there is a specific legal right or a positive duty to be performed, and when there is no other appropriate remedy.

[Ed. Note.—Cited in *State v. Charleston Light & Water Co.*, 68 S. C. 552, 47 S. E. 979.

For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. ⚡10.]

[2. *Counties* ⚡201.]

A written order by the auditor on the county commissioners, endorsed by them "Examined and approved," is not an audit of an itemized and verified account as required by law.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 313; Dec. Dig. ⚡201.]

[3. *Evidence* ⚡83.]

Where an audit by the board of county commissioners of an irregular claim appears on the face of the paper, it will not be presumed that their action was based on other proofs and in accordance with the requirements of law.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 105; Dec. Dig. ⚡83.]

[4. *Counties* ⚡206.]

A finding by the commission appointed to investigate the indebtedness of Colleton County, is not binding upon one who did not submit his claim to this commission.

[Ed. Note.—Cited in *State ex rel. People's Bank of Greenville v. Goodwin*, 81 S. C. 425, 62 S. E. 1100.

For other cases, see *Counties*, Cent. Dig. § 329; Dec. Dig. ⚡206.]

[5. *Counties* ⚡206.]

But such claim having been submitted to a referee selected by the claimant and the board of county commissioners, this referee was in effect an arbitrator, and his award against the validity of the claim is binding on the claimant.

[Ed. Note.—Cited in *State ex rel. People's Bank of Greenville v. Goodwin*, 81 S. C. 424, 62 S. E. 1100.

For other cases, see *Counties*, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. ⚡206.]

[6. *Mandamus* ⚡143.]

A delay of eight years in demanding by suit the payment of a county claim is such laches as will cause the court to refuse a writ of mandamus.

[Ed. Note.—Cited in *State ex rel. Gruber v. Knight*, 31 S. C. 84, 9 S. E. 692; *Milster v. Spartanburg*, 68 S. C. 35, 46 S. E. 539.

For other cases, see *Mandamus*, Cent. Dig. § 285; Dec. Dig. ⚡143.]

[7. *Counties* ⚡206.]

[Cited and disapproved in *State ex rel. People's Bank of Greenville v. Goodwin*, County Supervisor, 81 S. C. 427, 62 S. E. 1100, as to the point that an irregular audit of a claim by county commissioners is binding on the county until set aside.]

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 322, 323, 325-330; Dec. Dig. ⚡206.]

Mr. Chief Justice Simpson concurred in the result, and also Mr. Justice McIver upon the ground of laches.

Before Fraser, J., Colleton, February, 1885.
The opinion fully states the case.

Mr. W. Perry Murphy, for appellant.
Messrs. Edwards & Tracy, contra.

July 6, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On January 10, 1876, W. A. Paul, the then auditor of Colleton County, drew an order on the county commissioners of that county as follows: "To County Commissioners—Gentlemen: You will please pay to W. F. Myers, or order, the sum of three hundred and fifty dollars for clerical services rendered in this office from July 1, to November 20, 1875. The same to be paid out of funds appropriated for this office. Very respectfully, (Signed), W. A. Paul, county

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ty *auditor." This order was indorsed:

"February 4, 1876. Examined and approved. (Signed), Frank Youngblood, W. M. Shuler, Wm. A. Drille, chairman, county commissioners."

During the same year payments were made, aggregating \$170, leaving a balance unpaid in the summer of 1877 of \$180, when the claim was rejected by a "commission" appointed for Colleton County by the governor, under an act of the legislature entitled "An act to investigate and ascertain the actual bona fide indebtedness of the various counties in the State, and to regulate the manner of paying the same," 16 Stat., 311. It seems that at that time the claim went out of the list of county debts, and since then every board of county commissioners for Colleton County has refused to pay the claim as illegal and void. In 1883, another effort was made to ascertain all just claims against the County of Colleton. W. P. Howell, Esq., was appointed referee as to all disputed county claims, and this claim being submitted to him he rejected it, and refused to re-instate it in the list of the unpaid indebtedness of the county, on the ground that "the claim was for clerical services rendered in the county auditor's office. The A. A. of 1871 (Gen. Stat. of 1872, p. 78) provided for the payment of 'assistant assessors,' to enable the auditors to complete the assessment within the time provided by law. Even if Myers was an 'assessor,' he has been paid more than the amount he would have received as such. (Signed) W. P. Howell, referee."

After this, on September 24, 1884, application was made for a writ of mandamus, requiring the defendants, the present county commissioners of Colleton County, to pay the balance of said claim. The commissioners answered, denying the right of the petitioner to have the writ of mandamus upon various grounds, and among them, that the claim is wholly null and void, the services therein charged for not being allowed by law, or verified or itemized as required; that the claim had been rejected by the "commission" appointed by the governor, under the act of the legislature aforesaid, and by every subsequent board of county commissioners; "that the respondents are advised that it appears by reference to the records in the county auditor's office that more than one thousand dollars has already been paid for assistant assessors for the fiscal year against

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which said claim is charged;" *and denying that it is the plain legal duty of the respondents to pay said claim in preference to other claims, or to pro rate the claims against the county. This return was not traversed, and the facts stated must be taken to be true.

Judge Fraser granted the writ of mandamus, and the county commissioners appeal to this court, upon the following grounds: "1. Because it was not the plain legal duty

of the county commissioners to pay the relator's claim. 2. Because the relator, having submitted the bona fides of his claim to the board of county commissioners, appeal and not mandamus was the remedy. 3. Because the services charged for in relator's claim, to wit, county auditor's clerk, is not a proper charge against the county. The claim is null and void, and payment should not be compelled by mandamus."

Mandamus is a high prerogative writ—the highest known to the law—and according to all the authorities, only issues when there is a specific legal right or a positive duty to be performed, and when there is no other appropriate remedy. When the legal right is doubtful or the performance of the duty rests in discretion or there is other adequate remedy, the writ of mandamus cannot rightfully issue. *Ex parte Mackey*, 15 S. C., 322. Has the relator, Myers, a specific legal right, clear and beyond doubt, to require the present board of county commissioners to cause to be paid the balance of his claim as a plain ministerial duty resting upon them?

For obvious reasons the law is very particular in its requirements that the county commissioners shall audit none but strictly county claims; and that all accounts for labor performed, fees, services, and disbursements, &c., shall be made out in items, and be accompanied with an affidavit of a particular character, and that no allowance beyond legal claims shall ever be made. There can hardly be a doubt that this claim was not properly audited. There was no itemized account, but simply a written order of the auditor that the commissioners should pay the relator his check, \$350, "for clerical services rendered in his office from July 1st, to November 20th, 1875;" upon which order the commissioners simply made the endorsement, "examined and approved." This was not such an examination as is required

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by the word "audit." *Nor do we think that this is one of those cases in which it should be presumed that the officers did their duty, for the requirement of the law is positive, and there is no room for "presumption" as their action in the matter actually appears.

But this is not a proceeding to set aside the alleged audit, and, assuming that the claim was of such a character as to require the exercise of discretion and judgment on the part of the commissioners in making their audit, then their approval, although possibly irregular and erroneous, was quasi judicial and originally binding upon the county until set aside on the ground of mistake or fraud. *Richland County v. Miller, Clerk of Commissioners*, 16 S. C. 236. It does not, however, necessarily follow that the relator may at any future time or under any and all circumstances, have the writ of mandamus to enforce payment of his claim. "In such proceeding (mandamus) the de-

defendant may excuse himself by showing that the relator on his own showing is not entitled to the writ, or by traversing some material fact alleged, or by alleging fresh matter as an answer to the prosecutor's case." 2 R. & L. Law Dict., title Mandamus.

We do not think that the rejection of this claim by the "commission" appointed by the governor, under the "Act to investigate and ascertain the actual bona fide indebtedness of the several counties of the State, and to regulate the manner of paying the same" (16 Stat., 311), should be regarded as a conclusive adjudication of the illegality of the claim. In the case of *Wheeler v. County of Newberry* (18 S. C., 132), this court held that "the act of 1877 (16 Stat., 311), authorizing the appointment of a commission to ascertain the indebtedness of the several counties of the State, did not constitute such a commission a court; and therefore an adjudication by it, upon a claim against the county, not submitted to it by the claimant, is no bar to a subsequent action upon the claim." &c.

But it seems that in 1883, the relator and the then county commissioners made some arrangement by which this claim, along with other disputed or rejected county claims, was referred to M. P. Howell, Esq., as referee, and that he having decided that it was not a valid bona fide claim against the county, refused to restore it to the list of the unpaid

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indebtedness of the county. *The respondents claim that this was certainly a final decision and end of the matter, and that after and in the face of this second rejection, it would not be "their plain duty" to pay the same. The relator admits that under the advice of his counsel he submitted his claim to the referee, but insists that in so doing he reserved all his legal rights, and therefore he is not bound by the decision. He says, "that being delighted to secure his just dues, this claim has been (by advice of counsel and without prejudice to his legal rights) examined by M. P. Howell, Esq., a referee appointed by a subsequent board of county commissioners, and was by him rejected," &c.

It does not very clearly appear what were the precise terms of the reference, but we confess we do not see how the matter could be referred by consent, with the reservation claimed. That could hardly be called "a reference," which was to have no effect whatever, unless the decision was favorable. It seems to us that this voluntary reference was in the nature of a submission to arbitration, and that the parties were bound by the result. The reference to Mr. Howell was not to him as referee under the code, for no cause was pending between the parties. They, however, had a dispute, and they selected an indifferent person as the judge between them. "An arbitrator is a disinterested person to whose judgment or decision matters in dispute are submitted by consent

of parties." 3 Black. Com., 16. "Arbitration by consent is effected by a submission. If no action has been commenced concerning the matter in dispute, the submission takes the form of an agreement, called an agreement of submission. * * * An award is conclusive and binding on the parties unless set aside, or the matter is referred back to the arbitrators for re-consideration." &c. 1 R. & L. Law Dict., 103. "As between the parties the award of the arbitrator is the law of the case, and must be regarded as final and conclusive." *Mitchell v. De Schamps*, 13 Rich. Eq., 9.

But if in this there should be error, it is manifestly the policy of the law, in reference to the administration of county affairs, to keep separate and distinct the accounts of each fiscal year, chargeable as they are upon the levy for that year; and to that end great promptness is necessary in the presen-

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tation and settle*ment of county claims. Indeed, a recent act of the legislature (1882) declares that "all claims against a county, not presented in the fiscal year in which they are contracted, or the next thereafter, shall be forever barred." In this case the application for the writ of mandamus was not made until September, 1884, nearly nine years after the old board of commissioners endorsed the order of relator, eight years after the last payment thereon, and more than six years after its rejection by the "commission," and formal notice of refusal to pay it. Under these circumstances the respondents insist that "eight years having elapsed since the claim was declared invalid and not a part of the bona fide indebtedness of Colleton Comty, the relator has lost his right to the writ by his laches." The relator insists that there has been no laches on his part as shown by the fact that he has not slept over his rights; but during the whole period indicated continued to demand payment of his claim.

We do not understand that the question is in any way affected by protests, duns, and demands, short of the assertion of a legal right. The question is not whether the relator continued to make the claim, but whether during that time he failed to assert in the proper manner his legal rights. In this respect we are unable to distinguish this case from that of *The State ex rel. Cummings v. Kirby* (17 S. C., 564), in which it was said in regard to a state of facts precisely analogous: "There is no special limitation to a proceeding by mandamus, and the statute of limitations does not apply to such a proceeding. The rule, however, is that where there is unreasonable delay the court will, in the exercise of its discretion, refuse to issue the writ (citing the authorities). * * * It is a mistake to suppose, as was argued, that there was a continuing admission of the validity of these claims on the part of the

county commissioners, by placing them on the list of the past indebtedness of the county, for that allegation is distinctly denied in the return, which is not traversed. So, too, the return alleges that those claims were decided to be illegal as far back as 1875 (1877), and since that time payment of the same has been frequently refused. We are unable to discover any sufficient, or indeed any reason at all, for this extraordinary laches on the part of the relator, and there-

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*fore in the exercise of that discretion to which such an application appeals, we feel bound to refuse the writ prayed for, especially as the return, which is not traversed, and which therefore must be taken to be true, points out manifest errors in the accounts upon which these claims are founded," &c.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the application for a writ of mandamus refused.

Mr. Chief Justice SIMPSON concurred in the result; and Mr. Justice McIVER concurred upon the ground of the relator's laches in invoking his appropriate legal remedy.¹

¹This is the last of the cases of November Term, 1885.—REPORTER.

25 S. C. 106

Ex parte JOHNSON.

(April Term, 1886.)

[*Descent and Distribution* ⇨70, 72.]

A compromise agreed to by plaintiff in full discharge of all her interest in her father's estate approved by a judgment of the Circuit Court, included and released a fund derived and held by one of the executors as trustee for her under her father's will.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 81; Descent and Distribution, Dec. Dig. ⇨70, 72.]

Before Fraser, J., Laurens, December, 1885.

This appeal was heard only by Mr. Justice McIVER and Judge HUDSON, acting associate justice, the other two justices of this court having been of counsel in the cause. The opinion of this court, and the statement of the case in [*Dickerson v. Smith*] 17 S. C., 289, are sufficient for a proper understanding of the point involved in this appeal.

Mr. George Westmoreland, for appellant. Messrs. Holmes & Simpson and Ball & Watts, contra.

May 19, 1886. The opinion of the court was delivered by

Mr. Justice HUDSON. The cause in which the aforesaid petition is filed, came, before this court on appeal at the November term, A. D. 1881, and the judgment then rendered

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is *reported in 17 S. C., pp. 289-313. Pursuant to that judgment the Circuit Court for the County of Laurens, September 25, 1882, by an appropriate order, made the judgment of this court the judgment of the Circuit Court, and referred it to C. D. Barksdale, master, "to state the accounts of the executors of the last will and testament of John Smith, deceased testator, for the purpose of carrying into effect the judgment of the Supreme Court," &c.

At a subsequent date, the present petitioner, Henry S. Johnson, was appointed trustee of the estate of Lucy W. Dickerson arising under the will of her father, John Smith, in the place of the former trustee, W. T. Smith, who was relieved of the trust. All the parties necessary to the determination of the controversy concerning the rights, interest, and estate of Mrs. Lucy W. Dickerson, and her children, having been thus brought before the Circuit Court, the master was ready to proceed with the reference. The object of the original action was to recover of the executors of John Smith's will, and of the trustee of the portion of Mrs. Dickerson and her children, all the estate devised and bequeathed to them by said will. The purpose of the reference to the master was to ascertain this entire interest under the principles laid down in the aforesaid judgment of this court.

The reference promised to involve a tedious accounting, the result of which was reasonably uncertain. In this attitude of the litigation, the parties agreed upon a settlement by way of compromise, the terms of which were that W. T. Smith and John E. Smith, executors, should pay to the trustee of Mrs. Dickerson and children the sum of eighteen thousand dollars "in full for their interest in the estate of John Smith," by a day stated, and should pay also the costs of the action, with a proviso, that the settlement should be sanctioned and approved by the Circuit Court. On due report of this compromise it was approved by the court, and its terms fulfilled and performed by the said executors, one of whom, W. T. Smith, was former trustee of the share of Mrs. Dickerson and children.

After this compromise settlement had been thus fulfilled, the present trustee, Henry S. Johnson, filed his petition in said original cause in which he seeks to recover of the

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former trustee, W. T. Smith, seventeen hundred dollars of Georgia Railroad and Banking Company stock, which he alleges was in his hands as the property of said beneficiaries, and was not included in the agreement of compromise. This is resisted by the said executors, and upon a hearing on Circuit, that court adjudged that this stock was covered by the agreement, and dismissed the

petition. The trustee, Henry S. Johnson, has appealed to this court to reverse said judgment.

We concur with the Circuit Judge in holding, that the eighteen thousand dollars is expressed to be "in full" of the share of Mrs. Dickerson and children in the estate of John Smith, deceased, and that there is no reservation of a right to make any additional demand of the executors or of the trustee, W. T. Smith. The compromise was in full of their entire share in said estate, and necessarily included whatever was in the hands of W. T. Smith, trustee, as well as what was in the hands of W. T. Smith and John E. Smith, as executors. The demand of the trustee, Henry S. Johnson, is in violation of the compromise, and was properly refused by the Circuit Court.

Wherefore it is the judgment of this court, that the judgment of the Circuit Court be affirmed, and the appeal dismissed.

25 S. C. 108

Ex parte SMITH.

(April Term, 1886.)

[*Appeal and Error* ⚡S33.]

This was an application to restore to the docket of this court the case of *Dickerson v. Smith* (17 S. C., 289), and to have the same re-considered so far as it affected the interests of petitioner. But the petitioner having given no notice of appeal in that case, having joined in one of the exceptions then considered, and having taken no steps to bring his present claim to the attention of the court before the remittitur was sent down, his petition was refused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3232; Dec. Dig. ⚡S33.]

In this case Judges HUDSON and FRASER sat in the place of the CHIEF JUSTICE and Mr. Justice McGOWAN, who had been of counsel in the cause. The opinion states the case.

Messrs. F. P. McGowan and Geo. Westmoreland, for petitioner.

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*Messrs. Holmes & Simpson and B. W. Ball, contra.

May 31, 1886. The opinion of the court was delivered by

Mr. Justice FRASER. This is an application to restore the above stated case to the docket of this court, and "that this court re-consider the said case so far as it relates to the interest of Basil H. Smith." The judgment of this court, a re-consideration of which is here asked for, will be found 17 S. C., 289.

It appears from the case as reported, the brief used in that case at the hearing, and now on file with the records of this court, and other papers used at the hearing of this

application, that Basil H. Smith, the petitioner in this application, was one of the defendants in the cause; that the Circuit decree was filed February 27, 1881; that notice of the filing of the Circuit decree was served on some of the counsel on January 31, 1881, and on the others February 8, 1881; that notice of intention to appeal was served on the part of plaintiffs on February 5, 1881; that no notice of intention to appeal has been given by the petitioner, Basil H. Smith, who was one of the defendants; that on due application an order was made extending the time for making up the case and exceptions; that the exceptions on the part of plaintiffs were thereupon served March 31, 1881; that in one of these exceptions Basil H. Smith claimed to have joined, and it is stated as follows: "As to the settlement of the personal estate (and in these exceptions the defendant, Basil H. Smith, joins with the plaintiffs)." The case as prepared for the hearing in the Supreme Court was consented to by all the counsel in the case and contained the above stated exception. The judgment of the Supreme Court was rendered on the appeal and the remittitur has been duly filed with the clerk of the Circuit Court. In the judgment of the Supreme Court there is no order either affirming, reversing, or modifying the judgment of the Circuit Court as to Basil H. Smith.

There has never been any notice of appeal, or of an intention to appeal, on the part of Basil H. Smith, and unless there had been such notice within the ten days required, as allowed by law, the right of appeal will be lost. It is not necessary here to consider whether there may not be in any case a

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waiver of the failure *to serve the notice in time, either by express agreement or by not making it a ground of a motion to dismiss the appeal. Whenever, before the final judgment of this court, it is brought to its notice that the notice of appeal has not been given and has not been waived, the fundamental jurisdictional fact is wanting to give this court control over the case, and the appeal must be dismissed.

The appellant may put into his grounds of appeal whatever pleases him, and the respondent is without any remedy to prevent it. He can only submit his rights to the court on the hearing, and he is in no way estopped by anything contained therein. Basil H. Smith was not before the court as an appellant, and it is the proper and natural result from that fact that the Supreme Court should, as it has done, make no order in reference to his interest in the matters under litigation in the cause. If, however, it is assumed that Basil H. Smith was properly before the court as an appellant, he is concluded by the judgment of the court, just as much as he would have been if he had

been named and an express order made in reference to his interests.

Out of abundant caution, this court has adopted a rule allowing ten days after its judgment is filed with the clerk before a remittitur is sent down to the Circuit Court, in order that parties may file a petition for a re-hearing, and even a provision for staying the remittitur for this purpose. If the petitioner had any interests which were overlooked by this court, it is his misfortune that he has failed to move in the matter until now, when this court has no right to re-open the case.

It is, therefore, ordered that the motion be dismissed.

25 S. C. 110

STATE v. QUICK.

(April Term, 1886.)

[Bastards \S 83.]

There is no law authorizing the court to imprison a person convicted of bastardy.

[Ed. Note.—Cited in State v. Brewer, 38 S. C. 267, 16 S. E. 1001, 19 L. R. A. 362, 37 Am. St. Rep. 752.]

For other cases, see Bastards, Cent. Dig. \S 210; Dec. Dig. \S 83.]

Before Aldrich, J., Marlboro, February, 1886.

The opinion fully states the case.

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*Messrs. Townsend & McLaurin, for appellant.

No counsel contra.

June 17, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The appellant was convicted of bastardy and judgment was rendered "that the said defendant, Addison E. Quick, be committed to prison, to wit, to the county jail of Marlboro, there to remain until he shall enter into recognizance, with two good and sufficient sureties, in the penal sum of three hundred dollars conditioned for the annual payment of the sum of twenty-five dollars, for the maintenance of the said child till it reaches the age of twelve years, and so save harmless the said county aforesaid, and that the said recognizance be made payable in annual instalments, beginning with September 4, 1885, the day said child was born, and in default of defendant giving said recognizance, that execution for the said amount and for the costs do issue against the property of the said defendant, as in case of defendants convicted of misdemeanor."

From this judgment defendant appeals substantially upon the ground that the Circuit Judge erred in imposing the punishment of imprisonment in default of defendant entering into recognizance for the sup-

port of the child. The authorities cited by the counsel for appellant (General Statutes, section 1582, and State v. Glenn, 14 S. C., 134) fully sustain the ground taken by him. We are not aware of any statute, and none has been brought to our notice, which authorizes the imposition of punishment by imprisonment upon a person convicted of bastardy. On the contrary, the statute above cited expressly provides that a person convicted of this offence "shall be required to give the security or recognizance hereinbefore required, and in default thereof shall be liable to execution as are defendants convicted of misdemeanors."

The judgment of this court is, that the judgment of the Circuit Court, in so far as it requires the appellant to be imprisoned until he shall enter into the required recognizance for the maintenance of the child, be reversed.

25 S. C. *112

*SOLOMONS v. SHAW.

(April Term, 1886.)

1. A party now seeking the aid of the Court of Common Pleas on its equity side, must present a case over which the old Court of Equity would have had jurisdiction.

[2. Homestead \S 107.]

Where creditors obtained judgment in 1870 on debts contracted prior to 1868, and in 1873 their debtor became a bankrupt, reserving his homestead, and in 1875 obtained his discharge, such creditors could not invoke the aid of equity to subject this homestead to the payment of their judgments.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 165, 166, 168-172; Dec. Dig. \S 107.]

[3. Judgment \S 855.]

These creditors having had for several years a plain, adequate, and complete remedy at law, they cannot invoke the aid of equity to restore to them those rights which they lost through their own laches.

[Ed. Note.—Cited in Fowler, Foster & Co. v. Wood, 26 S. C. 173, 1 S. E. 597.]

For other cases, see Judgment, Cent. Dig. \S 1572; Dec. Dig. \S 855.]

Before Aldrich, J., Sumter, October, 1885. The opinion sufficiently states the case.

Messrs. Moises & Lee, for appellants.

Messrs. Haynsworth & Cooper and H. Frank Wilson, contra.

June 17, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Separate judgments were obtained by the testators of the plaintiffs on January 22, 1870, in the Court of Common Pleas for Sumter County against one John J. Shaw, ancestor of the defendants, in each of which was included attorneys' costs for the plaintiff, E. W. Moise. These judgments were upon demands which antedated the constitution of 1868.

Executions were issued, but no further steps taken for the collection of the debts. At that time the debtor, John J. Shaw, was in possession as owner of a certain tract of land, containing some two hundred and twenty-five acres, located in Sumter County, upon which it is alleged that these judgments had a valid and subsisting lien.

On November 26, 1873, John J. Shaw was upon his own petition adjudged a bankrupt; among the debts included in his schedule were these judgments. In 1875 he was discharged from all debts due by him on the

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said November 26, 1873. The tract of land above mentioned, of which he was in possession, was in some way excepted from the operation of the bankrupt proceedings by some claim of exemption made under the laws of the State. The above judgments were not proved in the bankrupt court, nor did the plaintiffs receive any dividend from the bankrupt assets. John J. Shaw died in 1878 intestate, leaving the defendants his heirs at law, who are in the possession of the above mentioned tract of land as said heirs.

Under this state of facts the action below was instituted on the equity side of the court in which the plaintiffs demanded judgment. 1st. That the lien creditors of the said John J. Shaw be called in; and 2d. That the said lands be sold and the proceeds be applied to the payment of said judgments, &c. His honor, Judge Aldrich, who heard the case, dismissed the complaint with costs, on the ground that plaintiffs having failed to enforce their judgments, while of active energy with lien on the land in question, and having failed to apply to the bankrupt court for relief during the bankrupt proceeding and before the bankrupt's final discharge, and having adequate remedy at law at one time, which had been lost by the laches and neglect of the plaintiffs, "there was now no equitable ground for the interference of the court."

The plaintiffs have appealed upon several exceptions, all of which, however, may be reduced into the single question, whether under the facts of the case it was error to deny the plaintiffs the equitable relief demanded? The decision of this question, in our judgment, has rendered the consideration of the other questions raised unnecessary. In giving the reasons, therefore, for our judgment, we will confine ourselves to the question, whether or not the facts of the case warranted the court on its equity side to take jurisdiction.

We remark, in the first place, that the destruction of the old Court of Equity and the combination of equity and common law principles within the jurisdiction of the same court, to wit, the Court of Common Pleas, has by no means extended or enlarged the class of cases in which equity principles may be administered. It is true that the mode of

reaching the court and of invoking its aid has been materially changed by the code, but this change has not given rise to any new eq-

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uity rights different from those formerly existing. On the contrary, these remain as before, and a party seeking the aid of the Court of Common Pleas now, on its equity side, must come in with a case over which the old Court of Equity would have had jurisdiction in former times, or he will fail. So that, to test a question of jurisdiction now in a given case, we have only to inquire whether the old court could have heard it. Let us apply this test to the case before us.

We find in the heading to the first chapter in Judge Story's Equity Jurisprudence the following expression: "Courts of Equity afford relief in regard to those rights, recognized by the jurisprudence of the State, where the remedy at law is doubtful, inadequate, or incomplete." And again, at section 33 of the same chapter, this eminent author condenses in a few words the foundation of equity jurisprudence, as understood and administered in the English and American courts, where he says: "Perhaps the most general, if not the most precise, description of a Court of Equity, in the English and American sense, is that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law." Under the old courts, then, two things were necessary to give them jurisdiction, to wit, a recognized right, one entitled to protection in the party seeking their aid, and the absence of power in the common law courts to give adequate and complete relief.

Were these two things present below in the case as presented in the pleadings? The plaintiffs sought by their action to have certain lands in the possession of the defendants sold and the proceeds applied to their judgments. Now, did they have a recognized right, either legal or equitable, to have these lands sold at the time their action was instituted? And, if so, was there no adequate remedy to this end existing at law? These two conditions must appear, or the action has no foundation in equity. Do they exist here? In a general sense every creditor has the right to make his claim out of the property of his debtor if necessary; that is, he has the right to reduce his claim to judgment, and by execution issued thereon make his money by sale of the debtor's property.

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*But this is not the right sought to be enforced here. The plaintiffs' claims have already been established and reduced to judgment, with the right to issue execution thereon, and they are not now seeking new judgments with the accompanying right to issue execution thereon, but they are seeking to sell the debtor's land by a direct order from the

court. Have they any such right? While, as we have said, a creditor in a general sense has the right to enforce his claim against the property of his debtor, or other wrong-doer, yet this can be done only through certain established forms and modes of procedure. For instance, it may be done by a direct order of the Court of Equity, if necessary, in all those classes of cases over which that court has acknowledged jurisdiction, such as trusts, frauds, mistakes, &c., creditors' bills, the sale of real estate in aid of personality, and the marshalling of assets in the estates of decedents, &c., or it may be done in a law court by means of judgment obtained and execution thereon.

It is not pretended that the right claimed here belongs to any of those cases mentioned above as of acknowledged equity jurisdiction. Does it belong to the last class? Have the plaintiffs the right to sell the land in question under their judgment, and are they seeking the aid of equity jurisdiction to enforce said sale because no adequate and complete means at law exist to that end? No, they have no such right. True, they once had it, but it has been lost, and they are seeking the aid of equity because of the fact of this loss. In other words, they are asking equity to reinstate their right, and then to enforce it, not by execution, but by a direct and independent order of sale. We know of no authority or established equity doctrine by which this can be done. We think, therefore, that the Circuit Judge was right in dismissing the complaint on the ground stated above.

And even if the case, as above, was doubtful, we think the case of *Williamson v. King* (McNull. Eq., 41) would be conclusive against the appellants. In that case it was said: "When a party has once had a plain and adequate remedy at law, which he has lost by his own laches, it may well be doubted whether this court will aid him with another remedy, of which he might have availed himself in the ordinary forum had he acted promptly."

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*Here the plaintiffs once had a legal right to sell Shaw's land, with a plain, adequate, and complete remedy for the enforcement of this right. This state of things existed for several years. The plaintiffs failed to act, and by this failure their right was lost. Under such circumstances we do not see that equity can aid them.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 116

ROBSON & SON v. SANDERS BROTHERS.

(April Term, 1886.)

[1. *Principal and Agent* ⇨78.]

A complaint alleging that defendant as agent of plaintiff had received certain goods for

sale and refused to account therefor, states a cause of action.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 169; Dec. Dig. ⇨78.]

[2. *Principal and Agent* ⇨78.]

Where an agent received fertilizers for sale under instructions to secure deferred payments by agricultural liens duly filed, which he neglected to do, the principal, instead of suing for this breach of agreement, may bring action simply for an accounting, in which case the burden is on defendant to account for all the fertilizers received by him for sale.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 172; Dec. Dig. ⇨78.]

Before Hudson, J., Sumter, February, 1885. The opinion states the case.

Messrs. Moises & Lee, for appellants.

Mr. Jos. H. Earle, contra.

June 17, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. About the 1st of March, 1882, the defendants, appellants, became the agents of the plaintiffs, respondents, for the sale of "Robson's C. & C. Fertilizer," under instructions to sell at \$37.50 per ton in cash, and \$47.50, or 475 lbs. of middling cotton, per ton, including freight, to be paid on the first day of November, 1882, all deferred payments to be secured by agricultural liens on the crops of the purchasers for the year 1882, and duly filed in the prop-

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erty office according to *law.* Under this agency the defendants received one hundred and ten tons of said fertilizer, which it is alleged in the complaint they sold or otherwise disposed of, accounting for six tons sold for cash, for twenty-one and 5-8 tons sold for cotton, and delivering to the plaintiffs agricultural liens for twenty-four and one-fourth tons thereof, leaving fifty-eight and one-eighth tons unaccounted for. The action below was brought to recover the value of said 58 1-8 tons, which is alleged in the complaint to be worth \$2,470.31, and for which the plaintiffs prayed judgment, the defendants having failed and refused to account therefor.

At the trial the defendants requested the presiding judge (his honor, Judge Hudson) to charge: "That if the jury believed that the defendants did not take or file liens in all cases, yet the plaintiffs can only recover such sum as may be shown to result in loss from the failure to take liens and record them, and this cannot be guessed at by the jury, but the plaintiffs must prove what damage resulted from such failure. The jury must have some proof that the taking and recording liens would have saved the plaintiffs from loss." His honor declined to charge as requested, and instead thereof charged as follows: "That if the jury concluded that the defendants were agents, with

authority to sell on credit only in cases where they should secure payment by note and lien duly recorded, and that they failed to take liens of purchasers and record the same; and if they further find that the plaintiffs have lost a certain number of tons in hands of the defendants, for which the defendants have not accounted, then the burden of proof is cast upon the defendants to show what has become of the unaccounted guano, and that the same has not been lost through their neglect or fault; in other words, they must show that they have not been at fault, but have complied with the terms of the agency," &c.

The appeal involves the correctness of the rulings of the judge, both as to the charge, and his refusal to charge defendants' request, and also his refusal to sustain an oral demurrer of the defendants, "that the facts stated in the complaint were not sufficient to constitute a cause of action;" and further, that his honor refused to grant a new trial.

As to the demurrer. Although the refusal

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to sustain it is *made a ground of exception, yet this exception has not been pressed or urged in the argument, and we suppose that it was abandoned by the appellants. Be this, however, as it may, we have considered the exception, and find nothing in it. If the allegations of the complaint be true, they certainly constitute a cause of action. An agency is alleged, and the receipt by the agents of a certain number of tons of "Robson's C. & C. Fertilizer," for a portion of which it is alleged that said agents have failed and refuse to account. What more was necessary to constitute a cause of action, we cannot see.

The main point, however, upon which the appellants rely, is the fact that his honor declined to charge, that it was necessary for the plaintiffs to prove damage resulting from the failure of the defendants to take and record agricultural liens in the sales of the unaccounted guano, and that the taking and recording said liens would have saved the plaintiffs from loss. It seems to us that the defendants, in raising this exception, have misconceived the gist and scope of plaintiffs' action. They seem to regard it as simply an action for the breach of an agreement on the part of the defendants to take and have recorded agricultural liens in such sales as they might make on a credit. If this was the cause of plaintiffs' action, and nothing more, then defendants' position would doubtless be correct. Because then it would have been incumbent upon the plaintiffs to prove the agreement, its breach, and that damage had resulted from said breach, as appears from the authorities cited and relied on by the appellants.

But plaintiffs' action was not founded upon, nor limited to, an agreement of the kind

suggested. It is true that it was a part of the instructions under which the appellants undertook the agency, that all deferred payments were to be secured by agricultural liens on the crops of the purchasers for the year 1882, and duly filed in the proper office according to law, and a failure to observe this instruction, resulting in damage to the plaintiffs, would have been actionable; but the plaintiffs do not complain of such failure as the cause of action. They allege that defendants received one hundred and ten tons of their fertilizer, to be sold under the instructions mentioned; that all of said fertilizer had been properly accounted for except

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58 1-8 tons, which had *not been accounted for, and which the defendants had refused to account for, the same being reasonably worth \$2,476.31.

The Circuit Judge, instead of confining the case to the question whether the loss to the plaintiffs had resulted from the failure on the part of the defendants to take and record agricultural liens, with the burden of proof on the plaintiffs, instructed the jury, "that if they found that the plaintiffs had lost a certain number of tons in the hands of the defendants, for which the defendants had not accounted, then the burden was cast upon the defendants to show what had become of the unaccounted for guano, and that the same had not been lost through their neglect or fault; in other words, they should show that they had not been at fault, but had complied with the terms of the agency." Regarding the action as an action for the value of the unaccounted for guano, which the plaintiffs alleged had been lost in the hands of the defendants, there was no error in the charge of the judge.

The judgment of the Circuit Court is therefore affirmed.

25 S. C. 119

LOWNDES v. MILLER.

(April Term, 1886.)

[1. *Appeal and Error* ⇨106.]

Where the Circuit Judge, in a cause properly before him, determined none of the issues involved, but recommitted the case to the referee to take and report further testimony upon the matters at issue, an appeal does not lie from such order of recommitment.

[Ed. Note.—Cited in *Jones v. Trumbo*, 29 S. C. 30, 6 S. E. 887; *Clayton v. Mitchell*, 32 S. C. 204, 9 S. E. 814, 10 S. E. 390; *Muckenfuss v. Fishburne*, 65 S. C. 574, 44 S. E. 77; *First National Bank v. Lee*, 68 S. C. 118, 46 S. E. 771; *Davidson v. Copeland*, 69 S. C. 49, 48 S. E. 33; *Jones v. A. H. Williams & Co.*, 89 S. C. 581, 72 S. E. 546.

For other cases, see *Appeal and Error*, Cent. Dig. § 729; Dec. Dig. ⇨106.]

[2. *Reference* ⇨101.]

It is within the discretion of the Circuit Judge to suspend the hearing of a cause for the

purpose of obtaining further testimony, if in his judgment the ends of justice require it.

[Ed. Note.—Cited in *Trustees of Wadsworthville Poor School v. Orr*, 33 S. C. 275, 11 S. E. 830; *Latimer v. Latimer*, 42 S. C. 209, 20 S. E. 159.

For other cases, see Reference, Cent. Dig. § 177; Dec. Dig. [§101](#).]

[3. *Appeal and Error* [§90](#).]

[An order, to be appealable, as "involving the merits of the action, or some part thereof," must be one decisive of the question involved, or of some strictly legal right of the appellant. If it leaves the point involved still pending and undetermined, it cannot be said to involve the merits or affect a substantial right.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 599; Dec. Dig. [§90](#).]

[4. *Appeal and Error* [§93](#).]

[An order affecting a substantial right, made in an action, when such order in effect determines the action, and prevents a judgment, from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part thereof, or any pleading in an action, may be reviewed in the Supreme Court.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 643; Dec. Dig. [§93](#).]

Before Fraser, J., Georgetown, May, 1885.
The opinion sufficiently states the case.

Messrs. Simonton & Barker and Walter Hazard, for plaintiff.

Mr. R. Dozier, contra.

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*June 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This action was brought by the plaintiff for the foreclosure of a mortgage of real estate, given to secure the payment of an ordinary money bond, the plaintiff claiming to be the owner and holder thereof, by various successive assignments from the original obligee and mortgagee. Upon hearing the pleadings it was referred to a referee "to inquire into the facts set forth therein and to report the testimony to this court." The case came on for a hearing before Judge Fraser on the pleadings and testimony taken by the referee, and he, after suggesting several difficulties and doubts as to the sufficiency of the testimony adduced to establish the several assignments through which the plaintiff claimed, but without deciding definitely any of the points suggested, declined to proceed to a consideration of the merits of the case, or to determine any of the issues in the action, and passed an order recommitting the case to the special referee, in which he directed that the referee "do take and report to this court such further testimony in reference to the various assignments as may be produced before him in the manner provided by law, by the plaintiff or defendant in this case."

From this order both parties appeal—the plaintiff, substantially, upon the ground that the testimony reported by the referee was

sufficient to establish his case, and that the Circuit Judge erred in declining to render judgment of foreclosure as prayed for in the complaint; the defendant upon the ground, substantially, that the testimony reported by the referee was insufficient in law to establish the plaintiff's right to the bond and mortgage, and therefore the defendant was entitled to a judgment dismissing the complaint, and the Circuit Judge erred in declining to render such judgment.

Before this court can enter upon any discussion or render any decision upon the points raised by the several grounds of appeal, we must first determine a preliminary question, which meets us at the very threshold, and that is whether we now have jurisdiction of such points. This depends upon the inquiry whether the order complained of is appealable. Section 11 of the Code of Procedure declares what shall be reviewable

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by appeal *to the Supreme Court, as follows:

"1. Any intermediate judgment, order or decree, involving the merits in actions commenced in the Courts of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior courts or jurisdiction, and final judgments in such actions. * * * 2. An order affecting a substantial right made in an action, when such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; or when such order strikes out an answer, or any part thereof, or any pleading in an action. * * * 3. A final order affecting a substantial right made in a special proceeding, or upon a summary application, in an action after judgment."

It is quite clear that the order of Judge Fraser does not fall under subdivision 3 of the section just quoted; and we think it equally clear that it does not fall under subdivision 2. For to bring it under that subdivision it must be not only an order "affecting a substantial right," but it must also, in effect, determine the action or prevent a judgment from which an appeal might be taken, or it must discontinue the action. Now, even if it should be conceded that the order appealed from does affect a substantial right, it is quite clear that it does not, in effect, determine the action, or prevent a judgment from which an appeal could be taken, for on the contrary, it determines nothing as to any of the issues in the case, and so far from preventing a judgment, its declared object is to obtain such further light as would enable the court to render judgment. Nor do we think it can be regarded as an order, either granting or refusing a new trial, for the trial of the issues was arrested before any conclusion, ei-

ther one way or the other, was reached. There has never yet been any trial of such issues, for though it was commenced, yet the Circuit Judge, in the exercise of his discretion, deeming it necessary for a proper determination of the questions involved to have further testimony, practically continued the case until such further testimony could be obtained.

The only remaining inquiry, therefore, is whether the order in question falls under subdivision 1 of section 11 of the Code. That subdivision embraces two classes: 1st. In-

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termediate judgments, orders, or decrees, involving the merits; and, 2nd. Final judgments. As the order here under consideration is, manifestly, not a final judgment, our inquiry is narrowed down to the question whether it is an intermediate order "involving the merits." It certainly is an intermediate order, but does it involve the merits of the action? Precisely what the words "involving the merits," as used in the section of the code above referred to signify, may be difficult to define so as to cover every possible case that may arise. In *Henderson v. Wyatt* (8 S. C., 112) it is said: "An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defence in the case in which the order is entitled." This language is quoted with approval in *Westfield v. Westfield* (13 S. C., at page 484), where it was applied to a case which, in principle, was like the case now under consideration. There, where a claim was presented under a proceeding to marshal assets, the Circuit Judge not being satisfied under the testimony offered, either to allow or reject the claim, recommitting it for further proof, and it was there said that such an order was not appealable. See, also, what is said in *Watkins v. Lang* (17 S. C., at page 21), where an order recommitting a report of the master for further testimony is spoken of as a matter resting in the discretion of the Circuit Judge, with which this court will not ordinarily interfere.

It is true that there may be cases in which an order recommitting a case to the master or referee for further testimony might present errors of law, involving the merits of the action, which would render it appealable; but we do not think that the present is such a case. We do not understand that Judge Fraser decided any of the questions involved in the case, but as a prudent precaution desired further testimony before proceeding to make any decision. This was a matter clearly within his discretion, and we cannot say that it was improperly exercised. The courts of this State have gone very far in recognizing the discretionary power of the Circuit Judge as to the time of receiving further testimony in a case, when it is deemed necessary to secure the ends of justice, some-

times permitting it to be offered even after a motion for non-suit has been made and

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argued, and even after *the opinion of the judge has been indicated in favor of the motion (*Browning v. Huff*, 2 Bail., 179; *Poole v. Mitchell*, 1 Hill, 404), and sometimes permitting a case to be withdrawn from the jury and continued with a view to obtain further testimony necessary to establish plaintiff's case. *Cook v. Cottrell*, 4 Strobl., 61, recognized in *Wilson v. Dean*, 21 S. C., 327. Indeed, as is said in *Mathews v. Heyward* (2 S. C., at page 247), the conduct of a case on Circuit, "so far as relates to the time of the introduction of testimony on the one side or the other, must be regulated by the particular circumstances then existing, of which the presiding judge can properly alone decide."

In the case now under consideration, the Circuit Judge, after hearing such testimony as had been taken by the referee and reported to the court, not feeling satisfied that he had sufficient testimony before him to enable him properly to determine the issues involved in the case, declined to pass upon the merits of the action, and practically continued the case for further testimony, and we do not think his order to this effect is appealable. This being so, it would be premature now to consider or determine the questions presented by the several grounds of appeal.

The judgment of this court is, that the order appealed from be affirmed.

25 S. C. 123

DOWIE & MOISE v. JOYNER.

(April Term, 1886.)

[1. *Pleading* ⚡32.]

A paper in form a promissory note, given for the purchase of fertilizers with the addition of an agreement to remit all cash collected and all notes taken for the sale of said fertilizers, was declared on as a promissory note. *Held*, that if the paper were not a promissory note, still the allegations of the complaint were sufficient, and the plaintiff on proof of the paper was entitled to recover.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 56; Dec. Dig. ⚡32.]

[2. *Bills and Notes* ⚡46.]

But the note was a promissory note, notwithstanding the additional collateral agreement. *National Bank v. Gary*, 18 S. C., 285.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 64; Dec. Dig. ⚡46.]

[3. *Pleading* ⚡367.]

If a defendant is in doubt as to the character of the claim made against him, the proper remedy is a motion to have the complaint made more definite.

[Ed. Note.—Cited in *Buist v. Melchers*, 44 S. C. 64, 21 S. E. 449.

For other cases, see *Pleading*, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. ⚡367.]

[This case is also cited in *Ruff v. Columbia & G. R. Co.*, 42 S. C. 119, 20 S. E. 27, and distinguished therefrom.]

Before Kershaw, J., Richland, July, 1885.

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*The opinion fully states the case.

Mr. A. J. Green, for appellant.

Mr. John T. Sloan, jr., contra.

June 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff brought the action below on a money demand, a statement of his cause of action in the complaint being as follows:

"Second, for a second cause of action: That heretofore the defendant, by one P. H. Joyner, her agent duly authorized thereto, made her promissory note in writing, dated on the 23rd day of April, 1884, at Eastover, S. C., and thereby promised to pay to the plaintiff, under the style and firm name of Dowie & Moise, eight hundred and twenty-six dollars and fifty cents, on the first day of November, 1884;" and after acknowledging certain credits thereon, which reduced the sum due to \$526.50, demanded judgment for that sum with interest at 7 per cent. per annum. For answer to this, the second cause of action: "The defendant denied each and every allegation of the complaint in regard thereto."

By consent, the case was referred to the master, with leave to either party to review by exceptions his conclusions. On the trial before the master, a paper, of which the following is a copy, was introduced by the plaintiff in support of the cause of action above, to wit:

"Collateral note for fertilizers. \$826.50. Eastover, S. C. April 23, 1884. On November 1, next, I promise to pay to the order of Dowie & Moise, eight hundred and twenty-six and 50-100 dollars at 1st Nat. Bank of Charleston, for value received in fertilizers. And to secure the payment of this note, I hereby agree on or before May 15, next, to pay to the said Dowie & Moise all moneys collected from sales of said fertilizers, and to deliver to them all notes given for purchase of same, inclusive of freights on said fertilizers, as said collateral security for the payment of this note. That on or about September 15, next, Dowie & Moise agree to return said planters' notes for collection for their account, and that I agree in their be-

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half to collect the same, *and remit to them the proceeds of such notes as may be collected, or transfer the original notes which, as trustees for them, we may be unable to collect in part or in full, and this agreement to remain in force until this obligation is satisfied. (Signed) P. H. Joyner, Agt."

Endorsements: "November 28, 1884. By cash, account of within note, two hundred dollars. December 26. By cash on account of the within note, one hundred dollars."

It was admitted that P. H. Joyner was the

agent of his wife, the defendant, and that he was authorized thereto and did sign the original paper of which the above is a copy. Moise, the plaintiff, proved that the payments above were made by remittances by Joyner as the agent of his wife, and also that certain planters' notes taken in the sale of the fertilizer had been returned to him by Joyner in pursuance of the agreement above.

At the conclusion of this, the plaintiff's testimony, the defendant moved for a non-suit on the ground that the paper above was not a promissory note. 1st, that it contained engagements for something besides the payment of money; and 2d, by implication was payable out of a particular fund. This motion was refused by the master. The defendant then offered in evidence several notes given by planters, found in the "Case," marked C., and finally it was admitted that the terms of the collateral agreement appended to the original note (the one sued on), as to the return of the notes and liens to Joyner for collection, and the return of the same to the plaintiff, had been complied with. The master reported that he had refused the motion for non-suit, because he held that the paper in question, notwithstanding the appended agreement, was a promissory note. He further reported as matters of fact that P. H. Joyner, as agent of defendant, had made said note, that all payments had been properly credited, and that the terms of the appended agreement had been complied with, as admitted above. And he found as conclusions of law, 1st. That plaintiff was entitled to judgment on the first cause of action as set forth in the complaint in the sum of \$227.95. 2d. That said full compliance with the terms of the appended agreement as to the return of notes and liens to the defendant for collection, and the return of the same

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by her to the plaintiff, did not operate as a discharge of defendant's liability on said promissory note. And 3d. That there is now due to the plaintiff on said note, \$526.50, with interest, &c., amounting to \$550.30, for which, with costs and disbursements, he recommended judgment.

The defendant excepted, claiming that the paper was not a promissory note, and on that account the non-suit should have been granted. 2d. That the master erred in his second finding of law, the same not being warranted under the pleadings or evidence. 3d. That he erred in finding that plaintiff was entitled to recover \$550.30 and costs; and 4th. That he should have found that the instrument sued on was a contract for the sale of fertilizers, and should have been declared on as such.

The Circuit Judge overruled these exceptions, and confirmed the master's report, giving the plaintiff judgment, in accordance with the recommendations and conclusions thereof. The appeal of defendant involves

the same questions as those raised in the above exceptions to master's report.

The defendant contends, first, that she was entitled to a non-suit as to the second cause of action, because there was no evidence of indebtedness on her part by promissory note as alleged in the complaint, the paper introduced and relied on to support said cause of action being a contract, instead of a promissory note. Suppose it be admitted that the paper in question is not a promissory note, but is, as contended by defendant, a contract, what, then, is the result? Does it amount to more than that the plaintiff has made a mistake in the name which he has given to the paper sued on? Is such a mistake fatal? Doubtless it would have been under the old practice and pleading, where forms even to technical accuracy had to be observed; but can it be so under the code? Besides the liberal spirit which pervades the entire code, especially as to defects in pleading, there are two sections which appear to be directly applicable to a question like this before the court, to wit: section 163 and section 180. In the first, it is provided that the complaint shall contain a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition. In the second it is provided that in the construction of a pleading for the purpose of determining its effect, its allegations shall be

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liberally construed, with *a view of substantial justice between the parties. In addition, see also section 181, where it is provided, that when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made definite and certain by amendment.

Now, when it is remembered that the plaintiff here supposed that he had a cause of action upon that portion of the paper in which defendant had promised to pay him a certain sum of money at a day certain, and that he had no cause of action on the appended or collateral agreement, there having been no breach thereof, does not his complaint contain a plain and concise statement of his cause of action, or, at least, may not the action be sustained by the liberal construction required by section 180, to the end that substantial justice between the parties shall be done? All that is required is, that the defendant shall not be taken by surprise, that he shall be fully informed of the character of the claim made against him, so that he can interpose his defence. If he is doubtful in this regard, section 181, above, enables him to have the complaint made more definite and certain. The defendant did not ask the aid of this latter section, and we can hardly suppose that she was uninformed as to the precise claim made upon her. In this view of the case it is not important what

name the plaintiff might have given the paper relied on, whether promissory note or contract. The substance was there, and, as it appears to us, was stated in a sufficiently plain and concise form to meet the requirements of the code on the subject of complaints.

The appellant cites the case of *Hogg v. Pinckney* (16 S. C., 387), wherein it is said: "That it is well understood that all the facts which the plaintiff is required to prove to entitle him to a verdict should be alleged in the complaint." This is good law, but we do not see that it conflicts with the principles herein above, or that it was violated in the case at bar. We think that the plaintiff alleged in his complaint all that it was necessary to allege, and the evidence introduced, we think, sustained his allegations in substance, even if it be admitted that he gave a wrong name to the paper sued on.

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*But did he make a mistake in this respect? That he did not, see the case of the *Bank v. Gary*, 18 S. C., 285, and the cases there cited. This case, in our opinion, fully sustains the position of the master, affirmed by the Circuit Judge, that the paper in question is a promissory note.

The other exceptions were not discussed by appellant, his appeal in the argument being based entirely upon the question involving the character of the paper sued on, to wit, whether or not it was a promissory note. We may say, however, that the errors alleged therein do not appear.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 128

BOATWRIGHT v. NORTHEASTERN RAILROAD COMPANY.

(April Term, 1886.)

[1. *Master and Servant* ⇨288.]

In action by a car coupler against a railroad company for injuries received by him while coupling cars, there being some testimony as to the failure of defendant to furnish proper couplers, and that the conductor of the train had ordered the coupling to be done with improper couplers, a non-suit should not be granted.

[Ed. Note.—Cited in *Doolittle v. Southern Ry.*, 62 S. C. 136, 40 S. E. 133.

For other cases, see *Master and Servant*, Cent. Dig. § 1086; Dec. Dig. ⇨288.]

[2. *Negligence* ⇨136.]

The question of contributory negligence involves an issue of fact that must be submitted to the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. ⇨136.]

[3. *Master and Servant* ⇨288.]

Whether the injury in this case resulted from a risk incident to plaintiff's employment was a question of fact that could not be passed upon by the judge on a motion for non-suit.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. ⇨288.]

[4. *Master and Servant* ⇨198.]

The conductor of a train is the representative of the company, and not a fellow-servant with other employes operating the same train, under his orders.

[Ed. Note.—Cited in *Hicks v. Southern Ry.*, 63 S. C. 576, 41 S. E. 753; *Rhodes v. Same*, 68 S. C. 506, 47 S. E. 689; *Cain v. Atlantic Coast Line R. Co.*, 74 S. C. 99, 54 S. E. 244; *Reed v. Southern Ry.*, 75 S. C. 171, 55 S. E. 218.

For other cases, see *Master and Servant*, Cent. Dig. § 502; Dec. Dig. ⇨198.]

[5. *Master and Servant* ⇨198.]

The doctrine of the case of *Murray v. South Carolina Railroad Company* (1 McMull., 385 [36 Am. Dec. 268])—that a master is not liable to his servant for an injury caused by the negligence of his fellow-servant—has not been modified by subsequent decisions in this State, but is still recognized law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 503; Dec. Dig. ⇨198.]

[6. *Master and Servant* ⇨198.]

The Circuit Judge erred in charging the jury that "the employe does not take the risk of accident happening from the incompetency, ignorance, or culpable misconduct of his co-laborer."

[Ed. Note.—Cited in *Whaley v. Bartlett*, 42 S. C. 472, 20 S. E. 745; *Hicks v. Southern Ry. Co.*, 38 S. E. 729, 730, 866.

For other cases, see *Master and Servant*, Cent. Dig. § 503; Dec. Dig. ⇨198.]

[7. *Master and Servant* ⇨198.]

The engineer and coupler of a freight train are fellow-servants, and for injury to one caused by the other's negligence, the master is not liable.

[Ed. Note.—Cited in *Pagan v. Southern Ry.*, 78 S. C. 415, 59 S. E. 52.

For other cases, see *Master and Servant*, Cent. Dig. §§ 493-514; Dec. Dig. ⇨198.]

Mr. Justice McGowan concurred in the result.

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*Before Aldrich, J., Sumter, October, 1885.

This was an action by Sam Boatwright against the Wilmington, Columbia & Augusta Railroad Company and the Northeastern Railroad Company, lessees of the Central Railroad Company, for an injury done to him by a train of freight cars on the Central Railroad at Sumter while he was coupling two cars. The plaintiff was a brakeman and car coupler of the train. The accident occurred on the night of September 29, 1883, and this action was commenced September 10, 1885. Other matters are stated in the opinion of the court.

Mr. J. H. Rion, for appellants.

Messrs. Moises & Lee, contra.

June 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff brings this action to recover damages for an injury sustained by him while in discharge of his duty as car coupler on the Central Railroad of South Carolina, a road under a lease to, and operated by, the defendant companies.

The allegation in the complaint substantially was that by reason of negligence in running the cars on said road, and by reason of the failure of defendants to supply him with proper appliances for the performance of his duties as car coupler, he sustained the injury complained of.

The plaintiff offered testimony tending to show that two kinds of couplers were used on the road, one a straight link, proper to be used when the cars to be coupled were of the same height, and another, a crooked link, called a goose-neck, to be used in coupling cars of different heights, as safer than the straight link; that upon the occasion when the injury was sustained the plaintiff had applied for and failed to obtain goose-neck couplers for the train upon which he was employed, and that when directed by the conductor to couple some cars at Sumter, finding that they were of unequal heights, he said to the conductor, "I don't think I can make this coupling. I'll go back and see if I can find a goose-neck anyhow, because it's

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a high and low car, and I *don't think I can make the coupling." The conductor replied: "Be in a hurry." Failing to find a goose-neck coupler, he reported the fact to the conductor, and said: "I don't know what to do." To which the conductor replied: "Sam, you had better go in and make that coupling anyhow." Plaintiff said: "I don't like to do it," but he said: "I'll make them come back slow." Whereupon plaintiff replied: "All right, Cap; sign them back slow." The plaintiff then went in to make the coupling, and had his hand so crushed as to necessitate amputation just above the wrist.

At the close of the plaintiff's testimony, defendants' counsel moved for a non-suit upon two grounds: I. Because the evidence had disclosed the fact that the injury resulted from the negligence of the conductor, who was a fellow-servant of the plaintiff. II. Because the evidence disclosed the fact that the injury resulted from plaintiff's own negligence, and from the hazards incident to his employment.

The motion was refused and the defendants introduced testimony tending to show that the plaintiff's account of the matter was not correct; that the conductor did not insist upon plaintiff's making the coupling against his will; that the plaintiff had not used the proper efforts to obtain the required kind of coupler; and that if he had, he could have obtained it, and that there was really no more danger in making the coupling with a straight link than with a goose-neck, although there was always some danger in making a coupling with either kind of coupler. The defendants also introduced testimony tending to show that plaintiff, very soon after the injury was received, attributed the disaster to the fact that the en-

gineer of the train moved it back too quickly and caught his hand.

The jury having rendered a verdict in favor of the plaintiff, defendants appeal upon the following grounds:

1. Because the judge refused to charge: "That if the jury believe that the injury to the plaintiff was caused by the negligence of the engineer, or co-employé of the plaintiff, the defendants are not liable."

2. Because he refused to charge: "If the jury believe that it was the duty of the conductor to see that his train was furnished

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*with all necessary and suitable appliances and instruments, and that all such appliances and instruments were kept constantly on hand by the defendants, at a convenient place, subject to the order of the conductor, and that on the occasion of the plaintiff's injury the conductor failed or neglected to procure, call for, or order the said appliances or instruments, and that such injury resulted from the use of an unsafe or unsuitable appliance, then the plaintiff cannot recover."

3. For refusing to charge: "That the plaintiff and conductor were fellow-servants."

4. For error in charging the jury: "The employé does not take the risk of accident happening from the incompetency, ignorance, or culpable misconduct of his co-laborer. When railroads were in their infancy very large franchises were granted in their charters by the legislature, and very liberal constructions were ruled by the courts. Hence, in Murray's case a stringent rule was laid down by the court, which was generally adopted in this country and England. That rule did not give the employé protection against the corporation if the injury resulted from the carelessness, incompetency, or culpable neglect of his co-laborer. But in the course of time, as these corporations increased in number, wealth, and power, developing the immense resources of the country, and engaged in their service an army of employes—engineers, firemen, conductors, &c.—it became not only apparent, but eminently just, that this multitude of workers and bread-winners should be protected against the recklessness and incompetency of those engaged in the same service. Hence that rule has been modified, and I now charge you that the railroad corporation is not only bound to provide the necessary machinery and materials to run their trains, due regard being had to the safety of their employes, but it is also responsible to the employé if he is injured by the want of these, or by the incompetency and criminal negligence of the officers of the road, whose orders he is bound to obey."

5. For error in charging: "That the employé does not take the risk of accident happening from the incompetency, ignorance, or culpable misconduct of his co-laborer."

6. For error in charging: "That the rule

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laid down in *Murray v. So. Ca. R. R. Co.* (1 McMull., 385 [36 Am. Dec. 268]) has been modified in this State."

7. For error in refusing the motion for non-suit on the grounds stated above.

Let us proceed to the examination of these several grounds of appeal, though not exactly in the order in which they appear in the record. First, as to the motion for a non-suit. This motion, though nominally based upon only two grounds, really presents four questions: 1st. Whether the injury complained of resulted from the negligence of the conductor? 2d. Whether the plaintiff and the conductor were fellow-servants? 3d. Whether the injury was the result of plaintiff's own negligence? 4th. Whether it was the result of one of the hazards incident to plaintiff's employment? The first was manifestly a question of fact which the judge could not undertake to decide on a motion for a non-suit. Whether the injury sustained by the plaintiff was to be attributed to the fault or negligence of the conductor in ordering the plaintiff to couple the cars with a straight link, in the absence of a safer kind of coupler, or whether the want of the safer kind of coupler was due to the negligence of the conductor, or to the negligence of Milligan, who was in charge of the "supply house" in Charleston, where such articles were kept for the use of the trains, were questions of fact upon which it was not competent for the Circuit Judge to pass. Until, therefore, these questions of fact were solved, the second question presented by the motion for a non-suit could not arise, and need not now be considered.

The third question, that of contributory negligence on the part of the plaintiff, has been so frequently held in this State to be a matter of defence, which cannot be considered on a motion for non-suit, that, whatever may be the rule elsewhere, it is scarcely necessary to consider the question. The only question which can be considered by the court upon a motion for a non-suit is, whether there is an entire failure of testimony to sustain all or any one of the points necessary to be established in order to enable the plaintiff to maintain his action. Unless there is such a failure the motion must be refused, for where there is any testimony pertinent to, or tending to sustain the plaintiff's case, such testimony must be submitted to the jury to pass upon its truth

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*and determine its sufficiency. So that even where the testimony adduced by the plaintiff may tend to show contributory negligence on his part, as well as negligence on the part of the defendant, the judge has no power to grant a non-suit, for that would involve the necessity of his passing upon the truth of the testimony tending to show contributory neg-

ligence, as well as upon its sufficiency for that purpose, both of which are under our constitution exclusively within the province of the jury, and to that tribunal, therefore, such questions must necessarily be submitted.

The fourth question presented by the motion for a non-suit clearly involved a question of fact which the Circuit Judge could not decide upon a motion for non-suit. It is undoubtedly true that an employee assumes all the risks usually and ordinarily incident to his employment, but the material inquiry in this case was whether such risks had not been enhanced by the failure of the defendants to supply the plaintiff with suitable appliances for doing the work which he was employed and required to do. We think it clear, therefore, that there was no error in refusing the motion for a non-suit.

We propose next to consider the second and third grounds of appeal, both of which are based upon the proposition that the plaintiff and the conductor were fellow-servants, and therefore that the defendants cannot be held responsible for any injury sustained by the plaintiff by reason of the negligence of the conductor. To this proposition we cannot give our assent. The rule as settled in this State by the case of *Gunter v. Graniteville Manufacturing Co.*, 18 S. C. 262 [44 Am. Rep. 573], recognized in several subsequent cases, seems to be this: Where the master delegates to any officer or agent the performance of duties which the master owes to his employes, such officer or agent, by whatever name he may be called, becomes the representative of the master. His acts are the acts of the master, and his negligence is the negligence of the master. See *Couch v. Railroad Company*, 22 S. C., 557; *Calvo v. Railroad Company*, 23 Id., 526 [55 Am. Rep. 28].

Testing this question by this rule, it seems to us clear that unless the conductor of a railroad train is, while in charge of the train, the representative of the company, then the train is being run without any representa-

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tative. He has entire charge of the train and every employe on it is subject to his orders. This view is sustained by the Supreme Court of the United States, in the case of the *Chicago, Milwaukee & St. Paul Railway Company v. Ross* (112 U. S., 377 [5 Sup. Ct. 184, 28 L. Ed. 787]), where, after reviewing the cases on the subject, Mr. Justice Field, uses this language: "We agree with them in holding (and the present case requires no further decision) that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and therefore that, for injuries resulting from his negligent acts, the company is responsible.

If such a conductor does not represent the company, then the train is operated without any representative of its owner."

The first, fourth, fifth, and sixth grounds of appeal will be considered together. We think the Circuit Judge was in error in supposing that the rule as laid down in *Murray v. S. C. R. R. Co.* (1 McMull., 385 [36 Am. Dec. 268]), has been modified in this State. That case simply established the general proposition that a master is not liable to his servant for an injury caused by the negligence of his fellow-servant, and we do not understand that this general proposition has been in the slightest degree modified by our court. All the subsequent cases, while recognizing the correctness of the general proposition, have turned upon the question whether, in the particular case under consideration, the injury sustained by the plaintiff was occasioned by the negligence of one who stood in the relation of a fellow-servant to the plaintiff, or whether the injury complained of resulted from the negligence of some subordinate officer or agent of the master, who was not a fellow-servant of the plaintiff, but, on the contrary, a representative of the master. In *Murray's* case, however, no such question was raised or considered. There the action was by a fireman against the railroad company for an injury sustained by reason of the negligence of the engineer, and it was assumed throughout the case that they were fellow-servants, and the only question considered or determined in that case was, whether a master was liable to a servant for an in-

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jury caused by the negligence of a fellow-servant, and it was determined that in such a case the master was not liable.

This, we understand, is yet the law of South Carolina, and that whenever it is ascertained that the servant of a railroad company, or any other employee, has been injured by the negligence of one of his fellow-servants, no recovery can be had against the employer for such injury by such servant, unless it is made to appear by the plaintiff that the employer has himself been guilty of negligence in selecting his servants, or in retaining them in his employment after he knows, or has an opportunity of knowing, that the person whose negligence has caused the injury is not a suitable person to be employed in the service in which he was engaged at the time the injury was sustained. It follows from this that as one is presumed to have assumed all the risks naturally and reasonably incident to the employment which he voluntarily undertakes, one of which risks is, where numbers are employed, the negligence of his fellow-servants, that the Circuit Judge erred in charging the jury that, "The employee does not take the risk of accident happening from the incompetency, ignorance, or culpable misconduct of his co-laborer."

So, too, upon the same ground we think the judge erred in refusing to charge, "That if the jury believed that the injury to the plaintiff was caused by the negligence of the engineer, or co-employee of the plaintiff, the defendants are not liable." If the plaintiff and the engineer were fellow-servants, as we think they were, then, upon the principles above stated, the charge should have been given as requested. The plaintiff and engineer were both co-operating, and necessarily co-operating, to bring about the same end—the coupling of the cars. They were both acting under the common directions of the conductor. The engineer was required to move back the train by the agency of his engine, and the plaintiff was required to take position between the cars as the train was moved back, so as to secure them together by the coupling apparatus, and it seems to us that these two employees, acting under common orders to secure the same result, the action of both being necessary to that end, must be regarded as fellow-servants. According to the testimony, the business of coupling cars is, at best, attended with more

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or less danger, one material *element manifestly being the manner in which the train is moved back, and when the plaintiff undertook this employment he must be regarded as having assumed the risk arising in every case from a want of proper care on the part of the engineer in moving back the train; and if his injury was the result of the want of such care on the part of the engineer, he should not be entitled to recover from the defendants.

It is true that the case has been argued principally under the view that the injury sustained by the plaintiff was the result of the failure to supply him with proper appliances to make the coupling, but still the point which we have just been considering is made in the grounds of appeal, and we have therefore felt bound to consider it, especially as one of the allegations in the complaint is that the injury was caused by "carelessness and negligence in running and managing said train of cars," and there is some testimony to the effect that plaintiff, very soon after the accident occurred attributed it to the fact that the engineer had moved the train back "too quickly and caught his hand."

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the case be remanded to that court for a new trial.

Mr. Chief Justice SIMPSON concurred.

Mr. Justice MCGOWAN. It may be that the underlying principle announced in the case of *Murray v. Railroad Company*, is, that the company is not liable for damages re-

sulting from the negligence of one who is strictly a fellow-servant. But it seems to me, that some of the doctrines of that early case have been properly explained, limited, and modified by the course of modern decisions. I concur in the result.

25 S. C. 136

COOL v. CUNNINGHAM.

(April Term, 1886.)

[*Bills and Notes* ⇐92.]

Where a party purchased from a patentee the exclusive right to sell, in a certain county, the article patented, the patentee being under no obligation to furnish such article for sale, the notes given for the purchase money were without consideration and not binding upon the maker.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 166; Dec. Dig. ⇐92.]

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*Before Fraser, J., Laurens, December, 1885.

This was an appeal from the following decree:

This case was heard by me at the extra term of the court held for Laurens in December, 1885. Without relying on any of the testimony to which exception was taken, I find the following facts:

This action has been brought to foreclose a mortgage given by the defendant to secure four promissory notes bearing date March 31, 1876—one for \$450, due at three months, one for \$400, due at six months, one for \$400, due at nine months, and one for \$400, due at twelve months. These notes were payable to the McCall Manufacturing Company, or order. The mortgage bears the same date. The execution of the notes and mortgage is admitted, and the transfer of the notes to the plaintiff is admitted in the answer. And they were transferred to plaintiff in some way on account of his "share" in the company, of which he was one of the stockholders. It is by no means clear that he would have taken the notes discharged of the equities between the original parties, under these circumstances, even if they had been transferred to him before maturity. Whether it was an incorporated company or not, he stood as a privy in interest at the making of the notes. I take it, however, to be a fact as stated by the defendant, that these notes were transferred to plaintiff after they became due, and plaintiff holds them subject to all the equities between the McCall Manufacturing Company and John Cunningham, the defendant. It cannot affect the case whether there has ever been any protest for non-payment.

The defence set up is failure of consideration. The McCall Manufacturing Company had become the owner of certain patents for

the Rhind Patent Safety Lamps and established a manufactory for them in New York. The consideration of these notes, as set out in the deed of assignment by the said company, delivered to the defendant contemporaneously with the execution of the notes and mortgage, was "the sole and exclusive right to sell and dispose of all goods made by the McCall Manufacturing Company under said letters patent in and for the County of Kings, in the State of New York, and in

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no other places." *This deed shows that this consideration extended in all to \$1,600, and the parol testimony shows that the remaining \$50 incorporated in the first note for \$450 was in payment for goods or lamps to be furnished to the defendant to enable him to commence the business of selling under the assignment. So much of the testimony as goes to show that the patent was of no value in use, and that lamps made with the alleged improvement were unsalable is irrelevant, as a purchaser of these patent rights takes title, as to these matters, at his own risk, unless there is some guaranty as to them. There is none here.

My difficulty, however, as to the consideration in this case is not as to the value or salability of the lamps, but that what is called in this deed by the company to the defendant, "the exclusive right to sell and dispose of," seems to be really no right at all. There is no mutuality or reciprocity of obligation. The company never bound itself to sell the lamps to the defendant at any reasonable price, or at any price at all. It did not obligate itself to transfer the right to manufacture these lamps to other parties, or not to cease the manufacture of them, and not allow any other parties to engage in it. So that it would have been impossible for the defendant to have enjoyed any benefit from sales of lamps. The company, however, continued to make lamps. But if defendant had applied for lamps and tendered a reasonable and fair price for them, I do not see any remedy for a refusal to sell them to him. The company was under no contract, as far as appears from the evidence, to sell them, and neither a suit for damages or specific performance would have availed him. See *Chit. Cont.*, 15, 46. If, however, in fact, the company had gone on and furnished the lamps at reasonable prices paid for them, the agreement made by the defendant, though originally nudum pactum, might have been made good, at least to such extent as the defendant had enjoyed benefit under the deed of the company to him. See *Miller v. McKenzie* [95 N. Y. 575] 47 Am. Rep., 85, a New York case.

To my mind it seems to have been the duty of the plaintiff in this case to have shown the facts which could convert what, on its face, is an invalid claim to a valid one, and to show either that the defendant did enjoy

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benefit under the deed, or, then, *that it was his own fault that he failed to do so. The burden of proof on this point was on the plaintiff. In the sharp conflict of testimony as to who was to blame for the defendant's failure to receive any benefits under the arrangements and the clear proof that in fact he did not receive any benefit, I must hold against the plaintiff, whose duty it is to have, at least, a preponderance of testimony. I am inclined to think, however, that whatever may have been the value of these lamps, the company was too exacting to allow defendant to reap any benefit from their sale. I therefore hold that the collection of these notes cannot be enforced, except as to the \$50 included in the note for \$450, for the price of lamps to have been furnished to defendant to commence business, and as to so much of this sum as is due, plaintiff is entitled to foreclose his mortgage, and it is so ordered and adjudged.

It is ordered that it be referred to the master to inquire and report how much goods or lamps were furnished by the McCall Manufacturing Company to the defendant on account of said \$50, and that he report such sum and interest thereon in order that further orders may be made thereon. The master may use the testimony heretofore taken in this case, with the right to the parties to introduce such other competent testimony as they may desire.

From this decree plaintiff appealed upon the following exceptions:

I. Because his honor erred in holding that the notes and mortgage described in the complaint herein were transferred to the plaintiff after they became due in some way on account of his share in the McCall Manufacturing Company, and that plaintiff holds them subject to all the equities between the said company and the defendant.

II. Because his honor erred in holding that plaintiff was a stockholder in the McCall Manufacturing Company, and was a privy in interest at the making of the notes.

III. Because his honor erred in holding that there was no mutuality or reciprocity of obligation between the McCall Manufacturing Company and the defendant, and that the agreement was nudum pactum, and the right granted defendant under said agreement was no right at all.

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*IV. Because his honor erred in holding that it was the duty of plaintiff to show that the defendant did enjoy benefit under the deed of McCall Manufacturing Company, or that it was his own fault that he failed to do so, and that the burden of proof on this point was on the plaintiff.

V. Because his honor erred in holding that the defendant did not receive any benefit from the sale of lamps under the assignment of the McCall Manufacturing Company, and

it was because the said company was too exacting of him.

VI. Because his honor erred in holding that the collection of the notes complained upon cannot be enforced, except as to the \$50 included for the price of lamps.

Mr. W. H. Martin, for appellant.

Messrs. Cuninghame & Harris, contra.

June 25, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. (Omitting his statement of the case.) We have confined ourselves to the consideration of the questions raised in these exceptions. The first two involve questions of fact principally, and under the rule that findings of fact, even when they are within our cognizance, will not be disturbed, unless wholly unsupported by the evidence, the findings here must stand, as we have not found them thus unsupported.

The third brings up the main question in the case, and it is a question of law involving the construction of the contract between the parties. The Circuit Judge held that there was no mutuality or reciprocity of obligation between the parties, and therefore that the agreement was a nudum pactum. The defendant bought the exclusive right to sell the lamps in question in a certain county in the State of New York, which lamp the McCall Manufacturing Company alone had the right to manufacture. The enjoyment of this exclusive right depended, therefore, on the McCall Company furnishing him with the lamps needed for sale. If they were under no obligation to furnish the lamps, the right of the purchaser was the merest bagatelle. The right to sell an article, without the power to procure it for sale, amounts to nothing.

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*We cannot say what may have been the intention of the parties outside of their written agreement, or how far the McCall Manufacturing Company would have supplied the defendant, or how promptly or how free from difficulty. We must construe the contract by its terms, and looking at the deed from that standpoint, there is certainly no mutuality or reciprocity of obligation in it. The company did not bind itself to furnish a single lamp to the defendant. In fact, it failed to bind itself to do anything. It only assigned the exclusive right to sell, retaining the right to prevent sale by failing to stipulate to furnish the article to be sold, and with no power in the defendant to compel it to furnish said article. Such being the construction of the agreement, we think the Circuit Judge was correct in holding it to be a nudum pactum, and therefore in declining to enforce collection of the notes, except as to the \$50.

4. No doubt that had the plaintiff shown that defendant was furnished with lamps by

the company, and the defendant enjoyed the benefit of the contract, the plaintiff would have been entitled to recover, but this was not shown, and we agree with the Circuit Judge, that under this peculiar agreement the burden of showing this was upon the plaintiff. The 5th involves a question of fact. The 6th is disposed of by what has already been said.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 141

WALKER v. COLUMBIA & GREENVILLE R. R. COMPANY.

(April Term, 1886.)

[1. *Railroads* ⇨441.]

In action against a railroad company to recover damages for killing stock by a passing train, the plaintiff proved the fact of the killing and their value. *Held*, that defendant could not claim a non-suit.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1578; Dec. Dig. ⇨441.]

2. The decision of Danner v. South Carolina Railroad Company (4 Rich. 330 [55 Am. Dec. 678]), stated, affirmed, and approved; and held not to have been modified by statutory changes in the stock law.

[Ed. Note.—Cited in *Joyner v. South Carolina Ry. Co.*, 26 S. C. 61, 1 S. E. 52.]

[3. *Railroads* ⇨405.]

The care required of railroad companies as against trespassers is not so great as in other cases; but if stock trespassing upon a railroad track are killed through the negligence of the company's agents, the railroad company are liable for damages.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1393-1398; Dec. Dig. ⇨405.]

[4. *Appeal and Error* ⇨1005.]

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*The decision of the Circuit Judge on a motion for new trial, that the preponderance of the evidence is not opposed to the verdict, is final and cannot be reviewed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3872; Dec. Dig. ⇨1005.]

[5. *Evidence* ⇨155.]

Defendant's witnesses having testified that the stock killed could not have been seen within the distance necessary for stopping the train, the plaintiff was properly permitted to introduce testimony upon these points in reply, and defendant could not reply to such testimony.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 456; Dec. Dig. ⇨155.]

Before Kershaw, J., Richland, July, 1885.

This was an action by J. F. Walker against the Columbia & Greenville Railroad Company, commenced in January, 1885, to recover damages for three mules and two colts, alleged to have been negligently killed by a freight train of the defendant on December 26, 1884. The plaintiff proved the killing of the stock on the railroad track and their value, and that at the place where killed, the railroad ran through a pasture used by

plaintiff and an adjoining land owner. Defendant then moved for a non-suit, which was refused.

The character of the testimony for the defence and other matters are stated in the opinion of this court. The jury found a verdict for \$881.30 in favor of plaintiff, the amount claimed with interest to date of verdict. Defendant gave notice of motion for new trial on the minutes, whereupon plaintiff's attorney entered an order remitting the interest, leaving the judgment for \$850. The motion for new trial was then refused, the judge saying: "There was some evidence to sustain the jury if they believed it. It conflicted with Duren's statement, but they had the right to take the one and reject the other, and I cannot, whatever would have been my deduction from the testimony, invade their province and set up my opinion on a question of fact against theirs. Moreover, the jury were given an opportunity of investigating the matter of distances and possible length of view on the road at that point by an inspection of the locus in quo. They were not misled by the charge of the presiding judge, and the new trial is refused."

The defendant appealed upon the following exceptions:

I. Because his honor erred in refusing the defendant's motion for a non-suit in said cause.

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*II. Because his honor erred in refusing to allow defendant to rebut plaintiff's evidence as to the date and locality at which stock had been killed on former occasions near the scene of the killing, which is the cause of the present action, on the ground that it was plaintiff's evidence in reply, when in fact it was new matter.

III. Because his honor erred in refusing to allow defendant to rebut and reply to plaintiff's evidence as to stopping of trains and the distance in which they were stopped, on the ground that it was in reply, whereas it was new matter, which the defendant had a right to reply to, and his honor should have so held.

IV. Because his honor erred in instructing the jury that they could find in addition to what they believed the value of the stock killed, the interest upon said value from the date of the killing to the date of the verdict.

V. Because his honor erred in admitting plaintiff's evidence in reply, which evidence was not properly in reply, but was in fact matter only admissible in chief.

VI. Because his honor erred in refusing to set aside the verdict as found by the jury, and to grant a new trial.

Mr. John C. Haskell, for appellant.

Messrs. F. W. McMaster and Andrew Crawford, contra.

June 25, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON: The plaintiff recovered a verdict against the defendant for \$850, the value of three mules and two colts killed on the track of defendant's railroad in Richland County. The defendant appealed, assigning error to the presiding judge, in substance as follows: 1. That he erred in refusing defendant's motion for non-suit. 2. That he erred in refusing defendant's motion for a new trial. 3. That he erred in permitting the plaintiff to introduce new matter in reply to defendant's testimony. And 4. That he erred in refusing to permit the defendant to reply to the new matter introduced by the plaintiff, in his reply to defendant's testimony.

First, as to the non-suit. The plaintiff was

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introduced as a *witness, who proved the killing with some other facts, and closed, when the defendant moved for a non-suit. This motion was refused, and we cannot see how the Circuit Judge, under Danner's case, and several cases since that case, could have done otherwise than refuse it. With these cases before the judge, instead of its being error on his part to refuse the non-suit, would it not have been legal error to have granted it?

The appellant, in his argument, however, contends first, that the rule in Danner's case had its foundation in the stock law, then of force, which law having since been materially and radically changed, the rule which rested upon it must also change into some new rule in harmony with the new stock law; that the foundation of the old rule having fallen, the rule resting upon it must fall also. This argument would have much force if it were true that Danner's case rested upon the foundation suggested. But did it so rest? We had occasion in the recent case of Jones v. this same defendant (20 S. C., 254), to look into and examine this question, and we then came to the conclusion that the rule in question was established upon the principle that the facts and circumstances of the killing, upon which the issue of negligence in cases of this kind must be determined, being in most such cases entirely within the knowledge of the party committing the injury, it was right and proper that said party should be required to explain and exculpate.

The court said in Danner's case, "That the company did not produce witnesses to show how the damage occurred, nor explain why they omitted to do so, tends to induce the belief that they could make no defence. They had the witnesses under their control. The plaintiff may not have been present when the cattle were killed, and may not be able to discover who were the persons employed on the train when the damage was done. When a party is charged with an act or declaration which may subject him to an action, and does not deny it, his silence is con-

strued into an admission. The same construction may be put on a party's omission to offer testimony in his defence when it is in his power to produce witnesses who might exculpate him." Besides, as we said in Jones's case, *supra*, there is not a word, or an intimation in Danner's case, from begin-

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ning to end, involving the stock law then existing, as being an element in the decision establishing the rule. On the contrary, it was established upon principle and authority—several cases being cited and relied upon, these cases having no reference whatever to the then stock law.

It is true, in the subsequent case of *Murray v. R. R. Co.* (10 Rich., 232 [70 Am. Dec. 219]), the court did make some reference to the fact that cattle under the law could roam at large, and, therefore, that where the owner permitted them so to do, he was not guilty of legal negligence such as would embarrass his recovery from a person who, through negligence, hurt his cattle, thereby implying that if cattle were not allowed to roam at large, there might be greater difficulty presented to a recovery, when injured, than as the law then stood, but not that such a fact should require a different rule as to the effect of proof of killing. There is no intimation of that sort, and Judge Wardlaw, in delivering the opinion in *Murray's* case, follows what is said above with this: "The court acquiesces, too, in the reference which the recorder made to Danner's case for the presumption which arises from the killing of the horse by a train of cars established and unexplained, and for the unfavorable inference raised by the absence of all the defendant's agents who were at the killing. Negligence, rather than accident, is shown by proof of damages done by a train of cars when nothing more appears."

Our conclusion in Jones's case, *supra*, was: That the rule in Danner's case not having been established originally on the foundation of the stock law as then existed, it stood unaffected by the recent statutes requiring stock to be kept enclosed, and we see no reason for a departure from this conclusion. See *Jones v. C. & G. R. R. Co.* (20 S. C., 254).

As we have said before in one or more of the cases on this subject, the rule in Danner's case does not create any greater liability than existed before, nor does it dispense with negligence as a necessary element in liability. Nor does it increase or enlarge the care or modify it in any way previously required, so as to disprove negligence. It simply determines the force and effect of a proved fact. It says that the fact of killing being proved, then there is a *prima facie* case

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of negligence, and this presumption arises in every case where cattle are killed by a railroad, whether they are trespassing or not, for the reason that even as to trespass-

ing cattle it is not impossible that the killing may in some cases result from negligence. True, in the latter class of cases it would be much easier for the railroad company to disprove negligence than in the former, as the care required as against trespassers is not so great as in the other class. While, however, the law does not hold railroad companies to such strict accountability for injuries done to trespassers, as will be enforced when an injury is done to one not a trespasser, yet these companies cannot claim exemption upon the ground, simply, that the party injured was trespassing. It is possible that a trespasser even may be injured from negligence.

The rule in Danner's case does not interfere with the principles above stated. It does not make railroads liable where they were not liable before. It does not enlarge the degree of care required to exempt them from responsibility. It only goes to the extent of declaring, that the fact of killing, or injury done, presumes negligence, *prima facie*, and it then leaves the defendant with the burden of overthrowing this presumption, by such proof as the circumstance in the special case may enable him to do. If it be a case arising out of the trespass of the plaintiff, this is matter of defence, and may be set up as limiting the degree of care required to be proved in order to overthrow the presumption; or, on the other hand, if it be not a case of trespass, then the proof of greater care would be required to remove the presumption. Now, in all these cases, the party doing the injury is especially presumed to have information as to all the facts and circumstances attending it, and there is no hardship in requiring him to bring these facts and circumstances forward to his exculpation, if they exist, and upon failure to do so that he shall be presumed to have committed the injury, which has been traced to his hands, through negligence.

Nor do we agree with the appellant, that this principle discriminates against persons as compared with cattle, placing a higher estimation upon cattle than upon human beings. On the contrary, the tendency of the principle is directly towards the safety of passengers, and the protection of the lives of

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those who travel on railroads. It is in their interest. Railroad cars are, perhaps, as frequently endangered and thrown from the track by running over cattle as from any other cause. Would the overruling of the rule in Danner's case or the relaxing of it, have a tendency to lessen the number of these occurrences? Would the fact that killing stock raises no presumption of negligence, make those who run trains more watchful? Would the knowledge that railroad companies could not be made liable except upon affirmative evidence of facts and circumstances showing positive negligence, when it is well understood that in most of such cases the plaintiff

is utterly unable to prove anything more than the injury, knowing nothing of the attending facts or circumstances, increase the vigilance of railroad employees, &c? Care, close and constant care, in the interest of safety to passengers and to the protection of the lives of those who are on board, is at all times needed at the hands of those who run railroad trains; and if a change of the rule under discussion would increase this care, there would be reason for the change. But does not the rule, as established, afford a stronger motive to the exercise of care than would be the case without it? It certainly does not weaken incentive to care; on the contrary, we think it strengthens and adds greatly to such incentive.

We see no sufficient reason for overruling this rule, on any of the grounds urged by appellant. It may be, that it is not in harmony with all of the American railroad decisions on this subject. It is true, perhaps, that some of the other States have held differently, but with us it has been established long since. It has been affirmed and re-affirmed, and standing as it does, not only upon the authority of these several decisions, but upon sound and correct principles, it should not be disturbed.

Next, as to the new trial. This involves questions of fact, and is, therefore, beyond our cognizance. The judge held that the preponderance of the evidence was not opposed to the verdict, and his judgment is final.

The other grounds involve an inquiry, whether the Circuit Judge admitted evidence of new matter by the plaintiff in reply, as alleged, to defendant's testimony in defence, and also whether he refused to permit the

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defendant to reply to new matter thus introduced. In other words, whether the evidence admitted and objected to was new matter, such as the defendant should have been allowed to reply to.

The defence rested very materially upon evidence that the runner in charge of the engine, did not see, nor could have seen, the mules and colts, at a point sufficiently far from the place where they were killed to have stopped the train in time to prevent the accident. In this way the defendant undertook to disprove negligence, and to overthrow the presumption arising from the killing, the defendant relying upon two facts: First, the distance between the point where the runner saw the animals, or could have seen them, and the point where they were killed; and, 2nd, the impossibility of stopping the train between these two points. Now, it cannot be denied, that upon the close of defendant's evidence, the plaintiff was entitled to rebut by counter evidence defendant's testimony on these points. Nor can it be denied, that if such testimony is confined to such rebuttal, that the defendant is without the right of

reply. See 2 Phil. Evid., Pt. 1 (C. & H. notes), 712-715.

We have examined the testimony reported and found in the "Case" at the several folios where objection was made, and have found that said testimony was in rebuttal of defendant's witness on some one of the facts testified to by him, to wit: either as to the point where the animals mounted the track, as to the distance they could be seen, or as to possibility of stopping the train within the distance from the point of vision to the point of killing. As far as we have been able to discover, defendant's objections were made at folios 120, 122, 127, 128, and at folios 162, 163. Without prolonging this opinion by stating the questions and answers, we say that the Circuit Judge is sustained in his rulings therein by the law of evidence, as administered in this country. See the early case of *Scott v. Woodward*, 2 McCord, 161; 3 Wait Prac., 124, 125. Besides, these matters should be left very much to the discretion of the trial judge. 3 Wait Prac., 124.

The interest embraced in the verdict having been remitted, the question as to that matter is eliminated.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. *149

*BELL v. BELL.

(April Term, 1886.)

[1. *Bills and Notes* ⇨125.]

A note for \$500, payable twelve months after date "with interest at the rate of one and one-half per cent. per month" draws the stipulated interest until maturity, but only the legal rate thereafter.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 281; Dec. Dig. ⇨125.]

[2. *Judgment* ⇨688.]

Judgment having been obtained upon this note against the executor of the maker for more than was actually due, legatees under the will of the maker are concluded by the judgment, and cannot prevent a sale of their testator's property thereunder.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1211; Dec. Dig. ⇨688.]

[3. *Conversion* ⇨16.]

Testator having, by his will, directed his executor to sell his lands at the executor's option in such manner as he shall think best, the net proceeds thereof to be equally divided between testator's children, the direction to sell was absolute, the land was converted into personality, and the children were legatees and not devisees.

[Ed. Note.—Cited in *Mattison v. Stone*, 90 S. C. 149, 72 S. E. 991.

For other cases, see *Conversion*, Cent. Dig. § 43; Dec. Dig. ⇨16.]

4. Whether the executor himself might not have the erroneous calculation of interest in the judgment corrected by a proper proceeding for that purpose, is a question not raised in this appeal.

Before Witherspoon, J., Kershaw, February, 1885.

The opinion sufficiently states the case.

Messrs. W. H. R. Workman and J. T. Hay, for appellants.

Mr. W. D. Trantham, contra.

June 25, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This action was originally commenced sometime in the year 1880, for the purpose of settling up the estate of W. B. Huckabee, according to the terms of his will. On February 10, 1879, the respondent, John M. Mickle, recovered a judgment by default against A. A. Huckabee, as administrator of the estate of W. B. Huckabee, on a note of which the following is a copy:

"\$500.00. Camden, January 10, 1874.

"Twelve months after date we, or either of us, promise to pay to J. T. Mickle, or bearer, five hundred dollars, with interest at the rate of one and one-half per cent. per month, for value received. Witness our hands and seals.

"J. J. Huckabee, [L. S.]

"W. B. Huckabee, [L. S.]"

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*Credited as follows: "January 15, 1875. Received ninety dollars on the within note, interest for one year, ending January 10, 1875. February 10, 1876. Received on the within ninety dollars, interest to January 10, 1876," both of which credits are signed by the payee, J. T. Mickle. By the terms of the will of the testator, his executor was directed to sell all of the estate both real and personal, and divide the net proceeds amongst the six children of the testator named in the will; and testator's son, A. A. Huckabee, was appointed executor, duly qualified as such, sold the estate, and, according to his returns, appears to be indebted to the estate in an amount more than sufficient to pay the judgment above referred to.

On February 5, 1882, the judgment creditor, John M. Mickle, had a house and lot in the town of Camden sold under his said judgment, and the proceeds of sale not being sufficient to satisfy the same, he subsequently caused the sheriff to levy upon another piece of real estate belonging to the testator, to satisfy the balance due on his judgment. Thereupon the parties interested under the will of W. B. Huckabee filed a supplemental complaint, alleging these facts, and the further fact that the judgment was taken for a much larger amount than was really due on the note, inasmuch as, in ascertaining the amount, interest was calculated, after the maturity of the note at the rate of 18 per cent. per annum, to the date of the judgment, instead of at 7 per cent., as it should have been, and asking that the judgment be reformed accordingly, and in the meantime the judgment creditor, John M. Mickle, who was

made a party defendant to the supplemental complaint, be enjoined from enforcing the judgment. In addition to this a notice, bearing date July 12, 1884, signed by the attorney for the plaintiffs in the action, and by the attorney for A. A. Huckabee, as executor of W. B. Huckabee, addressed to the judgment creditor, John M. Mickle, seems to have been served, to the effect, "that on the hearing of this case a motion will be made, upon the part and behalf of the defendant, A. A. Huckabee, executor of the last will and testament of W. B. Huckabee, deceased, and the heirs of his estate, to modify and reduce" the judgment hereinbefore referred to by correcting the alleged erroneous computation.

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of interest. To this supplemental *complaint the judgment creditor answered, denying the right of the parties to review and revise his judgment, or to have same reformed and reduced, claiming that the judgment was properly and legally entered, and for no more than was justly due.

All the issues of law and fact were referred to the master for trial, who made his report setting out the facts in detail, and finding as his conclusions of law: 1st. That the lands of a testator can be sold under a judgment against the executor. 2nd. That the legatees had no right to be made parties to the action in which the Mickle judgment was recovered, the executor being the only proper party. 3rd. That A. A. Huckabee, the representative of the estate of Willis B. Huckabee, is bound by the said judgment, and cannot now in this action have the same reformed or reduced. 4th. That A. A. Huckabee, the executor, being bound, the legatees named in the third item of the will of the testator, being his privies in estate and represented through him, are also bound. 5th. That the said judgment, as the judgment of a competent court having jurisdiction of the subject matter, is absolutely conclusive against all the parties and must stand as rendered. 6th. That the interest did not commence to run on said note until after its maturity, and then according to its terms at the rate of one and a half per cent. per month."

To this report the attorney for the plaintiffs and the attorney for the executor, A. A. Huckabee, excepted as follows: "They except to the master's 3rd, 4th, 5th, and 6th conclusions of law as being erroneous, and so far as the third conclusion of law is concerned, because no point was made before the master as to the way in which these questions are brought up." Upon this report and these exceptions the case came on for hearing before Judge Witherspoon, who held, in substance, that the Mickle judgment was conclusive and cannot be assailed by the plaintiffs in this action. He then went on to say: "I cannot, however, concur with the master in his conclusions as to the interest on the note, as I think the note drew interest at

the rate of one and one-half per cent. per month, from date up to maturity, and only the legal rate of interest after maturity. It is ordered and adjudged that the report of the master in the above case, filed December 31, 1884, be confirmed and become the judg-

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ment of this court, *except as to the sixth (6th) conclusion of law, with reference to the interest upon the note, and plaintiffs' exception to said sixth conclusion is sustained, and all other exceptions to said report be overruled," and then proceeded to order that the injunction previously granted restraining the judgment creditor from proceeding to enforce his judgment be dissolved.

From this judgment plaintiffs appeal upon the ground that the Circuit Judge having determined that the interest on the note was erroneously calculated, should have directed the same to be corrected, and that he erred in holding that the judgment was conclusive in the sense that it could not be so corrected. The judgment creditor also appeals, upon the ground that the judge erred in holding that the interest was erroneously calculated upon the note, and upon the further ground that the judgment is conclusive as to the heirs and distributees of W. B. Huckabee and cannot be reviewed or reformed under these proceedings. The executor, A. A. Huckabee, does not appear to have appealed.

We will first consider the appeal of the judgment creditor, Mickle. We think it clear that his first ground cannot be sustained. The question in all such cases is, what was the intention of the parties, as gathered from the terms used in the written contract sued upon? We look, in vain, into the terms of this note for any word indicating an intention that the makers undertook to pay anything more than the legal rate of interest after the maturity of the note. It is nothing more than a promise to pay a certain sum of money, with a specified rate of interest, at a future specified time, without a single word indicating what shall be the rate of interest, or whether, indeed, there shall be any, after that time arrives. It is in effect a promise to pay five hundred and ninety dollars twelve months after the date, and the liability to pay any interest after that date only arises by operation of law, and not by virtue of express contract, by which alone can a rate greater than the usual legal rate be claimed.

The other grounds presented by this appellant are taken under a misconception of the true intent and effect of the Circuit decree, or perhaps out of abundance of caution: for we think that the judgment appealed from really establishes the very positions contended for in the second and third grounds of ap-

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peal presented *by the judgment creditor, Mickle. The Circuit Judge holds in terms, "that the Mickle judgment is conclusive and cannot be assailed by plaintiffs in this pro-

ceeding." He then orders and adjudges that the report of the master, except as to his sixth conclusion of law, with reference to the proper mode of computing the interest, "be confirmed and become the judgment of this court," and finally directs that the injunction previously granted restraining the judgment creditor from enforcing his judgment be dissolved. Now, when it is seen that the master in his fifth conclusion of law, which has been confirmed and made the judgment of the court, had found that the judgment in question "is absolutely conclusive against all the parties, and must stand as rendered," it is quite clear that this appellant has no cause of complaint against the judgment appealed from, as it gives to him everything he demands by his second and third grounds of appeal.

What was said in the Circuit Judge's decree as to the sixth conclusion of law reached by the master, was, no doubt, for the purpose of negating the idea that the Circuit Judge concurred with the master as to the construction which he placed upon the terms of the note, and not for the purpose of affecting his general conclusion as to the issues involved. The question presented for adjudication was whether the judgment could be reformed in this proceeding. This involved two inquiries: 1st. Whether there was error in the judgment; and, 2nd, if so, whether such error could now be corrected. The master determined the general question adversely to the plaintiffs for two reasons: 1st, because the judgment was conclusive and could not be inquired into, and, 2nd, because if inquired into, no error would be found. The Circuit Judge, while affirming the general conclusion of the master, for the first reason given by him, simply denied the sufficiency of the second reason relied on by that officer.

We come now to consider the appeal on the part of the plaintiffs, whom we regard as legatees of the judgment debtor, W. B. Huckabee. By the third clause of the will the executor is directed to "sell all my estate, real and personal, not hereinbefore disposed of, at his own option, in such manner as he shall think best, at private or public sale,

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and the net proceeds thereof *shall be equally divided between my six children," &c. Thus it will be observed there is nothing given to the children but the proceeds of the sale, and they are therefore to be regarded simply as legatees. It is a mistake to suppose, as has been argued, that this direction to the executor to sell was not absolute and positive, but simply discretionary, and therefore cannot have the effect of converting the realty into personalty. The only discretion conferred upon the executor was as to the manner of making the sale, and not as to whether he should or not make the sale, for nothing is given to the children but the pro-

ceeds of the sale. This being so, we think it clear under the cases of *Fraser & Dill v. City Council of Charleston* (19 S. C., 384), and *Huggins v. Oliver* (21 Id., 147), that the plaintiffs as legatees could not assail this judgment recovered against the legal representative of the testator. He was the only proper party to the action in which it was recovered and it is conclusive against him and the plaintiffs who are his privies.

Whether the executor himself might not by a proper proceeding for that purpose under the authority of the cases of *Mooney v. Welsh*, 1 Mill. Con. R., 133; *Bank v. Condy*, 1 Mill. 209; *Patton v. Massey*, 2 Mill. 475; *Ashmore v. Charles*, 14 Rich., 63, and other cases of that class, have any errors of the kind complained of rectified, is a question not presented by this appeal, and cannot, therefore, now be considered. It is true, that the executor did unite with the plaintiffs in giving notice of a motion to have the judgment reformed by a proper calculation of the interest, but this does not seem to have been followed up by any application by the executor for an order to that effect. On the contrary, no further notice seems to have been taken of it. There is nothing said in the report of the master in reference to it, and no exception to his report bringing this question to the attention of the Circuit Judge. Accordingly we do not find it alluded to in his decree, and there is no appeal from his decree by the executor. Under these circumstances we are not at liberty to consider it.

The judgment of this court is, that the judgment of the Circuit Court, as herein construed, be affirmed.

25 S. C. *155

*OWENS v. OWENS,

(April Term, 1886.)

[1. *Taxation* ⚭679.]

Land offered for sale in 1871 for the non-payment of taxes, and no bid received, became forfeited and the legal title vested in the State, there having been no irregularities in the tax proceedings up to that time.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1361, 1362; Dec. Dig. ⚭679.]

[2. *Taxation* ⚭855.]

But this land having been afterwards resold by the county auditor as forfeited land, without a compliance with the provisions of law regulating such sale, the purchaser's deed from the auditor was invalid.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1672; Dec. Dig. ⚭855.]

[3. *Partition* ⚭16.]

Such resale, however, having resulted in a payment to the State of all taxes, penalties, and costs claimed by the State, the former owner or owners were possessed of an equitable title, which, if in more than one person, is subject to partition.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 52; Dec. Dig. ⚭16.]

Before Witherspoon, J., Chester, May, 1885.

The Circuit decree fully states the case. It may be added, however, in view of subsequent changes in the law, that land forfeited to the State for want of bidders at a tax sale, under sections 124 and 125 of the act of 1868 (14 Stat., 63) was directed to be resold by the act of March 12, 1872 (15 Stat., 164); and it was under this act of 1872 that the county auditor of Chester attempted to sell this forfeited land on June 3, 1872. The Circuit decree was as follows:

William Owens died intestate in November, 1866, seized and possessed of two hundred acres of land in Chester County, leaving as his heirs at law his wife, Sarah Owens, and the above named plaintiff and defendants, his children and grandchildren. Sarah, the wife of William Owens, was insane at the death of her husband, and remained in this condition up to the period of her death in 1882. Jeremiah Mise administered upon the personal estate of William Owens, and has been discharged as such administrator by the Probate Court for Chester County. Sarah Owens at the time of her death had no personal property, her entire estate consisting of her one-third undivided interest in the real estate of her deceased husband. She also died intestate, leaving the plaintiff and defendants as her heirs. There has been no administration upon the estate of Sarah Owens. The defendant, Mary Ballard, is a minor, represented by her guardian ad litem, W. A. Sanders.

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*The plaintiff is a daughter and an heir at law of William and Sarah Owens, and seeks in the above entitled action: I. To have the real estate of William Owens partitioned. II. To have the defendant, Archy Owens, a son of William and Sarah Owens, to account for rents received from the land, as well as the proceeds of wood and cross-ties sold off of the land in excess of his proportionate share thereof. III. Out of the undivided one-third interest of her mother, Sarah Owens, in the land, plaintiff seeks payment of a reasonable compensation for the care and maintenance by plaintiff of her insane mother from 1867 to the death of her mother in 1882.

All of the defendants, except Margaret Mise, answer the complaint, denying plaintiff's right to compensation for the care and maintenance of her mother. The defendant, Archy Owens, in his answer, also denies that plaintiff and the other heirs of William Owens have any right, title, or interest in and to the lands described in the complaint. The defendant, Archy Owens, claims title to said land in himself by virtue of a deed from James L. Ralph, dated December 30, 1872, as well as by adverse possession under color of title.

All of the issues were referred to a special referee, who filed his report October 9, 1884, and the cause came on to be heard before me upon the referee's report, and exceptions to said report on behalf of the defendant, Archy Owens. It appears that after due advertisement, the Owens land was offered for sale by the county treasurer of Chester County as delinquent land in June, 1871, and that there was no bid made for the land. On May 30, 1872, the land was again advertised, and on June 3, 1872, was sold by the county treasurer as "forfeited land," and bid off by the defendant, Archy Owens, for \$100, who agreed that one James L. Ralph should advance the money and take and retain the county auditor's title to the land until he, Archy Owens, could refund the \$100 advanced by Ralph. James M. Brawley, county auditor, on June 3, 1872, made a deed of the land to James L. Ralph, in consideration of \$100. On December 30, 1872, James L. Ralph, in consideration of \$100, conveyed the land to the defendant, Archy Owens. After diligent search, no rec-

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ord *can be found in the county auditor's or treasurer's or comptroller general's offices of the alleged delinquent or forfeited sale.

The defendant, Archy Owens, in support of his title, introduced before the referee his deed from James L. Ralph, December 30, 1872. Having proved that after diligent search the records required by law to be kept could not be found in the auditor's or treasurer's office, the defendant, Archy Owens, examined the county auditor and treasurer as to the proceedings had with reference to the Owens land having become delinquent and forfeited. At the instance of the plaintiff and the other defendants, and under a subpoena duces tecum, the defendant, Archy Owens, was required to produce before the referee the deed from James M. Brawley, county auditor, to James L. Ralph, dated June 3, 1872. The referee states in his report that there is no evidence that the county auditor ever designated on the delinquent land list the Owens land as "forfeited," or that the "forfeited land record" was ever certified officially by the county auditor, or that he ever made a copy thereof to be transmitted to the State auditor, as required by sections 124 and 125 of an act of the legislature, approved September 15, 1868. See 14 Stat., 63.

The referee concludes, as matter of law, that the deed from J. M. Brawley, county auditor, to James L. Ralph, June 3, 1872, conveying the Owens land as "forfeited," is void, for the following among other reasons assigned in the report: I. Because the sale of the Owens land in June, 1872, as forfeited, was not advertised for two weeks, as provided under 3d section of the act of March 12, 1872. 15 Stat., 164. II. Because the deed of the Owens land, as "forfeited," from

Brawley, county auditor, to James L. Ralph, June 3, 1872, did not have the great seal of the State attached thereto. The referee also concludes, as matter of law, that the defendant, Archy Owens, is not entitled to hold the Williams Owens land by adverse possession. The referee, therefore, concludes that the plaintiff is entitled to have the William Owens land partitioned.

I concur with the referee in the conclusion that the deed from James M. Brawley, county auditor, to James L. Ralph, June 3, 1872, is void upon the grounds above set forth. As

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the defendant, *Archy Owens, claims through this deed, he has no valid title to the land in dispute. I also concur with the referee in the conclusion that the defendant, Archy Owens, cannot claim the land by adverse possession. But it must appear that the title to the Owens land is still in the plaintiff and the other heirs of William Owens in order to entitle the plaintiff to have the land partitioned. The referee finds that the Owens land became delinquent for taxes in 1871, was duly advertised and offered for sale as delinquent land, and there was no bidder for said land. There is no exception to these findings, and no effort has been made to show any irregularity in the proceeding prior to the delinquent sale in 1871.

The next inquiry, then, under the evidence, is whether or not the Owens land ever became forfeited, and the title thereto vested in the State according to law. If the title to the land has vested in the State, the plaintiff's action cannot be maintained. When does land become forfeited, and the title thereto vest in the State, and what is the evidence of such forfeiture of land, and vesting of title in the State? Section 124 of the act of 1868 provides that when land is offered for sale, as provided by law, and not sold for want of bidders, it "shall thereby become forfeited to the State of South Carolina, and thenceforth all the right, title, and interest of the former owner therein shall be vested in the State of South Carolina." Section 125 of said act provides that the auditor shall enter in a substantial book, denominated the "forfeited land record," a list of all real estate forfeited to the State, certifying to the correctness thereof, and sign the same officially, a copy of which he shall certify and transmit to the State auditor, by the county treasurer, when he makes his annual settlement. As the Owens land has been sold at delinquent sale, and there were no bidders, it would seem, under section 124, that if the proceedings conformed to law, the land became forfeited to the State. Under section 125, above referred to, the "forfeited land record" is intended to furnish the evidence of forfeiture, and the vesting of title to the land in the State.

The referee finds that the auditor kept in his office a "forfeited land record," but that it is lost or destroyed. If the "forfeited land

record," when produced, would furnish the

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evidence of *the forfeiture of the land, it seems to me that, upon proof of its loss or destruction, as in this case, the legal presumption would be that the auditor did his duty in making the necessary entries therein, as provided under section 125 aforesaid. This presumption would not be removed until there is some evidence to show that the auditor did not keep this record according to law. There is no such evidence in this case, or any attempt to show that the "forfeited land record" was not properly kept by the auditor. The certified copy of the entries in the "forfeited land record," directed to be furnished the State auditor, I do not think is intended as part of the evidence of forfeiture, but merely to enable the State auditor and county treasurer to have a correct annual settlement.

I am constrained, by the evidence in this case, to conclude that the title to the Owens land has vested in the State by forfeiture for non-payment of taxes, and the plaintiff is not entitled to have said land partitioned. In this view of the case it will not be necessary to consider the other points raised by the exceptions to the referee's report.

It is therefore ordered and adjudged, that the eighth exception of the defendant, Archy Owens, to the referee's report herein, alleging error in said referee's failing to find that the William Owens land had become forfeited and the title thereto vested in the State be sustained, and that plaintiff's complaint herein be dismissed with costs.

The appeal raises the points stated in the opinion of this court.

Mr. E. C. McLure, for plaintiff.

Mr. W. A. Sanders, for defendants, appellants.

Mr. Ashbel G. Brice, for Archy Owens, respondent.

June 25, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, Mary Owens, sought by the action below to partition a certain tract of land situate in Chester County between herself and the other parties named above as heirs at law of

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her father, William Owens, *deceased, and also that defendant, Archy Owens, in possession, should account for rents and profits, &c. She sought further to subject the interest of her deceased mother, Sarah Owens, in said land to a claim which she desired to set up for attention and services to her said mother, since the death of her father, the said Sarah being all that time, and up to her death in 1882, insane and incapable of taking care of herself. All of the parties answered, except Margaret Mise, who did not answer. Mary Ballard, being a minor, answered by guardian ad litem. All but the

defendant, Archy Owens, joined in the prayer for partition: they denied, however, the claim of the plaintiff, Mary, for the compensation demanded. The defendant, Archy, claimed the land as his own by virtue of a deed to him from one James Ralph and by adverse possession, and he denied that it was subject to partition between the heirs at law of the said William Owens, his father. He also resisted the claim of the plaintiff, Mary, for services rendered to her mother.

The case was finally heard by his honor, Judge Witherspoon, upon exceptions to referee's report. His honor, concurring with the referee, held, first, that in so far as the defendant, Archy, claimed under the deed from Ralph, his title was invalid, because Ralph claimed under a conveyance from the county auditor by purchase at a tax sale, which sale, not having been made according to law, was invalid. He also held that Archy could not claim the land by adverse possession under the evidence. Notwithstanding, however, that the defence of the defendant setting up title in himself could not avail, yet he denied the partition, because he found the title to the land in the State, the same having been forfeited to the State in 1871 as delinquent land, with no bidders. Reaching this conclusion, he declined to consider and adjudge the other points in the case, and he ordered and adjudged that the 8th exception of defendant to the referee's report, alleging error in said referee's failing to find that the William Owens land had become forfeited and the title thereto vested in the State, be sustained, and that plaintiff's complaint be dismissed with costs.

Mary Owens, Jane Craig, Chester Pertuis, Elizabeth Jacks, Mary Ballard, David Owens, and Isabella Bennett excepted and

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*appealed, raising in the main but two questions: First. That his honor erred in holding that title to the land in dispute had vested in the State by forfeiture; and, second. The county treasurer having received one hundred dollars at the forfeited land sale, and thereby the State and county taxes and all costs being paid, the title in equity, if not the legal title, is in the heirs of William Owens as tenants in common.

We agree with the Circuit Judge, that the land became forfeited and the title thereto vested in the State in 1871, when it was exposed to sale with no bidders. The Circuit Judge and the referee agree, that up to this time there had been no irregularity in the tax proceeding. The referee found that the land became delinquent for taxes of 1871, was duly advertised and offered for sale as delinquent, with no bidders, and the judge says there were no exceptions to these findings. All the conditions were present at that time to cause forfeiture. The land was placed on the tax duplicate, the taxes had not been paid, it was exposed to sale, and

there were no bidders, and under our act it was forfeited. There was no necessity for "inquest of office." The language of the act is definite and distinct. Section 124, act of 1868, 14 Stat., 63. See, also, Burr. Tax., § 110, on this subject; *McMillan v. Robbins*, 5 Ohio, 28; *United States v. De Repentigny*, 5 Wall., 211 [18 L. Ed. 627].

We agree, too, with the Circuit Judge, that the irregularities connected with the subsequent sale, which resulted in a conveyance from the county auditor, Brawley, to Ralph, under which the defendant, Archy, claims, were so great as to render that deed invalid, and therefore that it did not divest the title from the State; and we think the Circuit Judge was right in declining to decree partition upon the legal title of plaintiff.

But under the circumstances of this case we are of opinion that there were equitable grounds for the partition worthy of consideration, or, at least, there was enough in the case in that direction to entitle the plaintiff, and the other parties asking partition, to have those grounds considered and adjudged. There seems to be no doubt that the State has been paid for the land, all taxes, costs, and penalties appear to have been settled in a sale which the tax officials made of the land after it had been forfeited,

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and *the State now has no further claim upon it, so that the equitable title, at least, is in some one other than the State. Whether that equitable title is in the heirs at law, as a whole, or in some one of them alone, is a question to be determined by investigation, and is involved in the claim of the plaintiff for partition. So, too, the matter of rents and profits, in the event that it should be determined that there exists an equitable right to partition, would be involved. Also the claim of Mary, to subject her mother's interest in the land, in the event that partition is decreed, is a matter which should be considered.

Now, to the end that these matters may be considered and adjudged, it is the judgment of this court, that so much of the judgment of the Circuit Court as dismisses the complaint, be reversed, and that the case be remanded to that court so that the other questions suggested above, raised by the exceptions to the referee's report, and not considered in the decree herein appealed from, may be heard and determined upon the referee's report, including the testimony taken by him and the exceptions thereto.

25 S. C. 162

PEARSON v. YONGUE.

(April Term, 1886.)

[Waste ⇐12.]

Contingent remaindermen in land have not a right to ask the judgment of the court in ad-

vance, as to what will be the ultimate rights of themselves and of a party in possession of the land, at the time that this remainder becomes vested; nor to demand the payment of damages for waste committed by the party in possession.

[Ed. Note.—Cited in *Rabb v. Flenniken*, 29 S. C. 282, 285, 7 S. E. 597.

For other cases, see *Waste*, Cent. Dig. § 23; Dec. Dig. ⇐12.]

Mr. Justice McIver concurred in the result.

Before Wallace, J., Fairfield, February, 1885.

The case is sufficiently stated in the opinion of this court. The Circuit decree, omitting its statement, was as follows:

It is beyond question that G. B. Pearson, jr., had only a life estate in the land to which this action relates. It was bought and sold, and he was put in possession of it, with that understanding in writing. If he had sold himself, he could only have sold an estate of that degree, and could not have,

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by such sale, divest*ed the rights of his children as remaindermen. The sheriff could do no more at an execution sale than he could for himself.

Defendant, however, claims the protection of his purchase upon the ground that he is an innocent purchaser for valuable consideration, without notice. Even upon this ground it would seem that the deed from the sheriff to Jones only conveyed the "right, title, and interest" of Pearson, and Jones's deed to Clowney, by the erasure pointed out above, distinctly refused to warrant generally, and conveyed his right, title, and interest and both these deeds were recorded before the purchase of the Yongues. These significant facts appearing upon the face of the deeds would have sent a prudent man upon enquiry, and he would have found the Pearson deed to Fenly, and then found Fenly and gotten from him all that was necessary to enlighten him as to the nature of G. B. Pearson's interest in that land.

Mr. Pomeroy, in his work on Equity Jurisprudence, volume II., section 626, uses the following language: "Whenever a purchaser holds under a conveyance and is obliged to make out his title through that deed, or through a series of prior deeds, the general rule is firmly established that he has constructive notice of every matter connected with or affecting the estate, which appears either by description of parties, by recital, by reference, or otherwise, upon the face of any deed which forms an essential link in the chain of instruments through which he must derive his title," &c.

I think the plaintiffs are entitled to the remainder in the land, if they survive their father, G. B. Pearson, jr. And it is so adjudged. The testimony upon the subject of waste by the present occupant is very con-

flicting, and I am persuaded that, comparing his improvements with his injuries to the place, there would be a very small balance either way. So I will leave this question open to be settled hereafter at a more proper time, when all the parties who may be hereafter interested in it may be before the court.

Mr. E. B. Ragsdale, for appellant.

Mr. J. H. Rion, contra.

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*June 25, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In March, 1849, one George B. Pearson, senior, and his wife, Elizabeth M. Pearson, executed a deed by which they conveyed a certain tract of land, situate in Fairfield County, containing some fifteen hundred acres, to one D. D. Fenly, in trust, first, to secure the rents and profits to the exclusive use of the said Elizabeth; * * * second, upon the further trust, that the said D. D. Fenly, whenever called upon by the said Elizabeth, should allot and lay off, in such manner as she should elect, such portion of said land as she might desire to her son, George B. Pearson, jr., to be conveyed to trustees for the use of the said George B. Pearson, jr., for life, in such way as not to be liable for his debts, with remainder to his lawful issue, if he should leave such living at his death, with contingent remainders to the children of Mary P. Boyce and Emmeline S. Herbert. * * * Third, to hold the remaining portion of said land not so allotted as aforesaid, at and after the death of the said Elizabeth, for the use of her children for life, with remainder to the lawful issue of their bodies. And fourth, with power to the said Daniel D. Fenly, as trustee, at the request of the said Elizabeth, to change the investment, the substituted property, whether real or personal, to be subject to the same trusts and limitations as were therein declared upon said land.

Shortly thereafter Fenly, as trustee, and at the request of the said Elizabeth, allotted and laid off to the said George B. Pearson, jr., seven hundred and eighty six acres of said land, and in December, 1856, at the request of the said Elizabeth and of the said George B. Pearson, jr., and in consideration of the sum of \$14,000, to him paid by one James S. Milling, he, the said Fenly, granted, bargained, and sold said 786 acres to the said James S. Milling; and in 1858 thereafter, with a part of the said \$14,000, he purchased a certain other tract of land, containing some 244 acres, for the said George B. Pearson, jr. No deed, however, was ever executed either to himself or to any other trustee of this land, but instead thereof, an informal and temporary agreement was delivered by the vendor thereof

to the said D. D. Fenly as trustee, reciting briefly that the land was purchased by the

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*said Fenly, as trustee for said George B. Pearson, jr., and that said purchase was made at the request of George B. Pearson, jr. George B. Pearson was put in possession immediately as cestui que trust for life, and he has occupied it until it was afterwards sold, as hereinafter stated.

While George B. was in possession, one Robert T. Yarborough obtained a judgment against him, under and by virtue of which the said land was levied upon and the interest of the said George B. sold by the sheriff in 1867, one James Jones becoming the purchaser. At this sale notice was given that only the life estate of George B. Pearson was sold. James Jones subsequently sold to Samuel B. Clowney, who afterwards sold all "his right, title, and interest" to the defendant Hazel H. Yongue, and one William P. Yongue, warranting the title only against himself and his heirs. After this Hazel H. Yongue sold and conveyed his interest to the aforesaid William P. Yongue, who some time after this re-conveyed all of his interest to the said Hazel H. Yongue, who is now in possession.

George B. Pearson is still living, and the plaintiffs are his children. They have brought the action below, alleging that they are the owners in fee of said tract of land in case they survive their father, the said George B. Pearson, junior, by virtue of the original trust deed; that the defendant pretends to be the owner thereof, and although often requested so to do, has refused to acknowledge in writing or otherwise the rights of the plaintiffs, or that they have any interest or ownership therein; that the defendant Hazel H. Yongue, has committed and is committing great waste, * * * and they demand judgment that the trust in their favor covering the land may be declared, the said Hazel H. Yongue being entitled to hold the land for the life of the said George B. Pearson, jr., with remainder to these plaintiffs and any other children of the said George B. Pearson, jr., who may be living at his death. That the said defendant may pay damages in the sum of \$5,000 for the waste already committed, and may be restrained from all further waste, &c.

The defendant, admitting most of the allegations in the complaint, yet denied the title of the plaintiffs, and the allegations

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*of waste, &c., and for a further defence interposed the plea of bona fide purchaser for valuable consideration without notice, &c.

His honor, Judge Wallace, who heard the case, decreed, first, that the interest of George B. Pearson was an estate for life; that this was all that was or could have been sold by the sheriff; that the plea of bona fide purchase without notice was not sus-

tained by the evidence; that the plaintiffs are entitled in remainder, should they survive their father; and that the testimony in reference to waste was not sufficient to enable him to determine that question. This question, therefore, he left open, "to be settled hereafter, when all parties who may be hereafter interested in it may be before the court."

The defendant in his exceptions contests the correctness of his honor's rulings upon several points involved, but in his argument here, before reaching these exceptions, he has raised a preliminary question, by way of oral demurrer, to wit, that the complaint does not state facts sufficient to constitute a cause of action. This question has met us at the threshold and has been first decided, and from our view of it, the decision of the other points has become unnecessary, or rather, a decision as to those would be premature and wholly inoperative, as the parties now before the court may not be the parties in interest when the necessity for the adjudication of said questions arises. We may say, however, that we have very little doubt as to the correctness of the decree in regard to the estate of George B. Pearson, and as to the plea of bona fide purchaser, under the evidence as presented in this case, and as to the rights of such of the children of George B. Pearson as may survive him; but we do not see that the plaintiffs have such cause of action as warrants them in raising any of these questions, or in fact any question at this time in reference to the tract of land involved. Therefore we decline to pronounce any judgment thereon.

The plaintiffs in their complaint rely upon two alleged causes of action: First, they allege ownership of the land, in the event they survive their father—in other words, they claim that they are contingent remaindermen. They then allege that the defendant has refused to acknowledge their claim, either in writing or otherwise. Secondly, they allege

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the commission of waste by *the defendant, for which they demand damages. Those two allegations constitute their cause of action.

We know of no principle of law or equity, or precedent, for a contingent remainderman to come into court upon a cause like the one first above suggested, on the ground that the party in possession refuses to acknowledge plaintiffs' right or claim. This matter is in doubt between the parties, or rather it appears that they differ in opinion upon it, and the plaintiffs invoke the court, not for any immediate relief (because in no event are the plaintiffs entitled to any immediate relief), but to have its judgment as to the ultimate rights of the parties, in the event that they are alive and in being at some future time.

As to the second cause, even admitting the

commission of the alleged waste, and that a sum might be decreed against the defendant therefor, to whom would this sum be adjudged? Not to the plaintiffs certainly, as the facts now stand because they are admitted to be contingent remaindermen, their interest being dependent upon a contingency which has not happened, and which may never happen, and therefore never placing them in a position where they would be entitled to any portion of said damages. Suppose a decree was made adjudging the amount demanded for waste \$5,000, what would become of this sum, in the meantime, before future events determine who shall be entitled thereto? And if it should turn out that other children than those now in being, should become the vested remaindermen, would the decree in this case bind them? It may be said, that unless these plaintiffs are entitled to an action, that here is a case, especially as to the commission of waste by the defendant, of a wrong without a remedy. We think not. It is not for this court to suggest proper proceedings in any case, but we may venture to say that there is a remedy within reach, wherein all the questions raised here could be brought within the jurisdiction of the court, and its full judgment invoked and obtained.

It is the judgment of this court, that the judgment of the Circuit Court, on the questions determined, be reversed, not that we pronounce said judgment incorrect, but be-

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cause the said questions *were not ripe for judgment. It is further adjudged, that the case be remanded for such action as may be deemed advisable.

Mr. Justice McGOWAN concurred.

Mr. Justice McIVER. I concur in the result only, as I am not prepared to assent to all the views herein presented; especially as to the plea of purchase for valuable consideration without notice.

25 S. C. 168

STATE v. NANCE.

(April Term, 1886.)

[1. *Jury* ⇨110.]

The Circuit Judge is the trier of the competency of a juror challenged for cause. The law does not prescribe the questions to be asked, but only indicates the points upon which the judge is to be satisfied; and if counsel are not satisfied with the interrogatories propounded, he should object at the time.

[Ed. Note.—Cited in *State v. Williams*, 31 S. C. 257, 9 S. E. 853; *State v. Haines*, 36 S. C. 507, 15 S. E. 555.

For other cases, see *Jury*, Cent. Dig. § 513; Dec. Dig. ⇨110.]

[2. *Homicide* ⇨203.]

Where the deceased, on the day before his death, said he never expected to get over his

wound, and stated who had inflicted it, and soon thereafter became speechless, the judge did not err in receiving this statement as a dying declaration.

[Ed. Note.—Cited in *State v. Johnson*, 26 S. C. 155, 1 S. E. 510; *State v. McCoomer*, 79 S. C. 68, 60 S. E. 237.

For other cases, see *Homicide*, Cent. Dig. § 433; Dec. Dig. ☞203.]

[3. *Criminal Law* ☞227.]

During the trial some of the jurors retired, for a few moments, to their room, in which some of the witnesses who had testified were sitting, but it did not appear that any communication passed between them. *Held*, that this was not such an irregularity as would avoid the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2257; Dec. Dig. ☞272.]

[4. *Homicide* ☞51.]

The testimony being that the accused, with others, attacked the house of the deceased at midnight and having been driven off renewed the attack, whereupon deceased rushed out again attempting to drive the assailants off, and received the wound from which he died, the Circuit Judge did not err in charging the jury that there was no testimony as to self defence or such as would raise a question of manslaughter.

[Ed. Note.—Cited in *State v. Norton*, 28 S. C. 579, 6 S. E. 820; *State v. Jackson*, 36 S. C. 491, 15 S. E. 559, 31 Am. St. Rep. 890; *Norris v. Clinkscales*, 47 S. C. 517, 25 S. E. 797.

For other cases, see *Homicide*, Cent. Dig. § 75; Dec. Dig. ☞51.]

[5. *Criminal Law* ☞572.]

Where the defendant relies upon an alibi there must be a preponderance of evidence sufficient to establish such a defence, or to raise a reasonable doubt.

[Ed. Note.—Cited in *State v. Welsh*, 29 S. C. 7, 6 S. E. 894; *State v. Anderson*, 59 S. C. 231, 37 S. E. 820.

For other cases, see *Criminal Law*, Cent. Dig. § 1290; Dec. Dig. ☞572.]

[6. *Criminal Law* ☞938, 1156.]

The power to grant or refuse a motion for new trial belongs exclusively to the Circuit Judge, and from his decision on the subject there is no appeal to this court. This applies to a motion for new trial on the ground of newly discovered evidence.

[Ed. Note.—Cited in *State v. Don Carlos*, 38 S. C. 227, 16 S. E. 832; *Bratton v. Lowry*, 39 S. C. 388, 17 S. E. 822; *State v. Henderson*, 80 S. C. 166, 60 S. E. 314; *State ex rel. Weeks v. Board of Registration of Aiken County*, 87 S. C. 489, 70 S. E. 898; *State v. Jones*, 89 S. C. 51, 52, 71 S. E. 291, Ann. Cas. 1912D, 1298; *State v. Long*, 93 S. C. 512, 77 S. E. 61.

For other cases, see *Criminal Law*, Cent. Dig. §§ 2131, 2306-2315, 2317, 3069; Dec. Dig. ☞938, 1156.]

Before Wallace, J., Newberry, July, 1885.
The opinion states the case.

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*Messrs. Goggans & Herbert and John B. Jones, for appellant.

Mr. Solicitor Duncan, contra.

June 28, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. At the July term of the court for Newberry County a true bill was found against three women, viz.:

Vinnie Nance, Martha Lyles, and Amy Ruth-erford, for the murder of an old colored man, Daniel Kleekley, by striking him with a "rock" or stone. Upon motion of defendants' counsel, the presiding judge ordered a severance, and Vinnie Nance alone was put upon trial. At the request of the counsel for the defendant the jurors were sworn on their voir dire. When a colored juror was called the presiding judge propounded the usual question as to "relationship," &c., to the prisoner; but, the accused being a negro woman, when a white juror was called he omitted the question as to "relationship," and simply asked him "if he knew of any reason why he could not find a just verdict in the case, according to the evidence," and being answered in the negative, ordered him to be presented. No objection was made, at the time, to this mode of proceeding or any motion made "to introduce any other competent evidence in support of objection to any juror."

Sarah Ann Douglass testified "that on the night of June 27, 1885, between the hours of 12 and 1 o'clock, three women came to the house of her grandfather the deceased; that she was waked by an altercation between the deceased and one of the women, whom she recognized as Martha Lyles; that when she came out the three women had hold of the old man and were pulling him down towards the woods; that she and her brother (a boy of about 14) and another boy ran out of the house after them; that she ran out with an axe in her hands and they chased the women off, after which she and the deceased and the two boys went back into the house and barricaded the door. Three women came back and attempted to force open the door, but failed. The women then walked round the house, and finally deceased snatched the door open and they all rushed out at them again to run them off from the

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house. Then one of the *women whom she recognized as Vinnie Nance, the defendant, threw a rock and knocked the old man down. The women then left and she and the boys carried the old man into the house where he died on July 1st, four days thereafter." She testified positively "that she recognized two of the women as Martha Lyles and Vinnie Nance; that she did not recognize the third; and that she saw Vinnie Nance, the defendant, throw the rock that struck down the deceased."

The solicitor then offered in evidence, as the dying declarations of the deceased, a statement made under the following circumstances: Robert Davidson was with deceased several days after he received the injury and until he died, certainly on Tuesday and Wednesday, the latter being the day on which he died. On Tuesday morning, just before deceased became speechless, he said

that "he was very badly wounded and he never expected to get over it. Said he never expected to get over this wound," and in the same conversation he said that "big Martha and Vinnie Nance did him so—murdered him up—beat him." Motion to exclude the testimony was overruled.

The defendant introduced testimony principally for the purpose of establishing an alibi. The State offered nothing in reply. Before the commencement of the argument, several of the jurors retired for a short time to the jury room, in which the witnesses for the State had been confined during the trial, several of whom were still in the room. But it did not appear that there was any communication between the parties, thus accidentally thrown together in the same room for a few moments.

There were no requests to charge. The case being submitted to them, the jury rendered a verdict of "guilty." The counsel of the defendant made a motion for a new trial, and, that being refused, they now appeal to this court upon the same grounds, which we will now proceed to consider in their order.

The defendant insists that his honor erred in overruling the motion for a new trial, upon each of the following grounds: First. Because the jurors on their voir dire were not properly examined, the only question asked them being, "Do you know any reason why you cannot find in this case, a just verdict according to the evidence?" Section

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2261 of the General Statutes provides that, "The court shall, on motion of either party in suit, examine on oath any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection," &c. In all the cases there is concurrence in the view that the Circuit Judge is the trier to decide the question made by the challenge of a juror for cause. See *State v. Coleman*, 20 S. C., 240.

We do not understand that the law prescribes any particular formula of questions required to be propounded by the Circuit Judge, but only such as will satisfy him upon certain points indicated. The words of the provision are, "to know whether," &c. If the counsel for the accused considered the examination by the court as perfunctory or otherwise unsatisfactory, the objection should have been made at the time, or other evidence offered to support the objections to any particular juror. It does not appear that there is even an allegation of a well grounded objection to a single juror, who was sworn in the case. When a white juror was called, it seems that the judge did not consider it necessary to make enquiry wheth-

er he was "related" to the accused, who was a negro woman, and we cannot say that such omission was error of law. "The presiding judge must determine on the character of the questions proposed and when the examination shall close." *State v. Coleman*, 8 S. C., 239.

Second. "Because certain statements alleged to have been made by the deceased were improperly admitted as dying declarations." The rule is well settled that, when one who has received a wound, from the effects of which he is about to die, makes a statement as to the circumstances under which he received his mortal injury, such statement may be admitted in evidence as his "dying declarations," provided, "it appears satisfactorily that death was imminent at the time, and that the declarant was so fully aware of it as to be without any hope of life." Two days after he received his injury and the day before his death, the deceased, Daniel Kleckley, said to several persons that he was very badly wounded "and

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he never expected to get over *it, and that big Martha and Vinnie Nance had done him so." Was this statement made when death was imminent, and the declarant was so fully aware of it as to be without any hope of life? It is true that he said nothing expressly about living or dying or as to approaching death. But it seems to us, that, considering the condition and character of the deceased, he used equivalent words to express the idea: and soon after making the statement, he became speechless and died the next day. Under these circumstances we cannot say that the judge erred in refusing to exclude the testimony. See *State v. McEvoy*, 9 S. C., 212; *State v. Quick*, 15 Rich., 342; *State v. Washington*, 13 S. C., 458; *State v. Gill*, 14 Id., 415. In the case of *Quick*, the words were, "Leggett Quick killed me," and in the case of *Washington*, they were, "I am going to die and Daniel Washington killed me."

Third. "Because certain jurors sworn to try the case, after being empanelled, were permitted to be alone with certain of the State's witnesses in the privacy of the jury room, where the witnesses of the State were confined during the trial." It is true as urged, that in practice, great care should be taken, especially in State cases, to guard the jury against all irregular or improper influences. This is absolutely necessary in order to secure a pure administration of justice. But there may be objections more fanciful than real. In this case it does not appear that the jurors, who, before the argument commenced, retired for a moment into the jury room, held any communication whatever with the witnesses still there: and we cannot regard this accidental circumstance as an irregularity of so grave a character as should set aside the verdict. See *McCarty v.*

McCarty, 4 Rich., 598; *Smith v. Culbertson*, 9 Id., 106; *State v. Tindall*, 10 Id., 212.

Fourth. "His honor erred in charging the jury that a preponderance of testimony was necessary to establish the alibi or raise a reasonable doubt. And that there was no testimony as to self-defence, or such as would raise a question of manslaughter." &c. In charging the jury, a judge cannot be expected to state the whole law, which would often be confusing and misleading; but only

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such of it as is applicable to the facts *proved. In this case it seems that an old man, living with his grandchildren, was assailed in his house at night by three women. We fail to find in the testimony that the deceased, Kleckley, "rushed out with an uplifted axe and chased some persons down the hill, and when they returned and called him out to speak to him, he again ran out with axe in hand, and was struck the blow while advancing upon them," &c.

The witness, Sarah Ann Douglass, testified that when she first saw them "the three women had hold of the old man (the deceased), and were pulling him down towards the woods; that she ran out with an axe in her hands, and they chased the women off." After which she and the deceased and the two boys went back into the house and barricaded the door; three women came back, and failing to force it open, walked around the house, and finally the deceased "snatched the door open" and they all rushed out at them again "to run them off from the house; that then Vinnie Nance threw a rock and knocked the old man down," &c., of which injury he died. In this midnight attack upon the domicile of this old man, he had the right to defend himself and his premises. The whole trouble was caused by the three women, who were the aggressors from the beginning to the end. We cannot hold that the judge erred in charging that there was no testimony as to self defence, or such as could raise a question of manslaughter.

Nor can we say that he erred in charging the jury that "a preponderance of evidence was necessary to establish the alibi or raise a reasonable doubt." If a party charged with crime pleads a particular defense, such as insanity or an alibi, the fact must be proved as it is alleged by him. Preponderance of evidence is the lowest degree capable of producing conviction. Less cannot be required of one whose duty it is to establish a particular fact, subject, of course, to the general rule that a party charged with crime is entitled to the benefit of all reasonable doubts. "Where the State proves a *prima facie* case and a special defence, such as insanity or an alibi, is interposed, it must be established by such a 'preponderance of evidence' as will satisfy the jury that the charge is not sustained beyond all reasonable doubt.

If not so established, the defendant should

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be convicted." *State v. Paulk*, 18 S. C., 515; *State v. Bundy*, 24 Id., 439 [58 Am. Rep. 263]; *Commonwealth v. Webster*, 5 Cush. [Mass.] 323 [52 Am. Dec. 711]; *Johnson v. State*, 59 Ga., 142.

The fifth exception complains that the act of the legislature which fixed the time for holding the court at which the defendant was convicted, was unconstitutional and void. We are not sure that we understand this exception, as the ground of the alleged unconstitutionality is not stated. But the point was not pressed in the argument of defendant's counsel, and we suppose that it was abandoned.

Sixth. The defendant also made a motion before the Circuit Judge for a new trial upon the ground of newly discovered evidence, which, being refused, she renews in this court. This alleged newly discovered evidence principally tended to discredit the testimony of Mary Ann Douglass, the principal witness for the State, by showing that she had soon after the occurrence, stated that "Martha Lyles and Vinnie Nance were there that night; that they pulled Kleckley down the road, &c., but she did not know which one or who threw the rock that killed the deceased," &c. (See the affidavits printed in the brief.) It does not strike us that the alleged newly discovered evidence was of such a character as to authorize the Circuit Judge to grant a new trial on that ground. But it is not necessary to go into that subject. In the class of cases to which this belongs, this is only a court for the correction of errors at law, and has no power either to hear an original motion for a new trial upon the ground of subsequently discovered evidence, or to review the order of a Circuit Judge refusing such a motion, except in the single case where the Circuit Judge refuses to grant such a motion upon the ground that he has not the power to do so. The power to grant or refuse a motion for new trial belongs exclusively to the Circuit Judge, and from his decision on the subject there is no appeal to this court. See *State v. David*, 14 S. C., 432; *Steele v. Railroad Company*, *Ibid.*, 324, and the authorities there cited.

The duty of this court is rendered more painful by the fact that the defendant is a woman; but after a fair trial, and aided by zealous and able counsel, she has been convicted by a jury of the country of the crime of murder, and it only remains for us to announce the penalty of the law, which is, that

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the judgment *of the Circuit Court be affirmed, and the case remanded to that court for the purpose of enabling it to assign a new day for the execution of the sentence heretofore imposed.

25 S. C. 175

STATE v. BARTII.

(April Term, 1886.)

[*Criminal Law* ⚡776.]

The defendant, in his trial for murder, having introduced testimony of his good character, the Circuit Judge erred in charging the jury that the law limits the effect of good character to doubtful cases, and that only in such cases is it available.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1842; Dec. Dig. ⚡776.]

Before Cothran, J., Berkeley, October, 1885.

Upon the only point decided by the court, the opinion fully states the case.

Messrs. Mitchell & Smith, for appellant.

Mr. Solicitor Jervey, contra.

July 6, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The defendant was tried at the October term of the court for Berkeley County, for the murder of one James Hutchinson. The principal defence was that the killing was in self-defence, but he was found guilty of manslaughter, with a recommendation to mercy, and sentenced to five years in the penitentiary. His counsel made a motion for a new trial, and that being refused, he appeals to this court upon the following grounds:

1. "That his honor erred in charging that the good character of the accused was not a fact like all other facts proved in the case, to be weighed and estimated by the jury, but that its value was limited to doubtful cases; whereas he should have charged the jury that the good character of the accused is a fact fit like all other facts proved in the case to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases.

2. "That his honor erred in refusing to

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grant a new trial. *when it appeared that there was an improper and illegal influence brought to bear on one of the jurors, to the prejudice of the defendant, by a constable in charge of the said juror, attending to a call of nature, as set forth in the affidavits of R. J. Magill and George F. Haselden.

3. "That his honor should have granted a new trial, it appearing that an impartial trial was impaired by the clothing of the deceased being carried into the jury room during their deliberations, and examined by them, or some of them, without the order of the court or consent of counsel for the prisoner.

4. "That on the motion for a new trial, his honor erred in excluding from consideration the affidavit of George Coleman, one of the jurors empanelled in the case," &c.

As to the first exception. There was uncontradicted testimony as to the good character of the defendant—that he was not given to seek quarrels, and was "peaceable and

quiet." The court was requested to charge, "That the good character of the accused is a fact fit like all other facts proved in the case to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases; on the contrary, it may create a reasonable doubt as to evidence, which might otherwise appear conclusive; and such also is the effect of the bad character of the deceased." This request was refused, and instead thereof the court charged as follows: "That request involves the consideration of what appears to be a solecism of law, or rather I should say a paradox. You have heard in every case you have sat upon, that the defendant was entitled to the benefit of every reasonable doubt; now, here is a request which says that the good character of the accused is a fact, like all other facts proved in the case, to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases. The law does limit it to doubtful cases. That is the only class of cases in which good character is available; yet it looks paradoxical to say that a man would need the benefit of a good character in a doubtful case. Now, what does it mean? It is not a paradox when properly understood. Good character is not of any avail as against positive proof. If it were allowed to raise a doubt in the minds of the jury, it would be tantamount to saying to a man, you may go and commit one crime,

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and, your *character up to that time being good, the value of that character will raise such a doubt in the minds of the jury that you can be acquitted. That won't do. That would be licensing every one and any one in the community to commit one crime. What does it mean, then? It means this, and I can make it clearer by an illustration than by a definition. * * * Character is valuable in law, valuable in society, it is valuable everywhere, but only in doubtful cases; that is, as to the motive with which a thing is done," &c.

Was this error of law on the part of the judge? The law is tender to the life and liberty of the citizen. It declares that no man shall be convicted of crime unless the proof is clear "beyond a reasonable doubt," and, certainly when a felony is charged, it also gives the accused the privilege of proving his general good character; that is to say, a character inconsistent with the crime charged. In these rules of evidence we see no necessary paradox; there is between them no conflict or inconsistency, unless we limit the rule as to good character to doubtful cases. In that view it would seem that this rule is at least superfluous, for in a doubtful case the party is entitled to be acquitted under the general rule as to doubt, without any aid from that as to character. But does the law absolutely limit the rule as to good

character to doubtful cases? If so, such evidence is made dependent, not on any established principle, but on what may be the facts of a particular case, without having the means of deciding in advance to which category, as being clear or "doubtful," it may belong. As we understand, it is the privilege of the accused, in all cases where character is admissible, to put in evidence his good character without regard to the other proofs in the case, and it is for the jury to consider it in connection with the other evidence, and determine what force and effect it should have.

It may be true generally that evidence of good character should have more weight in doubtful cases of a particular character; and we think some confusion upon the subject has arisen from this fact; from overlooking the difference between the right and the force to which it may be entitled, and from the practice of explaining to juries that such evidence is most valuable, or only valuable, in such cases. Most certainly the com-

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mission of crime *must have a beginning, and there is always what may be called the first offence, in which the previous good character, or at least the fact that the accused had never before offended, may be thrown into the scale. But it does not follow that even in such a case proof of character must necessarily result in acquittal. No doubt there are such cases where the other evidence is so clear as to utterly overwhelm the effect of the proof of character, in which, while good character may be proved, it is also proved beyond doubt that the party committed the offence. As such proof is not expected, and may not out-weigh all the other evidence, we can perceive no reason why proof of good character in all cases should not be considered by the jury for what it is worth. It strikes us that it is a mistake to suppose that such rule "would be tantamount to saying to a man that you may go and commit one crime and your character will save you."

In 2 Russell on Crimes, 786, it is said: "Juries have generally been told that when the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not

in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." And in a note is cited the case of *Rex v. Stannard*, 32 E. C. L. R., 681, in which Patterson, Justice, said: "I cannot on principle make any distinction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The

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object of *laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case."

In Wharton's Criminal Evidence, sections 66 and 67 (1884), it is said: "It has been argued by high authorities that good character is of weight only in doubtful cases; but the better opinion is to the contrary. In the first place, it is conceded on all sides that evidence of character, when offered by the defence in criminal cases, is always relevant. Technically, therefore, it is always material. If immaterial, it should be rejected as irrelevant; but it never can be rejected as irrelevant, therefore it never can be regarded as immaterial. To this it is answered that the court, when admitting it as relevant, does not decide on its materiality, materiality being for the jury; but this virtually concedes that the question is one of logic, and not of law. It makes the weight of evidence as to character dependent, not on any rules arbitrarily pre-assigned, but on the facts of each particular case. It is substantially argued by Talfourd, J., that it is a *petitio principii* to say that evidence as to character is entitled to weight only in doubtful cases, when really it is to make the case doubtful that such evidence is offered. In some instances in which guilt would be otherwise established beyond reasonable doubt, evidence of good character may justly produce an acquittal. But in all cases it is an item of proof to be considered by the jury." See also many cases cited in the notes of Benet & Heard to 2 Lead. Crim. Cas., 351, and 3 Greenl. Evid., § 25 (1st edit., 13).

This is undoubtedly the rule laid down by elementary works and leading modern authorities, and we have not been able to find anything in our own decided cases which conflicts with it. Only two have been brought to our attention, and they did not decide the precise point made here. The *State v. Ford*, reported in a note to the *State v. Brown*, 3 Strobl., 526. In this case the prisoner was indicted for stealing slaves. He made no proof of good character, but relied upon

the naked presumption of innocence. The Circuit Judge stated to the jury that in two

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cases *proof of good character would make the scale preponderate in favor of a prisoner, viz., where his guilt depended on the legal presumption arising from his possession of the stolen articles, and in a case of doubt. Upon appeal the court said: "This ground is explained in the report (that no evidence of good character was offered). In a criminal case, character, to receive consideration must be proved. Indeed, such proof is the prisoner's privilege. He will be allowed (say the authorities) to call witnesses to speak generally as to his character. If he does not avail himself of this privilege, how can he claim any other benefit from the legal presumption that he is of good character, save that which is afforded to every criminal, that he shall be held to be innocent until his guilt be established to the satisfaction of the court and jury? It is in cases of doubtful facts or to rebut the legal presumption of guilt arising from the possession of stolen articles, that good character proved in court is of most effect. In each there is a possibility of innocence, and proof of good character adds so much more to that possibility, that a conviction would be wrong; but without that proof the prisoner has no advantage from character," &c. This is undoubtedly correct, and we see in it nothing in conflict with the rule as announced by the authorities herein cited.

The State v. Edwards, 13 S. C., 30. In this case the parties were indicted for grand larceny. There was proof of the good character of the defendant. The case went off on other grounds, but in commenting on a ground of appeal "that there was error in charging that testimony as to good character can have no weight, except in doubtful cases," the court say: "The charge that good character can have no weight except in doubtful cases might have the effect under some circumstances to divert the attention of the jury from the real importance of good character. The bearing of such evidence is directly upon the intent or motive to be ascribed to the conduct of the party, and the proof of good character may have the effect to call for a higher degree of certainty in the proofs of the conduct of the party than would be requisite if a notoriously bad character was shown. If a person of undoubted character is seen in the act of lifting goods from the counter of a store, an intent to steal

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could not be made out *against such proof of character, on testimony that might be abundantly sufficient to convict a notorious thief. While therefore the charge is not in itself necessarily erroneous, it is apparent that it might become so under circumstances easy to conceive. Its bearing in the present case

need not be considered, as the case is disposed of on other grounds," &c.

We think it was misleading and erroneous to charge the jury in general terms that "the law does limit the effect of good character to doubtful cases; and that it is only available in that class of cases."

This makes it unnecessary to consider the other exceptions as to alleged misconduct of some of the jurors and as to the clothes of the prisoner.

The judgment of this court is, that the judgment of the Circuit Court be set aside, and the case remanded in order that there may be a new trial.

25 S. C. 181

STANLEY v. SHOOLBRED.

(April Term, 1886.)

[1. *Ejectment* ⇨108.]

In action for recovery of a tract of land, the plaintiff having failed to adduce any testimony tending to show that he had title to the land described in the complaint, or any part thereof, or that defendant was in possession of or had trespassed upon any part of said land, a nonsuit was properly granted.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 316; Dec. Dig. ⇨108.]

[2. *Adverse Possession* ⇨100.]

A person in actual possession of a part of a tract of land may extend his possession to the whole tract by producing a deed or plat covering the whole, and may claim title to the entire tract by showing his exclusive possession thereof under this color of title for the requisite statutory period.

[Ed. Note.—Cited in *Anderson v. Lynch*, 37 S. C. 578, 16 S. E. 773.

For other cases, see *Adverse Possession*, Cent. Dig. § 547; Dec. Dig. ⇨100.]

[3. *Adverse Possession* ⇨100.]

But a claim under color of title is not shown by producing a grant and plat which had never been in the possession of the claimant or of those under whom he held; nor by a grant and plat of land, of no part of which land he had ever been in the actual possession.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 547; Dec. Dig. ⇨100.]

[4. *Pleading* ⇨127.]

Where the defendant pleads a general denial and a further defence by way of confession and avoidance, the admissions of the latter cannot be used by the plaintiff to establish the issues raised by the general denial.

[Ed. Note.—Cited in *Brook v. Nelson*, 29 S. C. 52, 6 S. E. 899; *Gilreath v. Furman*, 57 S. C. 293, 35 S. E. 516; *Hickson v. Early*, 62 S. C. 51, 39 S. E. 782; *Chapling v. Toxaway Mills*, 70 S. C. 475, 50 S. E. 186.

For other cases, see *Ejectment*, Cent. Dig. § 201; *Pleading*, Dec. Dig. ⇨127.]

[This case is also cited in *Mahoney v. Southern Ry.*, 82 S. C. 219, 64 S. E. 228, and distinguished therefrom.]

Before Hudson, J., Richland, October, 1885.

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*The opinion fully states the case.

Mr. R. A. Lynch, for appellant.

Messrs. Clark & Muller, contra.

July 7, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff brought this action in February, 1885, to recover possession of a tract of land described in his complaint as follows: "A tract of land situate in Richland County, State aforesaid, containing seven hundred and thirteen acres, formerly known as the Delozier land, bounded on the north by the lands purchased by William Bynum from Scott, and now in the possession of Mrs. Frances H. Shoolbred; also by land of Mrs. Sarah Ray and Jeff Tucker; on the east by land of Dr. William Weston and land of Lawrence Scott, on the south by land now claimed by Mrs. Jane Adams, on the west by lands of Alice Stack, G. A. Kammer, James Scott, and the estate of Dr. J. G. Huguenin."

The defendant interposed two defences as follows: "For a first defence, admits that she is in possession of about four hundred acres of land within the boundaries stated in the complaint, and admits that she withholds the same from the plaintiff; but she denies each and every other allegation in said complaint contained. For a second defence, alleges that neither plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises described in the complaint, or any part thereof, within ten or twenty years before the commencement of this action, but that defendant, her ancestors, predecessors, and grantors, have held and possessed the said premises adversely to the pretended title of the plaintiff for ten and for twenty years last past before the commencement of this action under a claim of title in fee exclusive of any other right."

The plaintiff did not undertake to make out any regular chain of paper title, but relied entirely upon a title by possession acquired by those under whom he claimed. For this purpose he offered testimony tending to show that one Asa Delozier, who died in 1822, was at the time of his death, and

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for some ten or *twelve years prior thereto, in possession of a certain plantation in Richland County, the boundaries or extent of which were not stated; that by his will he gave all of his property to his wife, Hannah Delozier, who continued to occupy the same place, cultivating a patch of some four acres, and having some claim to a mill about a half or three-quarters of a mile from where she lived, upon the time of her death, in 1856; that by her will she gave her property to her daughter, the wife of plaintiff, for her life, with remainder to her issue; that she died without issue, whereby the property reverted to the heirs of Hannah Delozier, and that plaintiff holds a conveyance from the only living child of Hannah for her interest in the estate of her mother, and in the estate of her deceased sister, who was the wife of plaintiff.

The plaintiff also introduced in evidence an

original grant and plat to Richard Jeffries for 300 acres, dated April 2, 1772, and original grant and plat to Moses Harris for 400 acres, dated June 4, 1786; but where these papers came from, does not very distinctly appear. The plaintiff's counsel in his argument assumes that they were found among the valuable papers of Mrs. Hannah Delozier after her death; but we do not find that these particular papers are anywhere mentioned in the testimony. The only thing which does appear in the testimony in reference to the finding of papers is what is said by Mrs. McLauchlin, the granddaughter of Hannah, when she was on the stand as a witness, and this is all that there appears: "Bundle of old papers presented to witness. I found these papers in an old box belonging to my grandmother. The box in which I found them was sent to my mother's house the day after my grandmother's death. The box had never been opened until I opened it. I carried the papers to my mother, who handed them to Mr. Stanley." But there is not a word in the testimony here, or anywhere else, to indicate that the two grants above referred to were in the "bundle of old papers" which this witness speaks of finding, and certainly nothing whatever in the testimony to indicate that either Asa or Hannah Delozier ever saw or heard of the existence of such papers. Indeed, the first mention we find made of them is when the plaintiff, near the close of his case, offered them in evidence.

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*The plaintiff then offered the surveyor, who testified as follows: "I surveyed this land under the order of this court, but only in part for want of proper time. Notice short. No instructions. I made a very imperfect survey; but I surveyed enough to be able to say that the mill is located on the plat accompanying the old grant to Richard Jeffries. I did not fully survey either grant. The plats cover the Bynum land, or what I have always heard called the Bynum land. The mill is on one of the grants. Can't swear that the two plats are of adjacent territory, but believe they are. The survey was very imperfect. I found none of the marks and stations. They were all gone." A Mr. Styles, who seems to have been employed as an assistant by the surveyor, testified as follows: "I was requested by James D. Stanley to locate the land covered by the Richard Jeffries and Moses Harris plats. I took the plats, went into the neighborhood, tried the plats by the lines and by the natural objects stated in the plats. I found trees marked as on the plats at some of the corners. At some of them I did not find the trees on the plats, but I found other trees of the same kind." This witness also speaks of a diagram made by the surveyor and himself, which, however, was not in evidence, and, therefore, need not further be referred to.

Another witness, W. B. McLauchlin, whose

testimony seems to be much relied on by appellant's counsel, after saying that he was employed by Mr. Adams, as executor of Wm. Bynum to rebuild the Delozier mill, proceeded as follows: "He told me to get all the timber to rebuild the mill from the Delozier tract. Tom Bynum, his overseer, pointed out the lines of the Delozier plantation to me. Recently I have gone over the same ground and recognize the lines pointed out to me. The lands seemed to contain 700 or 800 acres." But as neither this witness nor any other, so far as we have been able to discover, has undertaken to give the boundaries of what he calls the Delozier tract, and certainly not to identify such boundaries with those set out in the complaint, we are at a loss to perceive the pertinency or effect of his testimony.

At the close of the plaintiff's case, the defendant moved for a non-suit upon two grounds: 1st. Because the plaintiff has failed to show title to the premises sued for, or

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any part thereof. 2d. *Because, if the plaintiff could be regarded as having shown title to a part of the premises sued for, he has wholly failed to show that defendant is in possession of that part."

Judge Hudson granted the motion, giving as his reasons therefor the following: 1. Because plaintiff claims under two grants from the State, one for 300 acres to Richard Jeffries, April 2, 1772, the other for 400 acres to Moses Harris, June 5, 1786; but to neither of these grants did he trace his title by a chain of conveyances. In his efforts to do so he traced the links of his chain to the will of Asa Delozier, probated in 1822. From what source Asa Delozier derived his title, was not made to appear. 2. The plaintiff was, therefore, compelled to rely upon the long possession of Asa Delozier and his devisee, Hannah Delozier. Of course, then, it was essential to establish the location and extent of the possession. The *pedis possessio* of Hannah Delozier was confined to a small patch of about four acres, with some evidence of a claim to a mill-house some distance from her dwelling. But there was no legal color of title put in evidence, which in law could extend her constructive possession, because there was no evidence that she claimed for the statutory period any defined territory under a legal color of title. No deed, no plat, no line of marked trees connecting the little homestead with the mill, and claimed by her so to connect it, was offered in evidence. 3. But a greater want still remained to be supplied, and this was not done. Even had the plaintiff shown the limits and boundaries of the actual constructive possession of Hannah Delozier (and this he did not do), it next devolved on him to show that the defendant is a trespasser within that area. Of this fact there was no evidence. He failed to show the location of

any trespass or adverse claim of the defendant. It devolved on him to show, first, the extent of Hannah Delozier's title by possession, actual and constructive; and, secondly, that this title covered the trespass of the defendant. In both these essentials he failed, and hence the non-suit. By failure I mean a total want of evidence."

From this judgment plaintiff appeals upon various grounds, which need not be set out in detail here, for we think they may all be resolved into two general questions: 1st. Did the plaintiff fail to adduce any testimony tending to show that he had title to

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*the premises described in the complaint, or any part thereof? 2d. Did he fail to offer any testimony tending to show that the defendant was in possession of, or had trespassed upon the premises, or any part thereof described in the complaint, to which plaintiff had offered testimony tending to show title in himself? If both or either of these questions must be answered in the affirmative, then the non-suit was properly granted; but if they must both be answered in the negative, then the non-suit was improperly granted. For the plaintiff, to maintain his action, must establish two things—first, that he has title to the premises described in the complaint, or some part thereof; and, second, that the defendant has trespassed on such premises, or some part thereof. Hence, if the plaintiff has failed to present any testimony tending to prove either one of these propositions, both of which are not only material, but absolutely essential to the maintenance of his action, then the non-suit is proper.

First, then, let us inquire whether there was any testimony tending to show that plaintiff had title to the premises described in the complaint, or any part thereof. It is conceded that he has not shown any paper title at all, but he may, as he has done, rely upon title by possession—not his own possession, but the possession of those under whom he claims, viz., Asa Delozier and Hannah Delozier. Our first inquiry, therefore, is whether there is any testimony that either Asa or Hannah Delozier ever had any possession within the boundaries of the tract of land described in the complaint. We confess that we have not been able to find any such testimony. It is true that there is testimony to the effect that Asa Delozier for some ten or twelve years, and perhaps longer, prior to his death was in possession of a plantation in Richland County called his place, but there is not the slightest testimony tending to show where such plantation was located, or what was its extent, until we come to the testimony as to the possession of the same place by Hannah Delozier. It is quite certain, therefore, that there has been an entire failure to show any title by possession in Asa Delozier to any particular spot

of land, and most certainly not to any land within the boundaries set out in the complaint.

Then as to the possession of Hannah Delo-

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zier. While there is testimony showing that she had possession of about four acres of land, with some claim to a mill near by, no witness has undertaken to define the limits of such possession, or the location of the four acres which she occupied and used, or of the mill near by: and there is not a shadow of testimony tending to show that either the four acres or the mill are within the boundaries set out in the complaint. If, however, the plats attached to the grants to Jeffries and Harris can be used as color of title in her, then upon well settled principles they may be resorted to, to extend her possession to the limits embraced within those plats, provided it does not conflict with the possession of some one having a better title within such limits: for, according to the testimony of the surveyor, the patch of four acres and the mill are both within the lines of the Jeffries grant: but whether these two grants adjoin, does not appear.

The only witness who speaks as to this is the surveyor, who says: "Can't swear that the two plats are of adjacent territory, but believe they are." Now, when it is seen that the survey was "a very imperfect survey," (to use the language of the surveyor himself), it seems pretty clear that his expression of belief that these two tracts of land adjoined, was a mere conjecture, and not an expression of opinion based upon information derived from an actual survey: for if he had made such survey, he would have been able to say whether they were adjoining tracts, and he tells us that he did not make anything like a complete survey, his language being, "I surveyed enough to be able to say that the mill is located on the plat accompanying the old grant to Richard Jeffries. I did not fully survey either grant," and he says nothing whatever as to the lines of the Harris plat, or what land is embraced therein.

But taking the most favorable view for the appellant, and assuming for the purpose of this inquiry that the two grants are adjoining, let us consider whether these two plats, one or both, can be used as color of title to extend Hannah Delozier's possession to the limits of the lines of those plats. When a person is in the actual occupation, has *pedis possessio*, of a part of a tract of land, he may extend his possession over the whole tract, by producing a plat or deed covering

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the whole tract, or otherwise *showing that he claims to be in possession of the whole tract: and when such possession is of such a character, and has continued long enough to give him a title, he thereby acquires as good a title as if he had produced a regular

chain of paper title. But it is necessary for him to show not only his *possessio pedis* of a part of the tract, for the requisite length of time, but also to define clearly the limits to which he claims by virtue of such possession, and that he has for the requisite length of time made such claim. A man may have had actual occupancy of a small part, say five acres, of a tract containing 1,000 acres for nine years, without any plat, deed, or other color of title indicating that he claims, by virtue of such possession, the whole tract, and if he should, upon the expiration of the ninth year, have a plat made covering the whole tract, we do not think that he could by such color of title, at the expiration of the next year, claim to have thereby established his title to the whole tract; for while the evidence of his possession of the five acres would be amply sufficient to establish his title to that portion of the tract, there would be no evidence whatever that he had claimed to hold by possession the balance of the tract for a longer period than one year, and, therefore, no evidence by which his possession of a part of the tract could be extended over the whole tract for a period sufficiently long to give him a title to the whole tract.

We think, therefore, that it is necessary, in such a case, to show, not only an actual occupation of a part of the tract for the requisite length of time, but also there must be some evidence from which it can be inferred that the occupant has, by virtue of such *pedis possessio*, claimed the whole tract for the same length of time; for his possession outside of his *pedis possessio* cannot be said to begin until he acquires color of title extending such possession, or until he otherwise shows that by virtue of such *pedis possessio* he claims the whole tract; and, therefore he cannot be said to have established any title to the portion covered by such extended possession, until such extended possession has been shown to exist for the requisite time. This may be shown by the production of a plat made for, or a deed made to, himself or one under whom he went into possession, covering the whole tract, of the proper date for the purpose, or by any

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other *evidence showing that during the requisite time he has claimed the whole tract.

Applying these principles to the case under consideration, it is difficult to see how either of the plats attached to the old grants, afford color of title to Hannah Delozier so as to extend her actual possession over the whole of both or either of those grants. There certainly is not the shadow of any evidence that either of these grants were ever in the possession of Asa Delozier or were ever seen or ever heard of by him; and we do not see any evidence that they were ever in the possession of Hannah Delozier, or even their existence known to her. For

though, as we have said above, the counsel for appellant has assumed that these grants were found amongst Hannah Delozier's valuable papers at her death, yet we have heretofore recited all the testimony appearing in the record upon that subject, and we look in vain for any evidence that these two grants were in the bundle of old papers found by Mrs. McLauchlin in the box of Hannah Delozier. She does not say so, and no other witness says so, and we do not see how we can infer that it was so. But waiving this, and assuming that these two old grants were in the bundle of papers referred to by that witness, we look in vain for any evidence as to how or when Hannah Delozier acquired possession of them, or any evidence whatever that she ever, at any time, set up any claim to hold possession of all the land embraced within the plats attached to said grants, or even that she ever knew of their existence.

But even assuming that there was evidence tending to show that Hannah Delozier had possession of these grants for the requisite length of time, and that by virtue thereof she claimed to extend her possession over both of the tracts, we do not see how this would help the plaintiff. It might show that the plaintiff had offered testimony tending to show title by possession to all the land embraced within the lines of the Jeffries grant, inasmuch as there is some testimony tending to show that Hannah Delozier, under whom plaintiff claims, was in the actual occupation of a part of that grant, but we look in vain for any testimony whatever tending to show that the Jeffries grant covers a foot of land embraced in the complaint. Indeed,

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there is, throughout the whole testimony, a singular absence of any reference whatever to the boundaries of the land set out in the complaint.

But even conceding that the plaintiff, by using the Jeffries grant and plat as color of title, has established title by possession to the whole of that grant, where is there any evidence of such title to the Harris grant? To state it most strongly for the plaintiff, it is at least doubtful whether these two grants adjoin, but assuming that they do, how is it possible for the possession on the Jeffries grant to be extended so as to cover the Harris grant, even if the latter should be regarded as affording color of title in Hannah Delozier? Color of title is of no avail whatever except in aid of actual possession within the lines embraced in such color of title, and there is not a particle of testimony that Hannah Delozier ever had possession of any portion of the Harris grant, or ever set her foot upon it. The fact which has been assumed for the purpose of this inquiry, that she had possession of both of these grants, and thus had color of title to both, may, as we have said, enable her to extend her ac-

tual possession within the lines of the Jeffries grant to the whole of that grant, but how can it extend her possession to the Harris grant, in the absence of any evidence that she ever had any actual possession within the lines of that grant, even though they be conceded to be adjoining?

The case which has gone as far as any other upon this subject is that of *Alston v. Collins* (2 Speers, 450), but that case is very far from coming up to the present. There the ancestor of plaintiffs had acquired the title to five tracts of land, contiguous to each other, in 1785. In 1787 a resurvey of these lands was made, and they were all embraced in one plat, the several tracts being designated thereon by the numbers from 1 to 5 inclusive. In 1838 these lands were devised by the ancestor to the plaintiffs, who brought the action against the defendant, who had been in actual possession of a portion of tract No. 5 under junior grants for a period long enough to establish a title by the statute of limitations. The plaintiffs' ancestor, by his tenants, had possession all the while on tract No. 1, and it was held that this possession extended over all the land embraced within the plat of 1787, and therefore that the plaintiffs were entitled to recover all of the land except that of which defendant had

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had *pedis possessio* for the statutory period. It will be observed in that case that the five tracts were not simply adjoining, but they were all owned by the same person, the ancestor of the plaintiffs, and by him devised to the plaintiffs, and more than that, the five tracts had all, as far back as 1787, been embraced in one plat of resurvey, and these circumstances were held to be sufficient to extend the possession on one of the tracts over all five, except where it was displaced by the defendant's *pedis possessio*.

But in the present case we find no such circumstances. There is no evidence that the title to the Jeffries grant and the Moses Harris grant was ever held by the same owner, and no evidence that these two grants were ever consolidated into one plat. We can see no ground, therefore, for extending the actual possession on the Jeffries grant to the land embraced within the lines of the Harris grant. We agree, therefore, with the Circuit Judge that the plaintiff failed to show any evidence of title to the land described in the complaint or any part thereof.

But should we be in error in this, it would be necessary to inquire further, whether any evidence appears in the case tending to show that defendant was in possession of, or had trespassed upon, any of the land described in the complaint. No witness has testified that the defendant has trespassed upon, or is in the possession of, any land claimed by the plaintiff, or, indeed, of any land at all. To establish this part of his case, the plaintiff relies entirely upon the admissions in the

answer. We will first consider the admissions supposed to be made by the defendant, in pleading her second defence. Waiving any question about which there might be grave doubt, as to whether the language there used would amount to an admission that the defendant was in possession of any portion of either the Harris or the Jeffries grants, which, so far as we can understand, is the land to which the plaintiff claims title, it is sufficient to say that it is well settled that where a defendant pleads two defences—one a general denial, and the other by way of confession and avoidance, any admission contained in the latter cannot be resorted to by the plaintiff to establish the issue raised by the former.

As is said by Pomeroy in his work on

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Remedies, at page *743, section 724: "When a denial is pleaded in connection with a defence of new matter, or two defences of new matter are set up, the admissions in the one can never be used to destroy the effect of the other. The concessions of a defence by way of confession and avoidance do not obviate the necessity of proving the averments contradicted by the denial. This rule is universal." And again this standard author on the Code, at page 630, section 578, in speaking of the effect of the admissions of one of several defendants who have put in separate answers, says: "The same doctrine extends to separate defences of one party in a single answer; the admissions in a defence of confession and avoidance do not overcome the effect of a denial contained in another." Indeed, any other rule would, practically, deny to a party the right to plead a general denial, and a second defence by way of confession and avoidance. We think it quite clear that any admission (if there is any) to be found in the second defence here pleaded cannot be resorted to, for the purpose of establishing the issue raised by the first defence.

We proceed then to inquire into the effect of the alleged admission contained in the first defence. The allegations of the complaint are, that the plaintiff has title to a certain tract of land, described, 1st, as situate in Richland County; 2nd, as containing 713 acres; 3rd, as formerly known as the Delozier land; 4th, as bounded by certain land as specifically mentioned; 5th, that the defendant is in possession of said land and unlawfully withholds the same. The defendant, in her answer, "admits that she is in possession of about 400 acres of land, within the boundaries stated in the complaint, and admits that she withholds the same from the plaintiff; but she denies each and every other allegation in said complaint contained." From this statement of the pleadings it is manifest that defendant's admission relates solely to the 4th and 5th

allegations as we have stated them above, and that every other allegation was distinctly denied. She does not admit, but on the contrary denies, that the land in question is situate in Richland County, that it contains 713 acres, or that it was formerly known as the Delozier land. All she admits is, "that she is in possession of about 400 acres of land, within the boundaries stated in the complaint," and as there is not a single

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*word in the testimony as to those boundaries, or any intimation even that the land within those boundaries was ever known as the Delozier land, or even that the land covered by the Jeffries and Harris grants, the only land to which the plaintiff can by any possibility claim to have offered evidence of title, is the land embraced within the boundaries set out in the complaint, it seems too plain to need further argument to show that the admission in the answer cannot avail the plaintiff as any evidence whatever to establish one of the material points of his case.

We agree, therefore, with the Circuit Judge that the plaintiff utterly failed to adduce any testimony of any trespass by the defendant upon any portion of the land to which he sought to establish his title.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 193

Ex parte LYNCH AND BACHMAN & YOUNG. In re REEVES v. TAPPAN AND GARY. DIAL v. GARY & TAPPAN.

(April Term, 1886.)

[1. *Covenants* ⇨132.]

A mortgagor, being sued by strangers for the recovery of the mortgaged land, informed the mortgagee that he proposed to make terms with the plaintiffs, as he had been advised by counsel that the claim could not be successfully resisted; thereupon the mortgagee obtained leave of the court to make defence to the action, and succeeded in defeating it, and the property thus saved was worth more than the mortgage debt. *Held*, that the attorneys for the mortgagee were not entitled to payment for their services out of the surplus value of the mortgaged land.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 261; Dec. Dig. ⇨132.]

[2. *Attorney and Client* ⇨143.]

There having been no contract, express or implied, between the mortgagor and mortgagee, no promise to pay arises, notwithstanding the benefit which accrued to the mortgagor from the services rendered by these attorneys to the property in which they both had an interest. *Hand v. Railroad Company*, 21 S. C., 162, approved.

[Ed. Note.—Cited in *Hubbard v. Camperdown Mills*, 25 S. C. 501, 1 S. E. 5; *Ex parte Fort*, 36 S. C. 25, 15 S. E. 332; *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012.

For other cases, see *Attorney and Client*, Cent. Dig. §§ 328-331; Dec. Dig. ⇨143.]

[3. *Attorney and Client* ⇨133.]

The order of the court permitting these attorneys to appear for the mortgagee and defend the title of the mortgagor, did not constitute them attorneys for the mortgagor. Indeed, the Circuit Judge had no such power.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 318; Dec. Dig. ⇨133.]

[4. *Covenants* ⇨132.]

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*In action for the breach of a covenant of general warranty, fees paid to an attorney by the covenantee for defending the title cannot be recovered as damages.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 260-262; Dec. Dig. ⇨132.]

5. This court concurred with master and Circuit Judge in holding that there was no collusion between this mortgagor and the plaintiffs in the action for recovery of the land.

Before Witherspoon, J., Richland, April, 1885.

This was a petition by R. A. Lynch and Bachman & Youmans, attorneys, to be paid a fee for services rendered in establishing the title of Gary & Tappan to real property in the city of Columbia, and that the amount of such fee be decreed to be a lien upon said real property. The case was referred to the master and afterwards came before the Circuit Court on exceptions to his report. The decree upon these exceptions was as follows:

The first and third exceptions of the petitioners in substance allege error on the part of the master in not finding, as matter of fact, that there was such agreement and collusion between plaintiffs, Reeves et al., and defendants, Gary & Tappan, as to constitute fraud. It appears that the defendant, Edwin F. Gary, chiefly advised with counsel employed by defendants, Gary & Tappan, in the Reeves et al. suit. It also appears from the testimony that, prior to the July term, 1882, of the court, the defendants, Gary & Tappan, were advised by their counsel that they could not successfully defend their title in the suit of Reeves et al. It further appears from the testimony that under this advice and regarding further litigation as hopeless, the defendant, Edwin F. Gary, either directly or through counsel, consulted with plaintiffs' counsel, both in the suit of Reeves et al. and in the suit of Dial, administrator, to ascertain the best terms upon which the defendants, Gary & Tappan, could be relieved of further litigation and expense in defending the title in the suit of Reeves et al.

It does not appear that the defendants, Gary & Tappan, actually received any pecuniary benefit resulting from such negotiations for a settlement. Having paid a considerable amount for the property in 1872, it was natural and reasonable in 1884, when advised by their counsel that their title was

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worthless, that the *defendants, Gary & Tappan, should endeavor, under the advice of

said counsel, to secure the best terms of settlement that they could get. These propositions for settlement were not only submitted to the plaintiffs in the suit of Reeves et al., involving the title, but also to Dial, administrator, who was seeking to foreclose the mortgage. I think that the master's conclusion as matter of fact, that there was no intent upon the part of Gary to defraud Dial, administrator, is sustained by the evidence. The first and third exceptions are overruled.

The petitioners' second exception alleges that the master erred in not finding that the counsel for Gary & Tappan were passive in the proceedings referred to rather than inactive. Having concurred with the master that the defendants, Gary & Tappan, were not influenced by any intent to defraud Dial, administrator, it seems to me that the attitude of Gary & Tappan's counsel after the counsel for Dial, administrator, had assumed the defence in the suit of Reeves et al., is a matter of little consequence. The second exception is also overruled.

It appears that Judge Cothran has filed a decree in the foreclosure suit of Dial, administrator, v. Gary & Tappan, adjudging that the plaintiff is entitled to a sale of the mortgaged premises to pay his debt. From this decree the defendants, Gary & Tappan, have given notice of appeal. There can be no doubt that the petitioners rendered valuable services in sustaining Gary & Tappan's title in the suit of Reeves et al. If Gary & Tappan are liable for such services, I think the amount of compensation reported by the master is reasonable. It is clear that both Dial, administrator, and Gary & Tappan, have derived considerable pecuniary benefit from such professional services.

But the main question to be considered and determined is whether or not Gary & Tappan are legally liable to the petitioners for their valuable professional services rendered in sustaining the title in the case of Reeves et al. v. Gary & Tappan. The defendants, Gary & Tappan, contend that they are not liable for such professional services rendered by petitioners. As stated in *Nimmons v. Stewart* (13 S. C., 447), a claim for professional, like other claims for services, must rest on the contracts of the parties, express or implied, and can only be established on

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proof *of such contract, against the party who makes the engagement. This is the general rule, to which, however, there are exceptions on the equity side of the court. See, also, *Hand v. Railroad Company*, 21 S. C., 179.

There is neither allegation nor proof of any express contract or agreement between the petitioners and Gary & Tappan, with reference to the professional services of the petitioners. The ground upon which the petitioners rely is, that having established Gary

& Tappan's title, they are entitled to an equitable lien upon the mortgaged property as against Gary & Tappan to secure a fee, said lien growing out of the mortgage and other proceedings above recited. The motion of Dial, administrator, to be allowed to come into the suit of Reeves et al. to defend the mortgagor's title was resisted by the attorneys of Reeves et al., but was not resisted by the attorneys of Gary & Tappan. The petitioners were allowed to come into the suit of Reeves et al. as counsel for Dial, administrator. It does not appear from the proceedings in the above causes, independent of the mortgage, upon what ground the petitioners can establish an equitable lien upon the mortgaged premises, for their services as against Gary & Tappan.

It is, however, contended that petitioners are entitled to compensation from Gary & Tappan, and to a lien upon the property under the covenant of warranty in the mortgage of Gary & Tappan to Asa Burke. The covenant is as follows: "And we do hereby bind ourselves and our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Asa Burke, his heirs and assigns, for and against us and our heirs, executors, and administrators, lawfully claiming, or to claim, the same, or any part thereof." In the case of *Faries v. Smith*, 11 Rich., 80, it is held: "A warranty in the usual form against the grantor and his heirs is a covenant of seizure and of quiet enjoyment, not against the world, but against the grantor and his heirs."

This warranty does not contain the language usually employed where a general warranty is intended. A covenant of warranty is to be construed as a contract, under which the parties can enlarge or limit their ability, as they see proper. See the proviso to section 1775 of the General Statutes. Un-

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der the covenant of *warranty in the mortgage above quoted, Gary & Tappan bound themselves to defend the title only against themselves, their heirs, executors, and administrators. In the absence of fraud on their part, I do not think that Gary & Tappan, under their warranty, were under any legal obligation to defend the title against Reeves et al., especially after being advised by their eminent counsel that it would be a hopeless undertaking. If Gary & Tappan, under the covenant of warranty in the mortgage, were under no legal duty or obligation to defend their title against the claim of the plaintiffs, Reeves et al., there can be no implied undertaking on their part to pay the fees of the attorneys of Dial, administrator, for defending said title, as nothing can be implied contrary to the stipulations of the parties.

Counsel for petitioners cites 2 Jones on Mortgages, section 1606, which states that

"Courts of Equity may allow a mortgagee counsel fees in defending his title without an express contract." The author in his notes refers to two cases in support of this proposition, to wit: *Lomax v. Hide*, 2 Vernon, 185, and *Hunt v. Fownes*, 9 Vesey, 70. I do not think either of these cases applies to the claim of petitioners. In the first of the cases cited a bill was filed by a second mortgagee to redeem, in which the senior mortgagee in possession was allowed his costs and expenses in foreclosure, and the latter case involved the allowance to the mortgagor of the necessary expenses in procuring administration upon the estate of a necessary party to the suit for foreclosure. I can find no case in this State in which the point raised by the petitioners has been adjudicated, and have not been referred to any authority in law, or established principle in equity upon which, in my judgment, the claim of the petitioners for counsel fees as against Gary & Tappan can be sustained.

The defendants, Gary & Tappan, contend that the petition herein cannot be sustained, as they have never been served with a copy of the petition or the order of reference. It is sufficient, on this point, to say that I cannot review the order of Judge Cothran directing service of the petition upon the counsel of Gary & Tappan, but must confine myself to the consideration of the petition, the master's report, and the exceptions thereto.

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*It is ordered and adjudged, that the petition herein of R. A. Lynch, Wm. K. Bachman, and LeRoy F. Youmans, be dismissed with costs.

From this decree the petitioners appealed on several exceptions, which raised the points considered in the opinion of this court.

Mr. John T. Rhett, for appellants.

Messrs. Clark & Muller, contra.

July 7, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The petition in this case was filed by the appellants in re the two cases above stated, for the purpose of obtaining a reasonable fee for their professional services, in establishing the title of said Gary & Tappan to certain real estate in the city of Columbia, mortgaged by the said Gary & Tappan to Asa Burke, the intestate of Dial; and to have the amount of said fee declared a lien upon said real estate.

It appears that the appellants were retained as attorneys by Dial to foreclose certain mortgages on real estate in the city of Columbia, given by Gary & Tappan to Dial's intestate, a portion of the mortgaged premises being designated as the Gervais street property, and another portion as the Blanding street property. In the meantime, Sarah N. Reeves and others instituted an action to recover possession of the Gervais street proper-

ty against Gary & Tappan, in which action the defendants were represented by counsel, other than the appellants, to wit, by Messrs. Melton & Clark. While these two actions were pending, viz., the action for foreclosure and the action for ejectment, and shortly before the commencement of the term of court at which they stood for trial, Dial, the mortgagee, learned through the appellants, his attorneys, that Gary & Tappan, having been advised by their counsel that no valid defence could be made to the action of ejectment brought by Reeves and others, proposed to make terms with the plaintiffs in that action, whereby, for a consideration, the defence would be abandoned.

This information was communicated to the appellants as attorneys for Dial by the attor-

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neys representing Gary & Tappan in the action for ejectment, accompanied with a proposition to make terms with Dial, which proposition was declined by the appellants as attorneys for Dial. Thereupon appellants gave notice of a motion for an order directing Dial to be made a party defendant to the action brought by Reeves and others against Gary & Tappan, which motion was resisted by the counsel for Reeves and others, and advocated by the appellants, the counsel for Gary & Tappan taking no part, either for or against the motion. As the result of this motion, an order was granted: "That the said George L. Dial, as said administrator of the said Asa Burke, deceased, the mortgagee, be, and he is hereby, permitted to come in and defend the title of the said defendants, Henry L. Tappan and Edwin F. Gary, the mortgagors of the said Asa Burke, to the premises set forth in the complaint, and that Messrs. Lynch and Bachman & Youmans be permitted to enter their names as counsel of record in this cause for the said George L. Dial, as administrator aforesaid. * * * It is further ordered, that in the meantime the cause of George L. Dial, administrator aforesaid, against said Tappan & Gary, to foreclose the mortgage hereinbefore referred to, now also at issue in this court, be, and the same is hereby, suspended until the further order of this court herein."

From this time forward the appellants seem to have had the entire charge of the defence of the ejectment suit, which they conducted to a successful result, thereby establishing the title of Gary & Tappan as against the Reeves to the mortgaged premises,¹ which, according to the testimony, seems to exceed in value the amount of the mortgage debt; and out of such excess appellants claim that they are entitled to a reasonable fee for the successful defence of the title of the mortgagors. There can be no doubt that the appellants have rendered most

efficient and valuable professional services, which have enured to the benefit of Gary & Tappan, and for which, as a matter of abstract justice and equity, they should be well compensated. The question, however, for us to decide is, whether there is any legal or equitable principle upon which a court can decree such compensation to them out of the property of Gary & Tappan.

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*The question as to what will constitute a sufficient ground to base a claim for professional services as between attorney and client has been so recently and so fully and satisfactorily discussed by Mr. Chief Justice Simpson in the case of *Hand v. Savannah & Charleston R. R. Co.* (21 S. C., 162), that we need not go behind that case either for argument or authority. The underlying principle of that case is, that such a claim, like every other claim for services rendered, as between parties who are sui juris, must ultimately rest upon contract, either express or implied, made by the party to be charged, either directly or through some authorized agent or representative. As is said in that case: "No one can legally claim compensation for voluntary services to another, however beneficial they may be, nor for incidental benefits and advantages to one, flowing to him on account of services rendered to another, by whom he may have been employed. Before a legal charge can be sustained, there must be a contract of employment, either expressly made or superintended by the law upon the facts."

Testing this case by these principles, we are forced to the conclusion that the claim of these appellants cannot be sustained. It is conceded, and properly conceded, that there is no evidence whatever of any express contract upon which the claim can be based. Is there any evidence from which a contract can be implied? As we have seen, the mere fact that the services rendered by the appellants have enured to the benefit of Gary & Tappan is not sufficient to imply a contract to pay for such services; for it not unfrequently happens that professional services rendered by the attorney of one of the parties to an action contribute very largely to the promotion of the interests of another party to the action, represented by another attorney, and it has never been supposed that such incidental benefit constituted any foundation for a legal claim. As is said in the case just cited: "Thus it will be seen that such charges are allowed, not simply and alone because services have been rendered which have been beneficial to the common interest, but upon the ground that they were rendered by the authority of those having the common interest exercised by the representative, the compensation for which was to be chargeable to the fund protected or recovered."

¹ See *Reeves v. Tappan*, 21 S. C., 1.—REPORTER.

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*Now, to bring this case under the principle just stated, it would be necessary not only to assume, what may be conceded, that the mortgaged premises here constituted a common fund, in which Gary & Tappan on the one hand and Dial on the other had a common interest, but also to assume that Dial, when he employed the appellants to assist in the defence of the ejectment suit, was acting as the authorized representative of such common interest; and this latter assumption is not only without any support whatever in the testimony, but is directly in the teeth of it. These parties were not only not acting in concert, so as to authorize the inference that one was the representative of the other; but, on the contrary, they were at variance. Gary & Tappan, under the advice of their counsel, were unwilling to contest the Reeves claim, and unwilling, therefore, to incur any further expense or liability in conducting what they were advised and believed was a hopeless litigation; while Dial, under the advice of his counsel, was not only willing, but anxious, to carry on the contest, and for this purpose employed his own counsel, upon his own responsibility, and at his own charge.

Suppose it had been made to appear that Dial, finding that the counsel originally employed to defend the ejectment suit had no confidence in the defence, had proposed to Gary & Tappan to unite with him in employing the appellants, who were more sanguine of success, to conduct the defence, and Gary & Tappan had, in terms, declined to do so; and suppose that Dial had thereupon instructed the appellants to defend the action, and thereby became liable to them for the payment of their fee, and a successful defence had been made; would it be possible in such a case for a court to hold Gary & Tappan liable on a contract which they not only had not made, but had expressly refused to make, simply because the result of the defence, undertaken by Dial for the protection of his own interest, had enured to the benefit of Gary & Tappan? This would be directly in conflict with the principles laid down in Hand's case, *supra*, and subversive of the fundamental law of contracts.

Now, it seems to us that the case just supposed is no stronger than that which, in effect, appears in the testimony in this case. It is quite clear that Gary & Tappan, under

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the advice of eminent counsel, which, besides being of itself entitled to very great weight, seems to have been fortified by the well-nigh unanimous opinion of the Columbia bar, had lost all confidence in being able to make a successful defence to the action of ejectment, and had not only so informed their mortgagee, Dial, but had also expressed their purpose to make the best terms they could, either with the Reeves or

with Dial himself; and that when Dial, being thus informed, made his motion to be allowed to come in and defend the title to the mortgaged premises, the motion was neither resisted nor advocated by Gary & Tappan. This conduct on the part of Gary & Tappan indicated as clearly as the most explicit language could have done, that they absolutely declined to incur any further expense or liability in continuing what they were advised and believed was a hopeless contest, though they would not, perhaps because they could not, interpose any obstacle in the way of Dial's continuing the fight, if he desired to do so, for the protection of his own interest; for it appears from the testimony that Dial's only chance of securing the payment of his debt was out of the proceeds of the sale of the mortgaged premises.

Under this state of facts it seems to us that it would be straining a point to infer that Dial, in employing the appellants to continue the defence of the ejectment suit, was acting as the authorized representative or agent of Gary & Tappan; for to reach such a conclusion, it would be necessary to infer that Gary & Tappan had authorized Dial, as their representative, to do that which they had expressly declined to do for themselves. We think it quite clear that there is no evidence whatever from which to infer that there was any implied contract on the part of Gary & Tappan to compensate appellants for their professional services in defending the ejectment suit.

It is urged, however, that this matter is concluded by the order of Judge Witherspoon permitting Dial to come in and defend the title of his mortgagors in the action of ejectment. We do not so understand that order. Judge Witherspoon would not have had the power to appoint counsel for parties *sui juris* already represented by counsel of their own choice, and he did not undertake to exercise any such unauthorized power, as is shown by

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the language *of his order. He did not undertake to appoint the appellants as attorneys for Gary & Tappan; but, on the contrary, the language of his order was that these gentlemen "be permitted to enter their names as counsel of record in this cause for the said George L. Dial, as administrator aforesaid"—for the purpose of defending the title of his mortgagors to the mortgaged premises, as it was manifestly for his own interest to do, inasmuch as his only hope of realizing his debt would be out of the proceeds of the sale of the mortgaged premises, as it appears in the testimony that the mortgagors are wholly insolvent, and one or both of them have left the State.

Again, it is urged that Gary & Tappan, by the terms of the warranty contained in their mortgage held by Dial, was under an obligation to defend the title to the mortgaged premises against all the world, and that

when the duty imposed by this obligation was performed by Dial, they were liable to him for the expenses incurred in so doing, and hence bound to pay the appellants their fee as attorneys for Dial. The covenant of warranty contained in the mortgage is in the following language: "And we do hereby bind ourselves and our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Asa Burke, his heirs and assigns, for and against us and our heirs, executors, and administrators, lawfully claiming, or to claim, the same, or any part thereof." Whether this language would amount to a general warranty (which might be open to serious question); and whether, even if it be a general warranty, Gary & Tappan were thereby bound to defend the action of ejectment brought by Reeves and others, subsequent to the mortgage held by Dial, are questions which need not be considered; for it is well settled in this State, that in action for the breach of a covenant of general warranty, fees paid to an attorney for defending the title by the covenantee cannot be recovered as damages. *Jeter v. Glenn*, 9 Rich., 380. And if Dial could not recover from Gary & Tappan, it would seem to follow that his attorneys could not.

The alleged fraudulent collusion between Gary & Tappan with the plaintiffs in the ejectment suit, which is relied upon by appellants as one of the grounds upon which

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they are entitled to *recover, being without the basis of fact upon which it rests, need not be considered. The master and the Circuit Judge concur in finding that there was no fraud, and surely their finding is not so wholly unsupported by the testimony as to warrant this court, under the well settled rule, in disturbing such finding.

Under the view which we have taken of this case, the question whether the fee of appellants can be declared an equitable lien on the mortgaged premises cannot arise, and need not, therefore, be considered.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

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SHAW v. BARKSDALE.

(April Term, 1886.)

[1. *Executors and Administrators* ◊333.]

It has been conclusively determined by this court that the Court of Probate has jurisdiction to order the sale of the lands of a decedent in aid of assets, on the application of the personal representative or of a creditor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1375; Dec. Dig. ◊333.]

[2. *Courts* ◊475.]

Where two tribunals have concurrent jurisdiction, the one which first obtains possession

of the subject matter must adjudicate; but it must appear that when the second action was instituted, there was pending in the other tribunal another action under which the relief sought in the second action could as readily be obtained.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 1229; Dec. Dig. ◊475.]

[3. *Executors and Administrators* ◊338.]

An action in the Court of Common Pleas for foreclosure of a mortgage given by a devisee, did not prevent a proceeding in the Court of Probate by a creditor of the testator against the executor and devisees, to have this land sold for the purpose of paying testator's debts; especially so, after judgment of foreclosure in the first action.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1416; Dec. Dig. ◊338.]

[4. *Lis Pendens* ◊25.]

Notice of *lis pendens* in the foreclosure suit could only affect persons claiming under the devisee, and not those claiming by title paramount. Has such notice any force and effect after judgment rendered in the cause in which it was filed?

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. § 54; Dec. Dig. ◊25.]

5. This case distinguished from *Witte v. Clarke*, 17 S. C., 313.

[6. *Mortgages* ◊151.]

The right of an unsecured creditor to have the lands of his deceased debtor applied to the payment of his debts, is superior to the lien of a mortgage of such lands given by the devisee of the debtor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 317; Dec. Dig. ◊151.]

[7. *Payment* ◊66.]

The debt under which a decedent's land was sold could not be presumed to have been paid, although more than twenty years old, where it was reduced to judgment against the

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executor within the twenty *years. This case distinguished from *Campbell v. Sloan & Seignious*, 21 S. C., 301.

[Ed. Note.—Cited in *Ariail v. Ariail*, 29 S. C., 95, 7 S. E. 35; *Anderson v. Baughman*, 69 S. C. 42, 48 S. E. 38; *Brantley v. Bittle*, 72 S. C. 186, 51 S. E. 561.

For other cases, see *Payment*, Cent. Dig. § 179; Dec. Dig. ◊66.]

[8. *Limitation of Actions* ◊143.]

The admissions of a devisee, which prevent the running of a presumption of payment of his testator's debt, are binding in like manner upon his mortgagee claiming under him.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 583; Dec. Dig. ◊143.]

[9. *Estoppel* ◊94.]

The facts of this case do not show any laches nor raise an estoppel.

[Ed. Note.—Cited in *Brock v. Kirkpatrick*, 72 S. C. 505, 52 S. E. 592.

For other cases, see *Estoppel*, Cent. Dig. § 277; Dec. Dig. ◊94.]

Before Fraser, J., Laurens, December, 1885.

This was an action by John D. M. Shaw and wife, Leonora, against C. D. Barksdale, master, Nathan Henry, executor, William L. Boyd, and John W. Henry, commenced January 26, 1885. The opinion states the case.

The Circuit decree, after stating the facts, proceeded as follows:

I do not see in any of the dealings of these creditors any evidence of bad faith or unfair dealing, but only a struggle to secure the advantage of position from which to protect just claims, which they have allowed to be put in jeopardy by their previous dealings. If the title of J. D. M. Shaw under the sale made by order of the Probate Court is good, this will be conclusive of this case. Notwithstanding the able dissenting opinion of Chief Justice Moses, in *McNamee v. Waterbury* (4 S. C., 156), the ruling in that case seems to have been acquiesced in, and the Probate Court has continued to exercise jurisdiction to sell real estate of deceased persons for the payment of debts, and many titles to land in this State are now held under sales made by that court for that purpose. A Circuit Judge would not be justified in holding the question of that jurisdiction to be an open one.

I therefore assume that the Probate Court has jurisdiction to order sale of the real estate of Harrison Henry for the payment of his debts, if a proper case was made, and all necessary parties were before it. In this case the executor and the only heirs and devisees were before the court. In actions for partition judgment creditors of the several tenants in common are not necessary parties, and the purchaser of the land sold under proceedings for partition takes title free from any lien or encumbrance created by such judgment. See *Simmons v. Simmons*, Harp. Eq., 256; *Garvin v. Garvin*, 1 S. C., 62, where the authorities are cited. In *Keekeley v.*

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Moore (2 Strob. Eq., 24), Chancellor *Dunkin, in delivering the opinion of the court, says: "To require the judgment and other lien creditors of all the distributees to be made parties to a suit for the partition of the estate of the intestate, would introduce a novelty in the practice of the court, and encumber the proceedings with delay and expense, not calculated to promote the final settlement and adjustment of estates between the parties in interest, which is a leading object of the act of 1791."

A mortgage is nothing more than a security for the payment of a debt, and there is no reason which would make a mortgagee of one of the tenants in common a necessary party to a suit for partition which would not require a judgment creditor of the tenant in common to be made a party. The tenants in common have no rights not subordinate to the rights of the co-tenant to have a partition, and in the same way their rights are subordinate to those of the creditors of the deceased, and all who take under them take subject to these disabilities. There may be an exception where one or more tenants in common transfer their entire interest. If the rule prevails in matters of partition, it

should prevail, and for the same reasons, in actions for the sale of real estate to pay the debts of a deceased person. When the action is in the Common Pleas, the lien creditors of the individual co-tenant have their liens transferred to the fund, and the purchasers have their titles discharged from them. See *Simmons v. Simmons*, *Keekeley v. Moore*, and *Garvin v. Garvin*, supra.

In the Common Pleas such creditors might intervene by petition or rule, and perhaps such might be a proper practice in the Probate Court. The mortgages in this case did not constitute such an alienation as could have defeated the claims of the creditors of Harrison Henry. *Warren v. Raymond*, 12 S. C., 9. While the mortgagee of John W. Henry was not a necessary party, he would have been a proper party if the action had been in the Common Pleas, and perhaps also he might have been made a party in the Probate Court. If he had been, the only defence he could have set up so far as appears from the testimony, would have been that these notes held by J. D. M. Shaw had been paid in that there was a presumption of payment from lapse of time. This presumption could not

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have been successfully pleaded by *John W. Henry, because he conceded when he promised Shaw to furnish money to purchase these notes, and allowed him to purchase them, that they were then due and unpaid. This was somewhere between 1865 and the purchase by Shaw in 1872 or 1873, and probably just before 1872, when the first purchase was made. He certainly would not have been allowed to defeat Shaw in the Probate Court in 1883 and 1884 on this ground. If, therefore, W. L. Boyd, the mortgagee, had been a party to the action in the Probate Court, he would have been in no better position than John W. Henry, under whom he claims.

I do not think that there is anything in the case of *Campbell v. Sloan & Seignions* (21 S. C., 301) inconsistent with this view. See *Weinges v. Cash*, 15 S. C., 51; *McNair v. Ingraham*, 21 Id., 70, as to presumption of payment and statute of limitations. When the action was commenced in the Probate Court to sell this land to pay the debts of Harrison Henry, an action had been for some time pending in the Common Pleas to foreclose these mortgages to W. L. Boyd and W. L. Boyd as survivor.

It is said that the Common Pleas had first assumed jurisdiction of the case, and that therefore the proceedings in the Probate Court are void. In *Witte Bros. v. Clarke*, an action was pending to foreclose a mortgage given by a person who was in possession of land, and the court held that a proceeding in the Probate Court, commenced after the above action against the person in possession for assignment of dower, was void because the Common Pleas had assumed jurisdiction. *Witte Bros. v. Clarke*, 17 S. C., 317. The

court seems to have regarded the claim for dower simply a lien on the land itself, and the plantation (Green Hill) as the subject matter of the action. It was here held that these liens for dower and under the mortgages should be settled in one action.

Whatever may be the principle on which that case rests, it does not seem to me to apply to this case. The subject matter of the action in the Probate Court was the interest and estate of Harrison Henry, deceased, in this land. The subject matter of this action to foreclose the mortgages of W. L. Boyd in the Common Pleas, was the individual interest of John W. Henry, which had been conveyed by way of mortgage to W. L. Boyd.

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Each case could have proceeded on its own line, and after final judgment and titles acquired under them, the parties could have been brought to an issue in an action to recover the land itself. I think, therefore, that there was no conflict of jurisdiction, and that the proceedings in the Probate Court were valid.

I see nothing in the testimony to show that Mrs. Shaw in any way transferred any interest she may have had in this land to John W. Henry, even if she had any interest such as she could have conveyed without the intervention of her trustee, or that she would be now estopped from claiming it against the mortgagee of her brother. In my view, however, the whole estate of Harrison Henry passed under the deed to J. D. M. Shaw, and that the issues between the parties ought to be settled under this action to end the litigation.

It is therefore ordered and adjudged, that the defendant, William L. Boyd, individually, and as survivor of Boyd Bros., and all persons acting under them, or by their authority, be, and are hereby, perpetually enjoined from selling under the said judgments for foreclosure, or either of them, the said 800 acres of land described in the complaint in this case.

From this decree the defendant, Boyd, appealed upon the exceptions set forth in the opinion.

Mr. W. H. Martin, for appellant.

Messrs. J. T. Johnson and Y. J. Pope, contra.

July 12, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Some time in January, 1865, Harrison Henry, having first duly made his last will and testament, died seized and possessed of a certain tract of land, in Laurens County, consisting of 800 acres, more or less. By his will he directed that, after payment of his debts, all his property should be kept together for the support of his wife, and for the maintenance and education of his two children, the defendant, John W. Henry,

and the plaintiff, Leonora, who subsequently intermarried with her co-plaintiff, John D. M. Shaw, with power in the executors to sell any portion of his estate and re-invest

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the proceeds, or to sell a portion if necessary, for the support and education of his children. He further directed that when his son attained the age of twenty-one years, his estate should be equally divided amongst his wife and children, the third intended for his daughter being settled on her for her sole and separate use, and then "to go to the heirs of her body;" and the third intended for his wife being given to her for life, with remainder to his two children, to be equally divided betwixt them. The testator's brother, John H. Henry, was named as executor, and his wife as executrix, of the will; the former of whom qualified as such and continued in the management of the estate until his death in 1872, but the executrix named never seems to have qualified. John H. Henry left a will, of which Nathan Henry was executor, who thereby became the executor of Harrison Henry.

The widow of the testator and his son, the defendant, John W. Henry, continued to live together on the 800 acres of land, which seems to have been the homestead of the testator, until the death of the widow, some time in 1875, after which John W. Henry continued to reside there, paying the taxes, but paying no rent, until the sale of said land under the order of the Probate Court, hereinafter referred to, when the plaintiff, John D. M. Shaw, the purchaser at that sale, went into possession and still retains the same. Some time in 1872 the plaintiff, John D. M. Shaw, bought a sealed note from the administrator of Col. Irby, on which the testator was surety, and in 1873 he bought another sealed note on which the testator was likewise a surety. The testimony shows that the original intention was that these notes should be bought by Shaw and John W. Henry jointly, but the latter finding himself unable to furnish the money necessary to pay his portion, the purchase was made by Shaw alone, with his own funds.

On May 22, 1880, John W. Henry executed two mortgages, one to Wm. L. Boyd in his own right, and the other to him as survivor of Boyd Bros., embracing the 800 acre tract of land, as well as other valuable property in the town of Laurens, to secure the payment of his own individual debts. In January, 1881, Boyd commenced his actions against John W. Henry to foreclose these mortgages, the notices of his pendens being

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filed on January 24, 1881, and a few days thereafter Shaw commenced his actions against Nathan Henry, as executor of Harrison Henry, on the two sealed notes which he had bought as above stated; and in all these actions judgments were entered in fa-

vor of the plaintiffs respectively, on March 9, 1881.

On October 13, 1883, proceedings were commenced in the Probate Court by Nathan Henry, as executor of Harrison Henry, against John W. Henry and Mrs. Shaw, who were then the only devisees and legatees of the said Harrison Henry, to subject this land to the payment of his debts; but there is no evidence that there were any others except those bought by Shaw and by him reduced to judgment against the executor, as we have stated above. Under this proceeding an order for the sale of the land in question was made by the Court of Probate on October 2, 1884, and after due advertisement the same was bid off by John D. M. Shaw for two thousand dollars, who paid the purchase money, received titles, and went into possession of the land. After some considerable delay, occasioned by the interference of other creditors of John W. Henry, the appellant, Boyd, proceeded to advertise the land for sale under his judgments of foreclosure entered March 9, 1881, whereupon this action was commenced to enjoin such sale.

The case was heard by Judge Fraser upon the pleadings and evidence taken in open court, who rendered his decree, in which, after stating that he saw no evidence of any bad faith or want of fair dealing on the part of the creditors, but only a struggle between them so as to secure the advantage of position to protect just claims, he said he regarded the question whether the title of Shaw under the sale ordered by the Court of Probate is good, as the turning point of the case. As to this, he held that the Court of Probate has jurisdiction to order the sale of real estate of a decedent for the payment of his debts where the personal estate is insufficient for that purpose; that all necessary parties were before the court when the order for sale was made; that John W. Henry could not in that proceeding have successfully interposed the plea of payment against the notes bought by Shaw, based upon the presumption arising from lapse of time, and his mortgagee could not; that the

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fact that the Court of Common Pleas *had, previously to the commencement of the proceeding in the Court of Probate, assumed jurisdiction of an action to foreclose the mortgages on the land, did not prevent the Court of Probate from taking jurisdiction of this proceeding to sell the land for the payment of the debts of Harrison Henry; and he therefore held that Shaw's title was good, and rendered judgment perpetually enjoining the appellant from selling the land under his judgments of foreclosure.

From this judgment the defendant, Wm. L. Boyd, appeals upon the following grounds: "I. Because his honor erred in holding that the Probate Court had jurisdiction to order the sale of the land described herein. II. Be-

cause his honor erred in holding that the sealed notes held by J. D. M. Shaw were not presumed paid by lapse of time. III. Because his honor erred in holding that the plaintiffs are not estopped by their laches from claiming any interest in the 800 acres of land as creditor or devisee, or to the proceeds arising from the sale of the same." The remaining ground of appeal is couched in such general terms as not to call for any further notice, under the well settled rule of this court.

The first ground of appeal involves two questions: 1st. Whether the Court of Probate has jurisdiction to order the sale of real estate of a decedent for the payment of his debts, in the event of the personal estate being insufficient for that purpose. 2nd. Whether, if so, the Court of Probate could, in this case, take jurisdiction after the Circuit Court had already acquired jurisdiction.

The first question has been so conclusively determined by the decisions of this court, that it is not necessary to do more than to cite them. *McNamee v. Waterbury*, 4 S. C., 156; *Scruggs v. Foot*, 19 Id., 274. In the latter case this language is used, which ought to be conclusive: "In *McNamee v. Waterbury* (4 S. C., 156), this court sustained a judgment of the Probate Court ordering real estate to be sold to aid personally in the payment of debts, obtained upon the application of the administrator of the intestate. This settles the abstract question as to the jurisdiction of the Probate Court to order the sale of realty to aid personally in payment of debts, but it does not determine in

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terms *whether this jurisdiction can be invoked by creditors as well as the administrator." The Chief Justice then goes on to show that it can, and it was so adjudged.

Our next inquiry, therefore, is whether the fact that, before the proceeding was commenced in the Court of Probate, by the executor of Harrison Henry for the sale of the land in question to pay the debts of his testator, the appellant had instituted an action in the Court of Common Pleas to foreclose a mortgage on the same land, executed by John W. Henry, would prevent the Court of Probate from taking jurisdiction of such proceeding. There is no doubt that the Court of Common Pleas, as well as the Court of Probate, has jurisdiction of a proceeding to sell the real estate of a decedent, in aid of the personalty, for the purpose of paying his debts; and there is as little doubt of the proposition that where two tribunals have concurrent jurisdiction, the one which first obtains possession of the subject matter must adjudicate, and neither party can be forced into another jurisdiction; but the question is, does this principle apply to the case in hand? We think it clear that it does not. It necessarily involves the idea that the claims set up in the two jurisdictions

must be such as could be properly adjudicated by either tribunal, and it is quite clear that the claim of foreclosure set up by appellant in his action in the Court of Common Pleas could not have been adjudicated by the Court of Probate; and on the other hand, although the Court of Common Pleas would have jurisdiction of an action to sell lands for the payment of the debts of a decedent, provided the necessary parties were before it in such action, it is not perceived how the executor of Harrison Henry and his devisees, who would be necessary parties to such an action, could have required the appellant to make them parties to his action against John W. Henry to foreclose a mortgage given by him.

To make the principle relied upon applicable, it must appear that when the second action or proceeding was instituted there was another action pending in a tribunal having concurrent jurisdiction, under which the relief sought by the second action could as readily be obtained. This certainly did not appear in the present case, for, in addition to what has already been said, when the proceeding in the Court of Probate was

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commenced, the *action for foreclosure in the Court of Common Pleas was no longer pending, but had terminated in a judgment; and in addition to the other obstacles indicated, that circumstance would have prevented the parties to the proceeding in the Court of Probate from having themselves made parties to the action for foreclosure, even if they had encountered no other objection.

The case of *Witte v. Clarke* (17 S. C., 313), relied on by the appellant, differs widely from the present case. There the action brought by the plaintiffs had for one of its objects the ascertainment and settlement of all liens or incumbrances upon the land sought to be sold, and was actually pending at the time when Mrs. Clarke instituted her proceeding for dower out of the same land in the Court of Probate, where she obtained a judgment without the knowledge of the other parties interested, declaring her claim a prior lien to all others on the land in question; and there was no reason why she could not have had herself made a party to such action, and obtained all the relief to which she was entitled under the action. Here, however, the Court of Probate certainly could not have rendered a judgment of foreclosure against John W. Henry, and it is difficult to understand how, on the other hand, the executor and devisees of Harrison Henry could have required the appellant to make them parties to his foreclosure suit, especially after it had culminated in a judgment. The filing of the notice of lis pendens, even if such notice can be regarded as of any force and effect after judgment rendered, cannot affect the case. It operated merely

as a warning to all who might purchase from John W. Henry that such purchase would be subject to any judgment that might be rendered in the action in which such notice was filed. But how it could affect the rights of those who claimed under a paramount title to that of John W. Henry, we do not perceive.

Our next inquiry is whether there was any error on the part of the Circuit Judge in holding that the sealed notes were not presumed paid by lapse of time. The testimony shows that at the time Shaw commenced his actions, and at the time he recovered judgment against the executor of the testator, the twenty years had not run out, and therefore the plea of payment could not have been successfully interposed to those actions.

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*Hence it cannot be said in this case that the executor, through fraud or collusion, or even through negligence, has permitted a claim to be established against the estate of his testator. On the contrary, it must be assumed that the court, with the proper parties before it, determined that these notes were valid debts of the testator as late as March 9, 1881. In this respect, as well as in many others, there is a marked difference between this case and that of *Campbell v. Sloan & Seignious* (21 S. C., 301), for there the action against the executors "was not commenced until nearly three years after the twenty years had run out;" and, by reference to page 307, it will be seen that this circumstance was pointedly mentioned. Besides, in that case there were several other circumstances showing fraud and collusion, while in this case there is nothing of the kind.

It seems to us that where a creditor of an intestate in good faith recovers judgment against the legal representative on a bond or other like obligation before the twenty years have run out, that is a demand for the payment of his debt in the most effectual way, against the only person from whom such demand could legally be made, and the judgment is a judicial ascertainment of the fact that the debt is not then paid, and gives a new point from which the currency of the period necessary to presume payment commences, not only in favor of the legal representative, but also in favor of the heir or devisee of the decedent. This doctrine, however, cannot be applied where the action is not commenced until after the twenty years have run out, because in such case the presumption of payment has arisen before any demand in legal form was made by the creditor for the payment of his debt, and before anything was done by any one authorized to represent the estate tending to rebut the presumption. After the presumption has once arisen no act of the creditor, or any one assuming to represent the estate of the debtor, can have the effect of creating any

new debt, or even reviving the legal obligation of any pre-existing debt, which has once lost such legal obligation by the presumption arising from the lapse of time. Under this view it is quite clear that there was no error in holding that the debts claimed by Shaw against the estate of Harrison Henry were not to be presumed paid by lapse of

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time: for although the *twenty years had run out before the commencement of the proceedings in the Court of Probate, yet such period had not expired before the actions were commenced by Shaw against the executor of Harrison Henry, nor before judgments were recovered in such actions.

But in addition to this we agree with the Circuit Judge that inasmuch as John W. Henry could not have successfully interposed the plea of payment, based on the presumption arising from lapse of time, because of his acknowledgment of these debts—the one in 1872 and the other in 1873—long before the expiration of the twenty years, the appellant, his mortgagee, claiming under him, could not do so either. So that in any view of the case we do not think the second ground of appeal can be sustained.

As to the third ground, it might be sufficient to say that we see no evidence in the record that the question of laches was ever presented to or passed upon by the Circuit Judge, and hence, strictly speaking, that question is not properly before us. But as this question has been argued here on both sides, and as it is somewhat connected with the question raised by the second ground of appeal, we will not decline to consider it. We see no ground for imputing laches to the plaintiffs in this case, and nothing to estop them from asserting their claims as against the appellant. John D. M. Shaw holds strictly legal claims against the estate of Harrison Henry, which, in good faith, he bought up long before they were affected by any presumption of payment arising from lapse of time, and these claims, within the time allowed him by law for the purpose, he sued to judgment against the only person whom he could sue. How, in the face of this fact, he can be said to have been guilty of laches, we are unable to see.

Nor do we think there is any more ground for the estoppel set up by the appellant. It does not appear that either Shaw or his wife did anything, or omitted to do anything which they ought to have done, whereby the appellant was induced to take the mortgages from John W. Henry. Indeed, the testimony shows that the Shaws knew nothing of the mortgages until after they were executed; and there certainly is no evidence that any conduct of either of them was calculated to

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induce the appellant to *believe, when he extended credit to John W. Henry, that the

eight hundred acres of land belonged to him exclusively. True, he was in possession, but as tenant in common he had a right to such possession, and there were the records of the Court of Probate upon which was spread the will of Harrison Henry, showing to the appellant, and every one else, that he was such tenant in common with his sister, Mrs. Shaw, and there is not the slightest evidence that he had ever asserted any claim in hostility to her rights.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 216

NATIONAL BANK OF CHESTER v. ATLANTA & CHARLOTTE AIR LINE RAILWAY COMPANY.

(April Term, 1886.)

[1. *Railroads* ⇨259.]

A railroad company chartered by the State does not, by leasing its road to another corporation, release itself from liability for goods received by its line for carriage and not delivered. The lessor continues to be liable for all acts done by the lessee in operating the road, whether the cause of action be ex delicto or ex contractu.

[Ed. Note.—Cited in *Harmon v. Columbia & G. R. Co.*, 28 S. C. 404, 5 S. E. 835, 13 Am. St. Rep. 686; *Hart v. Railroad Co.*, 33 S. C. 436, 12 S. E. 9, 10 L. R. A. 794; *Bouknight v. Charlotte, etc., R. Co.*, 41 S. C. 421, 19 S. E. 915; *Parr v. Spartanburg, etc., R. Co.*, 43 S. C. 198, 199, 20 S. E. 1009, 49 Am. St. Rep. 826; *Davis v. Atlanta & C. A. L. R. Co.*, 63 S. C. 374, 41 S. E. 468; *Mathis v. Southern Ry.*, 65 S. C. 283, 43 S. E. 684, 61 L. R. A. 824; *Smalley v. Atlanta & C. A. L. Ry. Co.*, 73 S. C. 574, 53 S. E. 1000; *Reed v. Southern Ry.*, 75 S. C. 170, 55 S. E. 218; *Kirkland v. Charleston & W. C. Ry.*, 79 S. C. 276, 60 S. E. 668, 128 Am. St. Rep. 848; *Mayfield v. Atlanta & C. A. L. R. Co.*, 79 S. C. 563, 61 S. E. 106.

For other cases, see *Railroads*, Cent. Dig. § 812; Dec. Dig. ⇨259.]

[2. *Carriers* ⇨57, 94.]

A bill of lading is so far negotiable as to pass to its endorsee all the right to the possession of the goods therein mentioned. And while the goods may be delivered without the production of the bill of lading, the carrier thereby assumes the burden of showing that the delivery was to the proper person. Cases reviewed.

[Ed. Note.—Cited in *General Electric Co. v. Southern Ry.*, 72 S. C. 254, 51 S. E. 695, 110 Am. St. Rep. 600; *Greenwood Grocery Co. v. Canadian County Mill & Elevator Co.*, 72 S. C. 454, 52 S. E. 191, 2 L. R. A. (N.S.) 79, 110 Am. St. Rep. 627; *F. L. Layton & Sons v. Charleston & W. C. R. Co.*, 90 S. C. 327, 72 S. E. 988; *First National Bank of Chillicothe v. McSwain*, 93 S. C. 41, 42, 75 S. E. 1106.

For other cases, see *Carriers*, Cent. Dig. §§ 169-178, 311, 378; Dec. Dig. ⇨57, 94.]

[3. *Carriers* ⇨57.]

Where time drafts, accompanied by indorsed bills of lading of cotton, were cashed by a bank, any arrangement between the drawee of the drafts and the shipper, unknown to the bank, that the cotton should be delivered to the drawee without the production of the bills of

lading, would be a fraud on the bank, and would not excuse an improper delivery by the carrier to such drawee.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 169–178, 311; Dec. Dig. ⚡57.]

[4. Carriers ⚡57.]

A bill of lading drawn to the order of the consignor with the added words, "Notify L. M. Co.," did not require a bank receiving such bill of lading by proper indorsement for value, to notify the carrier not to deliver to the L. M. Co., nor to inquire whether the goods would be so delivered.

[Ed. Note.—Cited in Brown v. Atlantic Coast Line R. Co., 91 S. C. 379, 74 S. E. 754.]

For other cases, see Carriers, Cent. Dig. §§ 169–178, 311; Dec. Dig. ⚡57.]

[5. Carriers ⚡94.]

The Circuit Judge properly refused to charge the jury "that if the jury find that the L. M. Co. was entitled, by its contract, to the cotton, upon its acceptance of the drafts, then

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the plaintiff cannot recover, even *though it still holds the bills of lading"—for by so charging he would have submitted to them a question of law.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 387; Dec. Dig. ⚡94.]

[6. Carriers ⚡57.]

The judge did not err in refusing to charge that the railroad company was entitled to timely notice of the non-payment of the drafts, otherwise the bank was not entitled to recover; because (1) the railroad company could fully protect itself by complying with its contract made before the drafts were drawn, and the wrongful delivery was made without any knowledge of the existence of the drafts; (2) the delivery was made before the maturity of the drafts; and (3) notice was given within reasonable time after the non-payment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 169–178, 311; Dec. Dig. ⚡57.]

Before Wallace, J., York, April, 1885.

The opinion fully states the case.

Mr. C. E. Spencer, for appellant.

I. Whilst the railroad has a right to demand a bill of lading before delivery, its production is not necessary. Surely, the plaintiff has in no sense been damaged here, if the R. & D. R. R. Co. delivered to the party entitled to receive. The simple point contended for here is that the bailee is not estopped by his receipt, but that delivery to the party having the right of possession is a sufficient defence against the claim of the bailor. 93 U. S., 575. The instructions to the jury upon this point were calculated to mislead. II. The plaintiff took subject to the right of the L. M. Co. to the cotton (whatsoever that was) as against McCauley & Co. 1. This is true, even if plaintiff did not know of any right. A bill of lading is neither a negotiable promissory note, nor a bill of exchange. Code, § 133. 2. At best, it is only quasi negotiable. 2 Pars. Cont., 289; 55 Am. Dec., 290, 370. 3. But plaintiff knew, or was put upon inquiry, so it cannot plead a transfer in good faith, even if the bill otherwise falls under the exception in section 133 of the Code. III. There was evidence that, as be-

tween McCauley & Co. and L. M. Co., the latter was to get the cotton upon acceptance of the drafts. This evidence admissible. 1 Greenl. Evid., 225. McLure knew in June that the cotton had been delivered to L. M. Co., and proved debt against L. M. Co. afterwards. IV. The defendant was entitled to timely notice that the drafts were not paid,

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and that it would be held *responsible. V. There was no right of action against the defendant, if the R. & D. R. R. Co. was operating defendant's road at the time. The general doctrine is conceded that a railroad corporation cannot escape the performance of any duty imposed by its charter, by a voluntary surrender of its road into the hands of lessees. 17 Wall., 445. It is quite plain, therefore, that for all matters ex delicto, done or suffered by the lessee, the lessor is responsible. The practice is equally well settled that the lessee is liable to the same extent as the lessor would have been, while it continues to operate the road. 29 Vt., 421 (70 A. D., 426). The question was at first left open, however, as to the right to sue the lessor, when the cause of action was bottomed upon a special contract made with the lessee. 36 Am. Rep., 574. But it seems now that the recognized practice is to sue the lessee alone in such cases, especially where by its charter the lessor has the right to lease. Rorer R. R., 604, 605, note 5, 606–609; 10 Gray, 104. The charter to the defendant conferred upon it the right to farm out its road. 12 Stat., 440, § 4; 11 Stat., 348, § 13. "To farm out" is broad enough to cover a lease. 72 N. C., 637; 73 Id., 528.

Messrs. J. & J. Hemphill, and Brawley & Barnwell, contra.

July 12, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This was an action brought by the plaintiff against the defendant, a common carrier, for damages for the non-delivery of two lots of cotton delivered to it for transportation to the town of Lowell, in the State of North Carolina. It appears that by some arrangement between McCauley & Co., merchants, doing business in the town of Chester, South Carolina, and the Lawrence Manufacturing Company, carrying on their business of manufacturing cotton goods in the town of Lowell, North Carolina, McCauley & Co. bought cotton and shipped it to the manufacturing company, drawing time drafts on said company for the price of said cotton, which drafts were discounted by the plaintiff bank as soon as they were drawn, whereby the said McCauley & Co. were placed in funds to pay for the cotton.

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*When the two lots of cotton in question were bought by McCauley & Co. and shipped,

they received from the Chester & Lenoir Narrow Gauge Railroad Company bills of lading of the following tenor: "Received of D. McCauley & Co. the following packages in apparent good order, contents and value unknown, to be transported in like good order unto order, notify Lawrence Manufacturing at Lowell," &c. The remainder of the bill of lading being immaterial to the present inquiry. When the cotton reached Gastonia, it was delivered to the Atlanta & Charlotte Air Line Railroad Company, as appears by the receipt of its agent at that point, and was by the last named company, or rather by its lessee, the Richmond & Danville Railroad Company, transported to Lowell, where it was delivered to the Lawrence Manufacturing Company without the production of the bills of lading, or any order from the said D. McCauley & Co. When the drafts drawn by McCauley & Co. against this cotton were discounted by the plaintiff bank, they had attached to them the bills of lading, endorsed in blank by McCauley & Co. and the drafts, detached from the bills of lading which were retained by the bank, were promptly forwarded for acceptance to the manufacturing company, duly accepted, and returned to the bank. When the drafts matured they were not paid, except a small part of one of them, the manufacturing company having in the meantime failed. Soon afterwards demand was made upon the railroad company by the bank for the cotton, which not being complied with, this action was commenced.

The defendant undertook to show that though the bills of lading were drawn to the order of McCauley & Co., yet that the understanding was that the cotton was to be delivered to the Lawrence Manufacturing Company so soon as the drafts drawn against it were accepted by that company; but there was no evidence showing that the bank was a party to, or even knew of, such an arrangement. Indeed, it would seem that such an arrangement, if known to and acquiesced in by the bank, would render the security afforded by the transfer to it of the bills of lading wholly worthless, and is altogether irreconcilable with the conceded fact that the bank retained the bills of lading when the drafts were sent forward for acceptance;

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for if the bank had understood that the Lowell Manufacturing Company was to be entitled to receive the cotton when the drafts were accepted, and not when they were paid, then, according to the usual course, the bills of lading would have been sent along with the drafts when they were forwarded for acceptance. On the other hand, it would be somewhat difficult to understand what advantage the manufacturing company would gain by purchasing the cotton on time drafts, if it could not obtain possession of the cotton until the drafts drawn against it were paid, but for the fact appearing in the testi-

mony that the president of the manufacturing company had been the railroad agent at Lowell, and had been in the habit of delivering cotton to the company without the production of bills of lading, which practice had been continued by the new agent, and therefore it was not supposed that there would be any difficulty about it.

The jury having found a verdict for the plaintiff, and judgment being entered thereon, the defendant appeals upon the following exceptions:

"First. For that his honor erred in charging the jury—

"1. That where goods are shipped, deliverable to the order of the consignor, the carrier cannot deliver them legally without the production of the bill of lading, properly endorsed.

"2. That a bill of lading is both a receipt for the goods shipped, and an express written contract for their transportation and delivery, and is so far a negotiable instrument that a transfer of it in good faith for value received is equivalent in law to the transfer of the goods themselves, it being a symbolic and constructive delivery of the goods, and in commercial transactions is regarded as a substitute for the actual, corporal transfer of the goods.

"3. That if the jury believe from the evidence that there was an understanding or agreement between the Lawrence Manufacturing Company and D. McCauley, or any other person, by which the cotton was to be delivered without the surrender of the bills of lading, such understanding or agreement was a fraud upon the rights of the bank, and the bank cannot be prejudiced thereby, unless such a mode of acting was brought to its knowledge and acquiesced in by it.

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"*Second. For that his honor erred in refusing to charge the jury as requested by the defendant—

"1. That if the jury believe that the contract between D. McCauley & Co. and the Lawrence Manufacturing Company was that the cotton was to be delivered upon its arrival at Lowell, and the acceptance of the time drafts, then the plaintiff who discounted these drafts cannot recover.

"2. That the plaintiff cannot recover if the jury find the further fact that the plaintiff knew, or might by due inquiry have found out, that the Lawrence Manufacturing Company was to get the cotton before payment of the drafts.

"3. That if the jury find that the Lawrence Manufacturing Company was entitled by its contract to the cotton, upon its acceptance of the drafts, then the plaintiff cannot recover, even though it still holds the bills of lading.

"4. That the defendant was entitled to timely notice that the drafts were not paid, and that it would be held responsible by the plaintiff; and unless the jury find that

such notice was given, the plaintiff cannot recover.

"5. That the plaintiff cannot recover if the jury find that the defendant was not operating the railroad at the time of conversion."

As the last exception raises the question as to whether the proper party is sued in this action, we will consider it first; for unless the proper party is before the court, it would be fruitless to consider or determine the other questions as to the merits. The first question, then, to be determined is, whether the fact that the defendant company had, at the time the transaction here brought in question occurred, leased its road to the Richmond & Danville Railroad Company, which latter company was then operating the road, released the defendant company from liability in this case, leaving the Richmond & Danville Company solely liable.

When a railroad or other corporation receives its charter from the State, conferring certain franchises, rights, and privileges, it is upon the consideration that such corporation shall perform the duties and fulfil the obligations which it at the same time incurs. The fact that the corporation chooses

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to perform those duties and *fulfil its obligations to the community through another, whether as lessee or otherwise, cannot release it from the obligations which it has assumed by the acceptance of its charter. This doctrine has not only the support of reason, but is fully supported by the authorities. As is said by Mr. Justice Davis in *Railroad Company v. Brown*, 17 Wall., 445 [21 L. Ed. 675]: "It is the accepted doctrine in this country that a railroad corporation cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees." See, also, the *Y. & M. L. R. R. Co. v. Ross Winans*, 17 How., 30 [15 L. Ed. 27]; *Abbott v. J. G. & K. R. R. Co.*, 80 N. Y., 27, reported also in 36 Am. Rep., 572.

We are unable to appreciate the distinction attempted to be drawn by appellants' counsel between the liability of a railroad company which has leased its line to another, to actions *ex delicto* and actions *ex contractu*. The foundation of such liability is that such a company has, by accepting its charter, assumed obligations to the community from which it cannot absolve itself by leasing its road to another company; and as such a carrier is not only under an obligation to carry passengers safely, but also to deliver goods entrusted to it for transportation, we think the same principle which would make the lessor liable in the one case would also make it liable in the other. In this case, however, it appears that the defendant company, by its own agent, and not its lessee, receipted for the cotton, and hence

the contract must be regarded as made directly with defendant company, though its road may at the time have been operated by the Richmond & Danville Railroad Company as its lessee.

Subdivisions 1 and 2 of the first exception involving, as they do, the true meaning and legal effect of a bill of lading drawn to order, may be considered together. That such a bill of lading, though not negotiable in the fullest sense of that term like a bill of exchange, or to speak more accurately, although its negotiability is not attended with all of the consequences resulting from the negotiability of a bill of exchange, yet that it is negotiable in so far that by endorsement the right to the possession of the goods mentioned in it passes, is well settled by repeated adjudications of courts of the highest

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authority, and is generally if not *universally conceded by the elementary writers. *Conard v. Atlantic Insurance Company*, 1 Peters, 386 [7 L. Ed. 189]; *The Thames*, 14 Wall., 98 [20 L. Ed. 804]; *Dows v. National Exchange Bank*, 91 U. S. 618 [23 L. Ed. 214]; *Shaw v. Railroad Company*, 101 Id. 557 [25 L. Ed. 892]; and *Hieskell v. Farmers & Mechanics National Bank*, 89 Penn. St., 155; 8 C. 33 Am. Rep. 745; *McCants v. Wells*, 4 S. C., 381.

The case of "*The Thames*," supra, was very much like the case under consideration. There, one Gilbert Van Pelt, one of the members of the firm of Bennett, Van Pelt & Co., residing in Savannah, was in the habit of buying cotton and consigning it to his firm in New York. The cotton in question was paid for by the proceeds of drafts drawn by him on his firm in New York at fifteen days, which were discounted by the agent of an Atlanta bank, and the drafts were accompanied by bills of lading issued by the vessel to his order, and by him endorsed to the cashier of the bank. The drafts, with the bills of lading attached, were forwarded to the Fourth National Bank in New York for collection, and were duly accepted by Bennett, Van Pelt & Co. The vessel arrived in New York the day after the drafts were accepted and the cotton was immediately delivered to Bennett, Van Pelt & Co., who at once sold it for cash, and, before the drafts matured, failed. Thereupon the cashier of the bank filed his libel against the vessel, claiming damages for the non delivery of the cotton according to the terms of the bill of lading, and the vessel was held liable.

Mr. Justice Strong, in delivering the opinion of the court, uses this language: "No argument is needed to show what is most manifest that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper; and this obliga-

tion was disregarded instantly on the arrival of the ship, and it is no excuse for a delivery to the wrong persons that the endorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made, * * * and if after inquiry the consignee or the endorsees of a bill of lading for delivery to

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order cannot be *found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsibility. He has no right under any circumstances to deliver to a stranger."

This case and the others above cited, which are equally strong so far as the principle involved is concerned, fully sustains the correctness of those portions of the charge which we have been considering. It is true that a carrier may safely deliver goods entrusted to him for transportation to the person rightfully entitled to receive them, even without the production of the bill of lading, but in such a case he takes upon himself the burden of showing that the delivery was to the proper person, and this he must show as a matter of defence; for when it is once shown that he has delivered the goods to one not holding the bill of lading, a prima facie case is made out against him, which can only be rebutted by showing that although he made the delivery without the production of the bill of lading, yet he has in fact delivered to the very person who, according to the terms of the bill of lading, was entitled to receive the goods. In other words, the bill of lading is his contract by which he agrees to deliver the goods entrusted to him for transportation to the person named therein or to his order; and if he delivers them to any one else and loss ensues to the person entitled to receive the goods, he becomes liable. This is what we understand the charge to mean when read in connection with the facts of the case.

The case of *The Idaho* (93 U. S., 575 [23 L. Ed. 978]), is not, as we understand it, in conflict with these views. There, Porter & Co., of New York, advanced a large sum of money to Forbes, of New Orleans, upon the security of a bill of lading issued by the brig "Colson," but before the cotton was actually loaded into the brig, Forbes had it transferred to the steamship "Lodona," and consigned to Schaefer & Co., of New York. The cotton, upon its arrival in New York was fraudulently transferred to the libellants, who, in collusion with Schaefer & Co., shipped it by "The Idaho" to Liverpool, and upon its arrival there was delivered to the agents of Porter & Co., as the true owners; and it was held that the ship was not liable, because it

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was clear from the evidence that Porter & Co. were the real owners of the cotton, and upon its delivery to them the ship was relieved from liability to the libellants, who held its bill of lading for cotton to which they had never been entitled.

Practically the cotton was stolen from Porter & Co., who were the real owners, and the case therefore really decides nothing more than this: that where stolen property is delivered to a carrier for transportation, and a bill of lading for it is issued to the thief or one of his accomplices, the carrier may defend himself from an action brought by the thief or one to whom he has undertaken to transfer the bill of lading, for non-delivery of such property, by showing a delivery to the rightful owner. This is upon the well settled principle that even an innocent purchaser of stolen property (except negotiable notes and bills of exchange) acquires no title whatever to such property; and hence the holders of the second bill of lading—the one issued by "The Idaho"—had never acquired any right whatsoever to the property therein mentioned, and consequently the vessel was under no obligation to deliver the cotton to them.

It is true that Mr. Justice Strong, in delivering the opinion of the court, does go on to say that the fact that the shipper had obtained the cotton by fraud on the true owner, made no difference, and that the same rule would apply, even if the shipper had been innocent, and had been merely mistaken as to his right to the property; because, if he had no right to the property, the carrier incurred no obligation to him, as against the rights of the real owner. But to say nothing as to this being a mere obiter dictum, and assuming it to be good law, we do not see how it could be applied to the case now under consideration; for there can be no doubt that at the time the bills of lading were issued to McCauley & Co., and at the time they transferred them by endorsement to the plaintiff bank, McCauley & Co. were the real owners of the cotton, and as such had a perfect right to direct its delivery.

As to the 3d subdivision of the first exception we think it is too plain for argument, that if there was any understanding or agreement between McCauley & Co. and the Lawrence Manufacturing Company, that the cotton

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should be delivered to that company without the production of the bills of lading, it would be a palpable fraud upon the bank, unless the bank knew of such arrangement at the time it discounted the drafts and acquiesced in it. The bank certainly required the bills of lading to be transferred to it as a security for the payment of the drafts, as is conclusively shown by the retention of the bills of lading when the drafts were sent forward for acceptance; and any such arrangement

entered into by McCauley & Co. with the Lawrence Manufacturing Company (if, indeed, there was any) without the knowledge of the bank, would be a manifest fraud upon it, as it would destroy the security upon which it relied.

The remarks just made show that the 1st subdivision of exception second cannot be sustained, for even if the jury did believe that there was such a contract as that there mentioned, the right of the plaintiff to recover would not thereby be defeated, inasmuch as to produce such result the jury must also believe that such contract was known to and acquiesced in by the bank. It is clear, therefore, that the Circuit Judge could not properly have charged as there requested.

As to the 2d subdivision of exception second, we agree with Judge Wallace that there was nothing to put the plaintiff upon inquiry, and therefore, to charge as there requested would have been inapplicable to the case as made, and a refusal so to do cannot be assigned as error. The bank held the bills of lading, indorsed by McCauley & Co., by which the carrier contracted to deliver the cotton to the order of McCauley & Co., and there was nothing to make the bank suspect that the carrier would commit a breach of its contract by delivering the cotton to any one without the production of the bills of lading properly indorsed. The words, "notify Lawrence Manufacturing Company at Lowell," contained in the bills of lading certainly did not authorize delivery to that company, without the production of the bills of lading. These words, as explained by one of the witnesses, simply "notifies the agent at the point of delivery that there is a bill of lading out, and not to deliver until the bill of lading is produced. It means also that the consignee is to be notified so he can get the bill of lading and get the cotton." It seems to us that those words, taken in connection with the stipulation to deliver to

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the *order of McCauley & Co., clearly shows that the cotton, though intended for the Lawrence Manufacturing Company, could only be delivered to that company upon the order of McCauley & Co. Otherwise, that company would simply have been named as the consignee.

We also agree that the request which constitutes the basis of subdivision 3 of the second exception was properly refused, because it would have submitted a question of law to the jury.

As to subdivision 4 of the second exception, it seems to us that there are several reasons why the request therein referred to should not have been granted. In the first place, there is no evidence that the defendant knew at the time the cotton was delivered, that there were any drafts drawn against it.

All that it knew was that bills of lading had been issued by its agent, stipulating for the delivery of the cotton to the order of McCauley & Co., and it had the means of completely protecting itself by refusing to deliver except upon the production of the bills of lading properly indorsed. Whether any drafts had been drawn against the cotton, and if so whether they were paid or unpaid, was a matter of no concern to the railroad company. All it had to do was to comply with its own contract, as evidenced by the bills of lading, and if it failed to do so, it must respond for any damages sustained by the lawful holder of the bill of lading, by reason of its failure to perform its contract. The drafts were not drawn until after the railroad company had made its contract by issuing the bills of lading, and therefore could not in any way affect the obligation which it thereby assumed. We do not see, then, that the defendant was entitled to any notice of the non-payment of the drafts.

But, in the second place, it appears that the cotton was delivered to the manufacturing company before the maturity of the drafts, and therefore it would have been impossible to notify the railroad company of the non-payment of the drafts in time to prevent an improper delivery of the cotton. In the third place, it appears from the evidence that notice was given to the railroad company within a reasonable time after the non-payment of the drafts.

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*The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 228

COLVIN v. PHILLIPS.

(April Term, 1886.)

[1. *Judgment* ⇨866.]

Section 131 of the Code of Procedure, declaring that no acknowledgment shall be sufficient to revive a debt unless it be in writing, &c., does not apply to a judgment obtained in 1861; for in such case the right of action accrued before the code was enacted, notwithstanding the change thereby effected in the mode of renewing a judgment, and therefore such judgment is specially excepted from the provisions of this section.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1604; Dec. Dig. ⇨866.]

[2. *Witnesses* ⇨160.]

The proviso to section 400 of the Code, being an exception engrafted on a general rule, does not render testimony inadmissible unless it falls within the express terms of the proviso.

[Ed. Note.—Cited in *Merck v. Merck*, 89 S. C. 350, 71 S. E. 969, Ann. Cas. 1913A, 937.

For other cases, see *Witnesses*, Cent. Dig. §§ 696, 697; Dec. Dig. ⇨160.]

[3. *Witnesses* ⇨160.]

In action against the administrator of a deceased judgment debtor prosecuted by the assignee of the judgment, the plaintiff may tes-

tify to a conversation between his assignor, then the owner of the judgment, and the judgment debtor, now deceased.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 696; Dec. Dig. ⚡160.]

14. Judgment ⚡876.]

The revival of the execution by the original plaintiff, his payment of the costs, and his assignment of the judgment were all ex parte acts, and could not affect the presumption of payment arising from lapse of time.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1650; Dec. Dig. ⚡876.]

15. Payment ⚡66.]

A naked admission of a subsisting legal obligation is sufficient to rebut the presumption of payment up to that time, if made before the presumption has become complete. From such admission the law implies a new promise, which alone constitutes the cause of action.

[Ed. Note.—Cited in *Dickson v. Gourdin*, 29 S. C. 349, 7 S. E. 510, 1 L. R. A. 628.

For other cases, see Payment, Cent. Dig. §§ 176-188; Dec. Dig. ⚡66.]

16. Payment ⚡66.]

In action instituted in 1885, to revive a judgment obtained in 1861, inquiries made by the debtor (now deceased) to the creditor in 1870, as to what sum he would take for this judgment, are not such an acknowledgment as would defeat the presumption of payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 186; Dec. Dig. ⚡66.]

17. Abatement and Revival ⚡73.]

[Cited in *Leitner v. Metz*, 32 S. C. 387, 10 S. E. 1082, as an example of revival against an administrator of judgment against decedent.]

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 403-411, 417-428; Dec. Dig. ⚡73.]

Before Hudson, J., Chester, March, 1886.

The opinion sufficiently states the case.

Mr. W. A. Sanders, for appellant.

Mr. Giles J. Patterson, contra.

July 12, 1886. The opinion of the court was delivered by

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*Mr. Justice McIVER. This was a summons to revive a judgment and renew an execution, issued June 29, 1885, against the administrator of the defendant. It appears that on September 30, 1861, one Nicholas Colvin recovered judgment against the defendant Phillips for eight hundred and fifty three 41-100 dollars, and on October 1, 1861, the first execution issued thereon was lodged in the sheriff's office. On March 3, 1866, a second execution was issued and lodged in the sheriff's office, and on February 7, 1870, the plaintiff, Nicholas Colvin, paid to the sheriff the costs on said judgment. The administrator of Phillips showed for cause why the execution should not be renewed, the presumption of payment arising from lapse of time. To rebut this presumption the present plaintiff, to whom the judgment and execution had been assigned, on January 22, 1884, by his father, Nicholas Colvin, offered himself as a witness to prove a conversa-

tion between his father, who died in April, 1884, and Phillips.

This testimony was duly objected to as incompetent both under section 131 and section 400 of the Code of Procedure. The objection was overruled by the referee: to whom it had been referred to take the testimony in the case, and the present plaintiff testified as follows: "I am the owner of the judgment and execution in this case. No part thereof has ever been paid to me, and no part thereof was ever paid to Nicholas Colvin, as far as I know. A short time before Phillips died, in 1870 or 1871, he came to the field where my father, Nicholas Colvin, and I were at work; they had a conversation in regard to this judgment. Phillips asked my father what he would take for the judgment and execution he held against him (Phillips). Father told him he would take the principal. After talking some time he told my father he could sell his place for a thousand dollars. Father then told him to bring him \$500 and he would give up all claims he had against him. He told my father he would see about it, and came back in three days, and said he could not get but \$500 in cash for the place. He asked my father if he could not let him (Phillips) take the \$500 cash and my father wait for the other \$500. Phillips did not sell the place, and there was no settlement between him and father." It appeared that no one else was present at the conversation in the field ex-

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cept one E. C. *Faut, the nephew of the present plaintiff, who was then a boy about eleven years of age, and who, upon being examined, testified that he remembered Mr. Phillips coming into the field, but paid no attention to the conversation. Whether there was anyone else present at the conversation three days afterwards, does not appear.

The case was heard by his honor, Judge Hudson, who held: 1st. That the evidence above recited "under an equitable application of the provisions of section 131 of the Code" was not admissible. 2nd. That even if admissible, it was not sufficient to rebut the presumption of payment arising from the lapse of time; and, therefore, he refused the motion to revive the judgment and renew the execution.

The plaintiff appeals upon several grounds, raising the following questions: 1st. Whether the evidence offered as to the alleged acknowledgments made by Phillips in 1870 or 1871, not being in writing was inadmissible under the provisions of section 131 of the Code. 2nd. Whether such evidence, if admissible, was sufficient to rebut the presumption of payment arising from lapse of time. 3rd. Whether such evidence, coupled with the further facts of the renewal of the execution in March, 1866, and the payment of the costs of the case by the original plaintiff

in February, 1870, together with the assignment of the judgment to the present plaintiff in January, 1884, were not sufficient to rebut the presumption of payment. The defendant, in further support of the ruling below, also contends that the testimony of Nicholas J. Colvin was incompetent under section 400 of the Code of Procedure.

We propose to consider, in the outset, the questions as to the competency of the testimony of Nicholas J. Colvin; for if that testimony was inadmissible, it is quite clear that there is nothing to rebut the presumption of payment arising from the lapse of time. 1st. Was this testimony incompetent under section 131 of the Code, which reads as follows: "No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same be contained in some writing signed by the party to be charged thereby," &c. Now,

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if that section applies to the *present case, it is quite plain that the testimony in question, not being in writing, would be incompetent.

But does it apply? By its express terms it applies only to cases referred to in that "title" of the code in which the section is found: which is denominated, "time of commencing civil actions," but by its initial section (93) its operation does not extend to all civil actions, for in that section it is expressly declared: "The provisions of this title shall not extend to actions already commenced, or to cases where the right of action has already accrued: but the statutes then in force shall be applicable to such cases; according to the subject of the action and without regard to the form." It seems to us, therefore, that section 131, which contains one of the "provisions of this title," cannot be applied to any case where the right of action had accrued at the time of the adoption of the Code of Procedure, March 1, 1870. Now, as it is quite clear that in the case now under consideration, the "right of action"—whether by *scire facias* to revive the judgment, or by action of debt on the judgment—had accrued prior to the adoption of the code; we do not see how the provisions of section 131 can be applied in the face of this prohibition to the present case.

It is quite true that the right to institute the particular mode of procedure adopted in the present case, did not accrue, because it did not exist prior to the adoption of the code. But that is a mere change of a remedy from the old proceeding by *scire facias* to the present proceeding by summons, and does not affect "the right of action;" but only substitutes a new mode of enforcing such right. We think, therefore, that the Circuit Judge erred in holding the testimony incompetent under the provisions of section 131 of the Code.

2d. Was the testimony incompetent under section 400 of the Code? The general rule is that interest does not disqualify, and hence to render any testimony incompetent under the provisions of that section, it is necessary to bring such testimony under the express terms of some one of the exceptions to such general rule, mentioned in the proviso. *Guery v. Kinsler*, 3 S. C., 423; *Cantey v. Whitaker*, 17 Id., 527. Now, in this case the witness whose testimony was objected to,

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though a party to the action, *and though testifying as to a conversation of a deceased person: in a proceeding against his administrator, was not testifying "in regard to any transaction or communication between such witness and a person at the time of such examination deceased," &c. On the contrary, the transaction or communication to which he was testifying was between Nicholas Colvin, the father of the witness, and the deceased, Phillips. For all that appears, the witness, at the time of the conversation, was like any other disinterested by-stander, testifying as to a conversation between the two original parties to the judgment, both of whom are now dead. It is clear, therefore, that the testimony objected to cannot be brought within the express terms of the exception relied upon; as has been frequently held by this court. *Roe v. Harrison*, 9 S. C., 279; *Hughey v. Eichelberger*, 11 Id., 36; *McLaurin v. Wilson*, 16 Id., 402.

The testimony objected to not being incompetent upon either of the grounds taken; our next inquiry is whether it was sufficient, either alone or in connection with the other facts relied on, to rebut the presumption of payment arising from lapse of time. To determine this we will consider the second and third questions above stated, as presented by the grounds of appeal, together. First, then, as to the effect of a lodgment of a renewal execution in March, 1866, the payment of the costs by the original plaintiff in February, 1870, and the assignment of the judgment to the present plaintiff in 1884. These purely *ex parte* acts, not shown to have been known to the defendant in the judgment, or to his administrator, cannot, surely, have any effect whatever in rebutting the presumption of payment arising from lapse of time (*Dillard v. Brian*, 5 Rich., 501; *Tobin v. Myers*, 18 S. C., 324); and we do not see that they can lend any additional weight to the testimony of Nicholas J. Colvin as to the alleged admissions or acknowledgments of Phillips.

Inasmuch as the cases just cited establish the proposition that the twenty years begin to run when the judgment is entered up, and not when the last renewal execution is tested or loses its active energy, unless such renewal is upon notice to the defendant (*McNair v. Ingraham*, 21 S. C., 70); and inasmuch as the judgment was in this case originally en-

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tered in September, 1861, *it is quite clear that the presumption of payment had arisen in September, 1881, several years before the present proceeding was commenced, unless the testimony of Nicholas J. Colvin was sufficient to rebut such presumption. It will be observed that the conversations (for there seems to have been two—one in the field, and the other three days afterwards) occurred before the twenty years had run out, and therefore before the presumption of payment had arisen.

It may be, therefore, that this case does not fall within the rule laid down in *Boyce v. Lake*, 17 S. C., 481 [43 L. Ed. 618], and *Stover v. Duren*, 3 Strobl., 448 [51 Am. Dec. 634]; though it does seem, from the first ground of appeal in the last named case, that there was testimony of an admission made by the defendant that the debt was unpaid, before the twenty years had run out, but no notice of such testimony seems to have been taken, either in the Circuit Judge's report, or in the opinion of the Court of Appeals. While, therefore, it is quite clear that, in the conversations testified to by Nicholas J. Colvin, there was no such admission of a subsisting legal obligation, unaccompanied by any expression or conduct indicating an unwillingness to pay, as would, under the rule declared in those cases, be sufficient to rebut the presumption of payment, if such conversation had taken place after the twenty years had run out, and after the presumption had arisen; yet as these conversations took place before, it is necessary for us to consider their effect in that aspect of the case.

In considering the effect of admissions relied upon to rebut the presumption of payment arising from the lapse of time, the same principles are applicable which apply when admissions or subsequent promises, either express or implied, are relied upon to take a case out of the operation of the statute of limitations. There the rule is that, while a debt already barred by the statute cannot be revived except by an express promise to pay it, or by such an unequivocal admission that it is still due and unpaid, unaccompanied by any expression, declaration, or qualification, indicative of an intention not to pay, from which the law would imply a promise to pay, yet that before the debt is barred a naked admission of the subsisting legal obligation is sufficient. *Young v. Monpoe*, 2 Bail., 278. The very satisfactory

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reason given *for this distinction in that case is, that in the one case there is no longer any subsisting legal obligation; while in the other there is such an obligation; hence, in the former case there must be either an express promise to pay the debt, or what is

equivalent to it, while in the latter a mere acknowledgment of the subsisting legal obligation will, as matter of law, imply a promise to perform such obligation.

But as it is now settled that in either case the subsequent promise or acknowledgment, and not the original note, constitutes the cause of action (*Smith v. Caldwell*, 15 Rich., 365, and *Walters v. Kraft*, 23 S. C., 578 [55 Am. Rep. 44]), the practical inquiry in all such cases is, whether the subsequent promise or acknowledgment is sufficient to constitute a cause of action. The inquiry then is, whether the acknowledgment or admissions, as they are called, of Phillips are sufficient to constitute a cause of action. There was no express admission or acknowledgment of any subsisting legal obligation, and certainly no promise to pay anything. In the conversation in the field what Phillips first said amounted to nothing more than an inquiry as to what Colvin would take for the judgment, in general terms, and even when told that he could have the judgment for \$500, he did not agree to give that sum, or even intimate that he would do so. On the contrary, his only reply was, "he would see about it." Then when he returned, three days afterwards, he only inquired whether Colvin would take a certain sum and wait for it, to which, so far as the testimony discloses, there was no reply.

It seems to us that it would be difficult to construe this language as even implying an admission of any subsisting legal obligation. He certainly did not say so, and with equal certainty he made no offer to pay anything. This he seemed carefully to avoid, and to confine himself entirely to a mere inquiry as to what Colvin would take for the judgment. It may well happen that a person having a note out against him, or a judgment standing open against him, the validity of which he does not acknowledge, might for the sole purpose of avoiding expense and litigation, institute inquiries, or even negotiations, in regard to such claims, without acknowledging their validity or even impliedly admitting his obligation to pay

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them; and this is all that Phillips *seems to have done. When to this is added the further facts, appearing in the record, that though Phillips appears to have had property sufficient to pay a large portion of the judgment, no steps seem to have been taken towards enforcing it until some fourteen or fifteen years afterwards, after the death of Phillips, we cannot regard the testimony relied upon as sufficient to rebut the presumption of payment arising from the lapse of time.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 235

MILLER v. WHITE.

(April Term, 1886.)

[1. *Principal and Surety* ¶168.]

Where a sealed note signed by two obligors was in form following: "On or before November 1, 1883, we or either of us promise to pay D. E. Miller or order (for rent of farm), two hundred and fourteen dollars"—the note was an obligation to pay in money, and the obligee might sue the surety thereon without pursuing the principal debtor.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 469; Dec. Dig. ¶168.]

[2. *Bills and Notes* ¶242.]

If the note was a rent note, then it was the lease of both obligors, and neither of them was a surety.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 542, 547, 548, 550, 551; Dec. Dig. ¶242.]

[3. *Principal and Surety* ¶126.]

Notice by the surety to the obligee to seize the principal debtor's crop did not release the surety as (1) the obligee was not bound to take anything but money in payment of the note; (2) it did not appear that the crop was sufficient to discharge the debt; and (3) the landlord's right to seize a crop is not compulsory, and in this case the facts would not have authorized a warrant of seizure to issue.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 332; Dec. Dig. ¶126.]

Before Fraser, J., Darlington, October, 1885.

The facts of this case are fully stated in the opinion. The judge made the charge and refused the requests quoted in the exceptions.

Messrs. Boyd, Nettles & Brunson, for appellant.

Mr. J. P. McNeill, contra.

July 12, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an ac-

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tion on a note as follows: "On or by the first day of November, 1883, we or either of us promise to pay D. E. Miller or order (for rent of Mt. Hope Cemetery farm, for the year ending December 30th, 1883), two hundred and fourteen dollars, without interest until maturity. Witness our hands and seals at Florence, S. C. (Signed) J. M. White [l. s.], Thomas Ellis [l. s.]" Both the signers were sued. White made no defence, but Ellis answered, claiming that he had no interest in the land leased to White; that he was merely his surety on the note, and was discharged from liability by the conduct of the plaintiff creditor; that White made a crop on the premises, and that when the note became due he (Ellis) made demand on plaintiff that he should at once enforce his statutory lien on the crop and thereby obtain payment of the note, but that plaintiff refused to enforce his lien; that the crop was valuable and the plaintiff could have obtain-

ed payment, and not having done so, that he (Ellis) was discharged and no longer liable.

The plaintiff had a verdict for the amount of the note; and Ellis, having failed to obtain a new trial appeals to this court upon the following exceptions: "I. Because his honor erred in charging the jury that 'a demand made by the surety to a tenant, on the landlord, to enforce the statutory lien will not release the surety unless it is accompanied with or the landlord has information that the tenant is about to dispose of his crop or in some other way defeat the lien. Without this the landlord is not in a position to enforce the statutory lien by the usual warrant from the clerk.' II. Because his honor erred in refusing the request to charge that 'if Ellis was the surety of White and this was known to Miller, and if Miller was required by Ellis to enforce his statutory lien for rent on the crop upon the leased land, and refused so to do, and this omission resulted in injury to Ellis, then Ellis is discharged from his liability on the note.' III. Because his honor erred in refusing the request to charge that 'if White told Miller to take any part of his crop in payment, and Miller declined to take it, Ellis is discharged pro tanto the value of the crop he was so told to take and refused.' IV. Because his honor erred in refusing a new trial on the grounds above stated," &c.

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*The instrument sued on was signed by both of the defendants, and its terms are, "We, or either of us," and must be regarded as the undertaking of both the obligors, whether considered as a simple single bill, or a covenant for the payment of so much as rent for the farm; and in either case the promise was to pay so much money and nothing else. We incline to think that the instrument, notwithstanding the phrase as to rent inserted in the parenthesis, was a simple single bill for the payment of so much money. So considered, and assuming that Ellis was merely surety for White, it is perfectly clear that the plaintiff was under no obligation to take anything in payment but money; that was the express contract of the parties, and that the plaintiff was entitled to receive. So far as the creditor is concerned, both the principal and surety are his debtors, he took no other security from either than that personal obligation, and he might sue the surety without pursuing the principal. "To discharge a surety, it is necessary that the creditor should do some positive act which has that effect, and not merely that he should be passive; or that he should omit some duty to the surety, which he was bound to perform." *Jackson v. Patrick*, 10 S. C., 197.

But it is urged that the parenthesis inserted in the note, indicating the consideration, made it a rent obligation for the rent of the

cemetery farm. If so, was it not, as expressly declared, the lease of both? We do not clearly see by what principle or authority one of the signers can claim to be the principal and the other only surety. If, however, Ellis is still entitled to be considered as surety on the obligation as a rent note, we fail to see that the creditor owed him as such any duty to seize the property of White under an agricultural lien. We think there are several reasons why it was not his duty to do so:

1. His express contract was that he should have his rent in money; the surety as well as the principal so engaged, and he is not bound to take it in anything else. He may have required personal security for the rent for the very purpose of avoiding the necessity of seizing the crop, and in that case the note was the primary security.

2. The demand that the creditor should seize the crop, could not possibly be regarded as payment or tender either of the whole

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*or pro tanto, for it did not appear that the whole crop available would have discharged the whole debt. "Nothing short of an offer fully to perform the contract, evinced by a tender of everything the plaintiff is entitled to, is sufficient." *Baker v. Gasque & Rowell*, 3 Strobl., 25.

3. We do not understand that the right of a landlord under the law to seize the crop of his tenant under an agricultural lien is compulsory, so that the tenant or his surety may demand that the right shall be exercised. The law gives him that as well as other remedies to secure payment. It is his privilege in a proper case, but if he does not choose to exercise it, we do not see that the validity of the rent obligation, either against the principal or his surety, should be thereby affected. But in addition, it did not appear that the proper case existed and that the plaintiff could have made the showing necessary to obtain an agricultural warrant. The right only exists in a certain state of facts. *Kennedy v. Reames*, 15 S. C., 552; *Sullivan v. Ellison*, 20 S. C., 484.

If the defendant, Ellis, wished to save himself from loss on the note, he might have paid it, and possibly claimed to be reimbursed out of the crop. But be that as it may, we cannot hold that the Circuit Judge committed error as charged.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 238

MITCHELL v. TOALE.

(April Term, 1886.)

[1. *Master and Servant* ¶44.]

A master, after dismissing his servant, has not the right to recall the servant at any time and under all circumstances; but after dismiss-

al the master has the right to recall the servant, if otherwise unemployed, to do a portion of his stipulated work, without fully recalling him to his former position.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 59; Dec. Dig. ¶44.]

[2. *Master and Servant* ¶30.]

A servant is bound to obey the lawful, reasonable, and substantial orders of the master within the scope of the business; and if he refuses to do so, a discharge would be justifiable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 30-36; Dec. Dig. ¶30.]

Before Pressley, J., Charleston, June, 1885.

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*This was an action by H. W. Mitchell against P. P. Toale. The opinion states the case. The charge of the Circuit Judge to the jury was as follows:

The first question for you to determine is whether this was a contract for a year. You are to determine that from the testimony and from the circumstances of the case, the nature of the employment, how the matter was treated during the time, and all such matters. The rule of testimony is that where one party to a cause, if he be credible, testifies positively to conversations between himself and the other, and the other party testifies that he does not remember, that is not a contradiction, unless he goes further and testifies that he was in the habit of noting such things, and would have been apt to have remembered it, and to the best of his knowledge and belief it did not take place. You must judge of that from the whole testimony.

If you come to the conclusion that it was a contract by the year, then the next question is: Was the discharge for good cause? Good cause is such cause as you, as business men, knowing what are the annoyances and defects in matters of business, would consider, fairly and conscientiously, cause for the discharging of a clerk. You have heard the testimony on that point on both sides, and you must determine it by that testimony. I am asked to charge you that the plaintiff in this case must show that there was no good cause for the discharge. That I decline. The burden of proof is on the other side, and the employer must show that he had good cause for discharging the clerk if the contract was for a year.

I am also asked in the first request to charge you a matter which I decline to charge, because I consider the proposition too general. My charge to you upon that point is this, that an employer who has discharged a clerk has the right to recall his discharge and require him to go to work again. He has undoubtedly that right, and upon the subject of this request I charge you, that if Mr. Toale told him to go to work again, or told him anything else which could fairly be construed into a recall of the discharge, and the restoring him to his old place, he had the right to do so. But if he

required of him particular work which he claimed was left undone, and should have

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been done in the *term of his employment, then that would not release him from his obligations connected with the discharge. It would only give him the right to prove that that work was neglected, and to deduct from his liability whatever it cost him to have it done. So that if you construe Mr. Toale's proposition in this case as not fairly to admit of the construction that he recalled this employe's discharge and instructed him to go to work again under the old contract, then that would not release him of his liability by reason of his having discharged the clerk. It must be a recall and restoration to his old position. If under those circumstances the clerk refuses to go to work again, then it is an acceptance of his discharge, and he must take the consequences.

I am requested to charge you that the law implies a promise that the clerk, or book-keeper, or servant, shall obey all the reasonable orders of the master; and that any breach of this promise justifies the discharge. I have interlined the word substantial; and I charge you that the law does imply such a promise, and that any substantial breach of such a promise does authorize a discharge. It must be such a substantial neglect of duty, such a disobedience of orders, that a reasonable man would consider it good cause to discharge him for. If you find any such neglect of duty, and any such neglect of orders coming within that meaning, then Mr. Toale was justified in discharging him. If not, then, if it was a contract for a year, he was not justified in discharging him.

I am requested to charge you that if this was a contract for a year, and the contract ran on from year to year, then the year contract is implied in the renewal. If one be employed for a year, and the year expire, and he go on in the same employment without another contract, then another new year's employment is implied. That is what I charged in the case of Heyward against the Union Bank, I think. That is what I charge now, at any rate.

The second plaintiff's request to charge is concerning the burden of proof. I have already charged you that where a person justifies a discharge for cause, the burden of proof is upon him to show that there was cause. If, under the law, as I have laid it down, you consider that the plaintiff is enti-

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tled to his compensation, then you will give him his half year's salary, deducting what he earned during that time. You will also deduct the thirty-eight dollars which he admits stands on the books against him. The circumstances of that over-draft is a question entirely for you. You must judge of the whole matter.

Under the law, as I have laid it down, is

the plaintiff entitled to recover? If the defendant discharged him for good cause, your verdict must be for the defendant, for the thirty-eight dollars which he has charged against him. If the contract was for the year, and the plaintiff was not discharged for good cause, you will find for the plaintiff the amount claimed, there being no proof that he could have earned more than he gives credit for.

Messrs. Smythe & Lee, for appellant.

Messrs. Lord & Hyde, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, respondent, was employed as book-keeper by the defendant, appellant, for the year 1884, to wit, from December, 1883, to December, 1884, at a salary of \$800 for the year. On May 31, 1884, the defendant dismissed the plaintiff, but in a short time after this dismissal, and before the plaintiff had obtained other employment, the defendant, finding that the books kept by the plaintiff had not been balanced, called upon the plaintiff to do this work, which plaintiff refused to do, except at the rate of \$5 per day, which defendant declined to pay. The plaintiff afterwards obtained other employment, and upon the close of the year brought the action below, demanding judgment for three hundred and sixty-three dollars (\$363), the balance due him for the year's salary, after deducting a payment of \$438.37.

At the trial the defendant was allowed credit for the amount earned by the plaintiff since his discharge, \$120, and also for a small amount due by plaintiff to defendant on the books, \$38.39, which left \$241.63 due plaintiff, for which sum a verdict was rendered in favor of plaintiff. The appeal rests upon the refusal of the presiding judge to charge certain requests, and also upon his charge.

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*The defendant requested his honor to charge: "That if a servant employed by a master for a stipulated period be discharged by such master before the period expires, even wrongfully, but the master at any time thereafter require him to return to his service, or to perform any of the duties he had agreed to do, he is bound to do so, or else he cannot recover." This his honor refused to charge as too general. He, however, in response to the request, charged that if the call upon the servant could fairly admit of the construction that the discharge is recalled, and that the servant is expected to go to work again under the old contract, being restored to his old place, "he had a right to do so. But if he required of him particular work, which he claimed was left undone, that that would not relieve him from his obligations connected with the discharge." The defendant also requested the judge to charge

that "a promise to obey the lawful and reasonable orders of the master is implied by law. Any breach of his promise justifies discharge." This his honor also declined, unless the request was qualified by the word "substantial"—in other words, "that it was only a 'substantial' breach of the promise to justify a discharge." The appeal assigns error to the refusal above, and to the response given to the first request above.

We agree with the presiding judge, that the first request was too broad and general in its terms. A master dismissing a servant has no right to recall at any time and under all circumstances after dismissal, on pain of forfeiting all right of recovery. See the case of *Saunders v. Anderson*, 2 Hill, 486, cited by the appellant. In that case, where the general rule that the master had the right to exact or dispense with any portion of the time of the servant, and capriciously, if he chose, provided he inflicted no injury on the servant, was recognized, yet the court said that this rule must be understood with some qualifications: saying that the planter is not at liberty to drive off and recall at pleasure. If, in consequence of being improperly dismissed, the overseer engage in any other employment, he would not be bound to return. This being the law, the Circuit Judge did not err in declining the broad request made.

But we think the judge erred in the re-

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sponse which he made *to this request. The contract between the parties being an entire contract for the year 1884, the defendant was entitled to plaintiff's services for that period, within the scope of his employment, and as was said in *Saunders v. Anderson*, supra, he had the right to exact from the plaintiff the performance of that service, or to dispense with said service, as he chose, even capriciously, or for any cause, so that he kept within the qualification above suggested. See, also, *Wood's M. & S.*, 269. It appears that the plaintiff, at the time he was called to balance the books, had not been engaged by others, and it was no injury upon him to be recalled to do this work. It was error, therefore, for the judge to charge that the defendant had no right to recall the plaintiff, unless the plaintiff was to be restored to his former position.

The difference between the second request and the charge is so slight that the error assigned there hardly needs discussion. No doubt, the servant is bound to obey the lawful and reasonable orders of the master, within the scope of the business, and if he refuses to do so, a discharge would be justifiable; and probably no order would be lawful and reasonable, unless at the same time it was substantial—that is, pertained substantially to the business. Mr. Wood says: "The servant is bound to obey all the

master's lawful and reasonable commands, even though such commands may, under the circumstances, seem harsh and severe, but the master has a right to manage his own affairs, and it must be a very extreme case in which a servant would be justified in refusing obedience to his orders." *Wood, M. & S.*, 224, 225.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

25 S. C. 243

HUFF v. WATKINS.

(April Term, 1886.)

[1. *Costs* ⇐45.]

Plaintiff sued defendant for a tort, and on two appeals to the Supreme Court was successful in reversing judgments of the Circuit Court in defendant's favor; after this, the defendant died and the action was abated. *Held*, that plaintiff was entitled to the costs of the two appeals in which he had prevailed, notwithstanding there had been no final determination of the action.

[*Ed. Note.*—Cited in *Sease v. Dobson*, 36 S. C. 555, 558, 15 S. E. 703, 704; *Stepp v. National Life & Maturity Ass'n*, 41 S. C. 207, 19 S. E. 490; *Hall v. Hall*, 45 S. C. 7, 22 S. E. 881.

For other cases, see *Costs*, Cent. Dig. § 180; Dec. Dig. ⇐45.]

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*2. The decision in *Cleveland v. Cohrs*, 13 S. C. 397, stated and approved.

[*Ed. Note.*—Cited in *Murray v. Aiken Mining & Porcelain Mfg. Co.*, 39 S. C. 465, 18 S. E. 5; *Sullivan v. Latimer*, 43 S. C. 263, 21 S. E. 3; *Cumplingham v. Canthen*, 47 S. C. 163, 25 S. E. 87.]

Before Kershaw, J., Newberry, February, 1886.

The opinion states the case.

Messrs. Suber & Caldwell, for appellant.
Messrs. Moorman & Simkins, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff brought action in 1879 against William Watkins, to recover damages for the hiring and retention of a laborer alleged to have been previously hired for that year by the plaintiff. The case was heard by his honor, Judge Wallace, and a jury, with a verdict for the defendant. A new trial was ordered, on appeal to this court. 15 S. C., 82 [40 Am. Rep. 680]. The case was then heard a second time below, before his honor, Judge Pressley, when, under the charge of the judge, the defendant had a second verdict. The judgment on this verdict was set aside on a second appeal, and a new trial ordered again. 18 S. C., 510. In the meantime the defendant died, and the defendant, James F. Watkins, became his executor. At the November term of the Circuit Court thereafter, the

plaintiff moved to substitute the executor, and for leave to proceed with the action against the said executor. This motion was refused by his honor, Judge Hudson, before whom the motion was made, the judge holding that the action had abated. 20 S. C., 477.

The plaintiff then applied to the clerk of the court to tax the costs and disbursements of the two appeals, in which he had been successful, against the estate of the deceased. The clerk refused this motion. On exceptions taken, his honor, Judge Kershaw, overruled the clerk, and decided that plaintiff was entitled to his costs and disbursements on the two appeals, the plaintiff having prevailed therein, and having obtained a new trial in each. The question before us is, was this ruling of Judge Kershaw correct?

Costs are regulated by statute, and questions arising in reference to liability for costs, and the taxation thereof in favor of plaintiff or defendant, must be decided by the appli-

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cation of the *terms of said statute. The present act on the subject of costs, provides in the first section, that the attorneys of plaintiff or defendant shall be entitled to costs * * * "accordingly as the action may terminate." Gen. St., § 2425. The next (2d) section of the acts fixes the amount of costs, for plaintiff's and defendant's attorneys, as the case may be, in cases at law, §§ 2426, 2427. The next fixes the amount in equity causes, subject to the right of the judge to direct which of the parties shall pay these costs (§ 2428), and at the conclusion of this section it is provided: "That in all classes of cases, legal as well as equitable, for the plaintiff's or defendant's attorneys for making and serving a case or cases containing exceptions, ten dollars: * * * on appeal to the Supreme Court, fifteen dollars; on argument in Supreme Court, twenty dollars."

Now, the question arises whether the terms found in the first section, supra, to wit: "accordingly as the action may terminate," qualifies and controls this last provision of section 2428; or is that provision an independent provision entitling the successful party in the appeal to the costs allowed? If the former, then the judgment below was error, because the action below having abated by the death of the defendant, before final judgment on the merits, under circumstances which did not allow revival, it being a case in tort, there was no termination of the action in favor of either party. But if the provision as to costs in the Supreme Court can be regarded as an independent enactment, intending to allow costs to the prevailing party there, then his honor below was right. We think, from the language employed in the provision referred to, that it was its purpose to allow the costs mentioned to the prevailing party on appeal, without

regard to the final result of the action. Costs were certainly authorized to some one thereby, and we can hardly suppose that it was left to the final determination of the action to determine which of the parties should become entitled to these appeal costs, without regard to the fact which had been successful in the appeal. On the contrary, the most reasonable construction is, that this provision, although it is a part of section 2428, which as a whole is governed by sec-

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tion 2425 (the first section), yet it *was the intention to allow appeal costs to the prevailing party in the appeal.

This construction is fortified and sustained by the case of *Cleveland v. Cohrs*, 13 S. C., 397. In that case there had been two appeals, as in the case at bar, in both of which the defendant, appellant, had prevailed. The plaintiff, however, finally succeeded below, and the court held, that defendant having prevailed in both appeals, which were rendered necessary by the defective pleadings on the part of the plaintiff, he was entitled to have the costs incurred in such appeals taxed. It is true in that case the court did say (as above), "which were rendered necessary by the defective pleadings on the part of the plaintiff," but that was not the turning point of the decision; the fact that the defendant had prevailed, was the pivot. The question presented here depends upon the construction of our statute, and therefore the cases referred to by appellant, drawing a distinction between appeals founded upon errors of law in the judge, and defects of pleadings, &c., occasioned by the party, do not apply. Our statute, we think, gives appeal costs to the prevailing party in the appeal, without reference to the grounds of the appeal. We admit that the question is not free from doubt, but our conclusion is as above.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 246

WILBUR & SON v. HUTTO.

(April Term, 1886.)

[1. *Executors and Administrators* ⚭537.]

Creditors of an intestate have no cause of action against the sureties on the administration bond until after devastavit established against the administrator; and a complaint against the sureties alone which failed to state such devastavit was properly held bad on demurrer.

[Ed. Note.—Cited in *Burnside v. Robertson*, 28 S. C. 583, 585, 586, 6 S. E. 843.

For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2453, 2485-2581; Dec. Dig. ⚭537.]

[2. *Executors and Administrators* ⚭534.]

Judgment by default entered against an administrator on a debt of his intestate, and a return of nulla bona thereon, are prima facie

evidence of a devastavit, but they are not conclusive: to make the sureties on his bond liable in such case, there must first be a second action and judgment de bonis propriis.

[Ed. Note.—Cited in *Chick v. Farr*, 31 S. C. 479, 10 S. E. 176, 390; *Parker v. Latimer*, 59 S. C. 335, 37 S. E. 918.

For other cases, see *Executors and Administrators*, Cent. Dig. § 2459; Dec. Dig. ¶534.]

Before Pressley, J., Barnwell, November, 1885.

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*This was an action by T. A. Wilbur & Son against G. E. Hutto and E. E. Hughes, sureties on the administration bond of John L. Sease. The opinion states the case. It may be added, however, that the judgment of the plaintiffs against John L. Sease, as administrator, was a judgment by default.

Messrs. W. R. Kelly and James Thomson, for appellants.

Mr. C. C. Simms, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This action was brought against the defendants, sureties on the bond of J. L. Sease, administrator of A. E. Sease, deceased, under the following circumstances: The plaintiff recovered a judgment against the said J. L. Sease, as administrator aforesaid, for \$679.25. Execution was duly issued thereon, and the sheriff returned nulla bona, whereupon the action below was commenced against the defendants, sureties on the administration bond. The plaintiff alleged the amount due on the judgment, and demanded judgment for the same. The defendants demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was sustained, his honor, the presiding judge (Pressley), stating as grounds for his ruling: "That neither the administrator, nor his administrator, if he be dead, is a party to the action, nor is there any allegation that either was called to account, or a devastavit established." The appeal involves the correctness of his honor's ruling.

It will be conceded that creditors of an intestate have no cause of action against the sureties of the administrator until a devastavit has been first established against the administrator himself. This principle is founded upon that other principle that the assets of the intestate must be applied to his debts, through the management of the administrator, and the object and purpose of the administration bond is to secure such application, the obligation of the surety being that the administrator will so apply said assets. Such being the fact, and it being necessary that the complaint in every action should contain allegations stating the cause

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*of action, on pain of dismissal by demurrer, it follows, in the case at bar, that the com-

plaint herein should have contained an allegation, either expressly or impliedly, of a devastavit by the administrator; otherwise it was fatally defective and the demurrer was properly sustained. The question then is, did this complaint contain such an allegation? The complaint is very brief, the principal allegations being, that one A. E. Sease died in 1883; that John L. Sease was appointed his administrator; that the defendants became sureties on his official bond; that in 1884 the plaintiffs recovered the judgment mentioned against the administrator; that in 1884 execution was duly issued on this judgment, and afterwards in 1884 the sheriff returned that he could find no property out of which to satisfy said judgment.

Now, there is no allegation of a devastavit, certainly none in express terms. Is it impliedly made? Or can it be said that it is a legal inference from the facts stated? It will not be contended that the judgment obtained by the plaintiff was anything more than a judgment de bonis testatoris, as contradistinguished from one de bonis propriis. And it is admitted, that such a judgment, as a general rule, is an admission of assets in the hands of the administrator sufficient to pay the debt established; and if upon the issuing of an execution no assets can be found, a return of nulla bona would be conclusive evidence of a devastavit, if there was no other way except by devastavit for the administrator to have disposed of said assets after judgment obtained. And in that event, an allegation of nulla bona would be equivalent to an allegation of devastavit, and therefore would be sufficient. But a return of nulla bona is not conclusive of an unlawful disposition of the assets by the administrator. It is only prima facie, and notwithstanding such return, the administrator cannot be held liable de bonis propriis, except upon a separate action against him, where he is permitted to overthrow the prima facie presumption by showing a proper disposition of the assets under the judgment; in the absence of which proof the devastavit becomes fully established, and a judgment will go against him de bonis propriis on account of said devastavit.

Now, the sureties not being liable until a devastavit by the administrator has been es-

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tablished, and it requiring an action *against said administrator in his individual capacity to completely establish the devastavit in the absence of an accounting, it follows necessarily, that the creditor has no cause of action against the sureties until such action has been instituted and determined against him, which facts must be alleged in substance in the complaint against the sureties. What has been said above applies to the facts of this case. The question of the liability of the sureties, &c., after an account-

ing has been had against the administrator before a proper tribunal and a decree against him, is not before us, and we express no opinion on that subject. In support of the principles herein, see *Lyles v. Caldwell*, 3 McCord, 225; *Anderson v. Maddox*, Ibid., 237; *Cureton v. Shelton*, Ibid., 412; *Harrington v. Cole*, Ibid., 509, in which it was held that an accounting and a decree against the administrator before suit on the administration bond was necessary. See, also, *Young v. Kennedy*, 2 McMull., 80; *Brown v. Hillegas*, 2 Hill, 450; *Jones v. Anderson*, 4 McCord, 118.

We think the plaintiff failed to allege facts sufficient to constitute an action against the defendants.

It is the judgment of this court, that the judgment of the court below be affirmed.

25 S. C. 249

LEWIS v. RAILROAD COMPANY.

(April Term, 1886.)

[1. *Carriers* ⇨193.]

Plaintiff made a contract with a railroad company for special through rates on a shipment of five mares. On their arrival at their destination on another line of railroad, plaintiff tendered the amount fixed by the contract and demanded delivery, which was refused unless a larger sum called for by the way bill was paid. Plaintiff then brought action against this railroad company for the recovery of the mares. *Held*, that plaintiff having introduced no testimony to show that the initial road was authorized to make such special contract for the defendant, a non-suit was properly granted.

[Ed. Note.—Cited in *Venning v. Atlantic Coast Line R. Co.*, 78 S. C. 49, 58 S. E. 983, 12 L. R. A. (N. S.) 1217, 125 Am. St. Rep. 768; *Reynolds & Craft v. Seaboard Air Line Ry.*, 81 S. C. 385, 62 S. E. 445; *Smith v. Southern Ry.*, 89 S. C. 419, 71 S. E. 989.

For other cases, see *Carriers*, Cent. Dig. § 348; Dec. Dig. ⇨193.]

[2. *Carriers* ⇨195.]

The tender not having covered the usual charges for carriage, questions as to a carrier's lien for extra charges for feed, &c., are not involved in the case.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 435, 873-876; Dec. Dig. ⇨195.]

Before Pressley, J., Oconee, March, 1885.

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*This was an action by J. Earle Lewis against the Richmond & Danville Railroad Company to recover the possession of five brood mares, held by defendant at Seneca, a station on the Atlanta & Charlotte Air Line Railroad, then under lease to the defendant company and operated by it. The opinion states the case.

Mr. H. E. Ravenel, for appellant.
Messrs. Wells & Orr, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This appeal involves the question mainly whether the Cir-

cuit Judge erred in granting a non-suit below. As we have held in several cases, a non-suit is proper and demandable only where there is an absence of all testimony to one or more of the issues material to the case; and inasmuch as the issues are found in the pleadings, the question involved demands a consideration of the pleadings and the testimony introduced. We will, therefore, direct our attention first to the complaint.

The plaintiff alleges in his complaint, that in 1883 he shipped five valuable mares from Lexington, Ky., to be carried to Seneca City, in this State; that this was done under a written contract made with the Cincinnati, New Orleans, and Texas Pacific Railway Company, and through it, as agent of both plaintiff and defendant, with the lines connecting with said railroad to Seneca City, whereof defendant is one; that said mares should be carried to Seneca City from Lexington at the rate of sixty-one cents per hundred pounds for freight charges, on payment whereof said animals were to be delivered in good condition at Seneca City; that on the arrival of said stock at Seneca City, he tendered to said Richmond & Danville Railroad Company the full amount of freight due under said contract, and demanded possession, but that defendant refused to deliver, to his damage \$5,000. The defendant, with other defences, denied that it was a party or privy to the alleged contract, or that it was in any way bound thereby, and that it had no ar-

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gement with the initial road for *freight on live stock shipped to stations on its road, and that the cause of the non-delivery was, that plaintiff would not pay its freight charges, for which the company had lien on the stock, and also a charge for feed of said stock, to wit, \$120 for freight, and \$20 for feed.

It will be seen at once, from an inspection of the pleadings above, that one of the material issues in the case, and perhaps the most material issue, was that the alleged contract was made with the defendant, either through its agent, the Cincinnati, New Orleans, and Texas Pacific Railroad Company, or otherwise. It seems to be understood that the rates contracted for by the plaintiff were special rates, and could only be obtained or allowed by special contract; hence, the starting point in plaintiff's case was the contract, and proof that defendant was a party thereto. Without this, whatever else the plaintiff might prove, his action as brought of necessity would fail. It was not only necessary to prove this contract as alleged, in order to recover in the event that the case went to the jury, but to reach the jury it was necessary to introduce some evidence pertinent to that issue.

Now, did plaintiff introduce such testi-

mony? We have looked carefully through the testimony reported, and we must say that we have not been able to find a particle of evidence directed to the vital point, that the Cincinnati, New Orleans, and Texas Pacific Railroad Company was the agent of the defendant in this transaction, or that it had power, either expressly or impliedly, to bind the defendant in the contract made: and in addition to this, we find a slip appended to reported evidence, or to the "Case," in which it is admitted by both sides, that no notice whatever of this alleged agreement was given by the agent of said Cincinnati, New Orleans, and Texas Pacific Company to the connecting lines, but that one of said agreements was retained by said agent and the other by the plaintiff. It is not distinctly stated that this admission was before the Circuit Judge in the progress of plaintiff's testimony, but we suppose it was, as the non-suit was granted, of course, before the defendant was called upon to reply. Be this as it may, however, without this admission there is a total absence of all testimony on the

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pivotal point mentioned, to wit, that the defendant made the contract sued on, either directly or indirectly. Such being the fact, there was no error in granting the non-suit.

The appellant raised other questions in the exceptions, to wit, whether the defendant had a lien for amounts paid by the defendant to other companies for back freight, &c.; whether defendant had lien for feed of horses paid, &c.; and whether defendant could claim freight paid on the Cincinnati, New Orleans, and Texas Pacific Company, higher than the rates mentioned in the contract. These questions were not involved in the case as made below. The plaintiff came into court on an alleged special contract, in which it was agreed that certain freight rates were to be charged from Lexington to Seneca City, and his tender was based upon those rates, which were less than the usual rates, and failing to offer any testimony in support of the contract, his case fell at that point, which precluded any inquiry as to these other matters. Had his action been founded simply upon a refusal to deliver the stock, after tender of all proper charges, then the question of the right of defendant to hold on for other charges not covered by the tender, would have been before the court.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 252

BARKER v. DEIGNAN,

(April Term, 1886.)

[1. *Adverse Possession* ¶17.]

The oft-repeated but not continuous use of water, covering an adjoining lot of land, for floating rafts and lumber to the trespasser's

mill, does not constitute adverse possession of such lot of land.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 91; Dec. Dig. ¶17.]

[2. *Adverse Possession* ¶44.]

If there were no indication of ownership except the presence of floating rafts, then the removal of the rafts broke the possession, and putting other rafts in afterwards was not a continuation of the first trespass.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 226-231; Dec. Dig. ¶44.]

[3. *Adverse Possession* ¶31.]

Poles driven down in the water to fasten floating rafts to, did not constitute notice of adverse possession of the land.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 128-133; Dec. Dig. ¶31.]

[4. *Trial* ¶90.]

The Circuit Judge having admitted in evidence an old plat to sustain the defence of paramount title, on condition that the grant itself should be afterwards produced, which was not done, he did not err in ruling out all testimony as to this plat.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 239; Dec. Dig. ¶90.]

Before Pressley, J., Charleston, June, 1885.

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*This was an action by Theodore G. Barker against Charles Deignan, commenced in May, 1884, to recover a lot of land covered with water in the city of Charleston. The judge charged the jury as follows:

Where paper titles are admitted in evidence, I am bound to charge you as to their effect. I charge you that under those grants of 1857, produced, to Mr. Samuel G. Barker and his will, and the subsequent deed to Theo. G. Barker, trustee, that he has shown a complete chain of title to the land in dispute, and is entitled to recover it unless the defendant has broken down that evidence.

The first question is, has the defendant shown a paramount title in some one else, has he shown a paramount title in Cleland, or who may be entitled through him from his grant or supposed grant? I am bound to charge you that there is no Cleland grant before the court, and all that has been said about it must be ruled out. I admitted Mr. DeCaradenc's testimony on condition that a Cleland grant should be produced and with the understanding that his testimony on that point must be ruled out if it was not produced. The law at that time was this: a party desiring a grant got a warrant of survey: under that warrant of survey he had the land surveyed, and of that land thus surveyed a plat was made. That plat thus made was to be certified by the surveyor general as surveyed off to him. After getting that if he did not choose to go further and have that plat certified to the governor, connected with a grant made out, to which the plat should be attached, and signed by the governor, his warrant of survey and the survey thereupon fell to the ground;

the proof is in this case that he got a warrant of survey and that it was surveyed, and there the proof stops, and until he proves that he subsequently got a grant under seal of the State and signed by the governor, there is no grant proved before you, so there is no proof of paramount title under that grant.

I am requested by the plaintiff to charge you that if he had got a grant, it was void. I rule that that is the law. We are not to know but that it was the very discovery of that law which is the reason why the grant is not here. Under the law of 1784 if the survey had gone any further, it would

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have been null and *void, because he took more chains front than he took chains deep. The object of the act was to prevent one or two men from absorbing the whole of the river front.

Has the defendant proved title by adverse possession? Adverse possession must be in such way as to give the party fair notice that he is holding under adverse title. Where a person is holding under paper title, a wharf, office, shop, &c., are evidence of his title, to the extent of that paper title, but that possession was not notice that he was holding any further. When he took that title in 1869, calling for Mr. Barker's land as one of the boundaries, that was an admission by him that up to that time he did not claim that land by any adverse possession. Did he after that have ten years' adverse continuous possession? That is the law. It must be adverse and it must be continuous. What I mean by continuous is this: a man squats on another man's land, and even clears a few acres and builds a fence and cultivates it; if he removes the fence and carries it away before his possession of ten years is complete, and abandons the cultivation of the field, all his claim is gone; and if he comes back and commences a new possession, his adverse possession commences from the new start. You cannot link two, three, four, or five trespasses together to make one adverse possession. It must be continuous. There must be the same continuous possession from the time you do it until your title is perfect in ten years.

Does the floating of a raft of timber which is put there for use and moved as soon as used—does the doing that from time to time, floating it in a place which the owner is not using, constitute adverse continuous possession? If, at any time, he moved all those rafts away, that broke his possession. If at any time the premises were cleared, that broke his possession; and his putting rafts there six months after, or a year after, was not a continuance of the first trespass, if that was the character of his possession. It must be ten years' continuous possession, and I submit to you whether the putting of rafts, such as have been proved in this case, was such adverse continuous possession as would

be fair notice to the owner that he was claiming that land. If it was not, your verdict must be for the plaintiff. You cannot take into account the fence which the witnesses

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say was put there, *because that was not put there according to the evidence until 1881. He cannot rely on the fence as giving him ten years' adverse possession.

If the poles were put there simply for the purpose of fastening the rafts there occasionally, that would not constitute notice that he claimed the land. It must be such possession as claims the right to exclude the owner, and it must be continuous. Unless, therefore, you are satisfied from the testimony that the defendant has had ten years' adverse continuous possession of this land in dispute, as I charge you no paramount title is proved in the defendant or any one else, your verdict must be for the plaintiff for the land in dispute; but if you believe that he has had ten years' adverse continuous possession of that land, you will give him a verdict for so much of the land as he had possession of, if you can find that out. As there is no color of title with reference to this land, on proof that he had ten years' continuous adverse possession, you can only give him a verdict for so much as his timber actually covered, if you so find that there was any portion of it continuously covered by timber.

Mr. A. G. Magrath, for appellant.

Mr. C. H. Simonton, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In the action below the plaintiff, respondent, sought to recover damages from the defendant, appellant, for an alleged trespass upon plaintiff's land, of which plaintiff, in his complaint, claims ownership, and upon which he alleged that defendant had wrongfully entered, dug up the ground, and otherwise injured the premises, to the damage of the plaintiff one thousand dollars. The defendant denied each and every allegation in the complaint. The case was tried by jury, his honor, Judge Pressley, presiding, and a verdict was rendered for the plaintiff. There were no requests to charge from either side, but the defendant appeals from certain portions of the charge which the presiding judge delivered to the jury.

The defendant on the trial attempted to

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prove paramount title, *and also adverse possession, to overthrow plaintiff's title, which was complete unless overthrown by one or other of these defences. In the defence of paramount title the defendant relied upon a grant to one Cleland, and before the production of this grant certain testimony was introduced in reference thereto,

upon condition that the grant should be produced afterwards. This grant was never produced, and the judge in his charge ruled out all of the testimony which had been received in reference thereto. And the exception as to that matter is as follows: "Exception 6th. Because his honor charged the jury adversely to the defendant in regard to the Cleland grant, when he had excluded all questions as to that grant, and specially had excluded the decrees of this court in cases where the validity of that grant had been established."¹

The foundation for the other exceptions was what the judge said in reference to the defence of adverse possession. It appears that defendant was in possession of a small lot of land on Vardell's Creek and Town Creek, waters of Cooper River, upon which he had a mill. This property had been purchased from the plaintiff's ancestor, S. G. Barker, and called for other lands of the said S. G. Barker as its southern boundary in the deed of conveyance; and it seems that the defendant made use of these adjoining lots near his mill, which were water lots not built upon, to float his saw logs and rafts of timber, and in which certain poles were put up for keeping the rafts in. And the question of adverse possession turned upon the testimony in reference to the use made of said lots.

His honor charged in substance, that to give title by such possession, it must be adverse and continuous, and of such character as to give the opposite party fair notice that the possession is held adversely; and by way of illustration of what he meant by the term "continuous," he said: "If a man squats on another man's land, and even clears a few acres and builds a fence and cultivates it; if he removes the fence and carries it away before his possession of ten years is complete, and abandons the cultivation of the field, all his claim is gone; and if he comes back and commences a new possession, his adverse possession commences

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*from the new start. You cannot link two, three, four, or five trespasses together to make one adverse possession. It must be continuous. There must be the same continuous possession from the time you do it until your title is perfect in ten years. Does the floating of a raft of timber, which is put there for use and moved as soon as used—does the doing that from time to time, floating it in a place which the owner is not using, constitute adverse continuous possession? If at any time he moved all these rafts away, that broke the possession. If at any time the premises were cleared, that broke the possession, and his floating rafts there six months after, or a year after, was not a continuance of the first trespass, if that was the character of his pos-

session. It must be ten years' continuous possession, and I submit to you whether the floating rafts, such as has been proved in this case, was such adverse continuous possession as would be fair notice to the owner that he was claiming the land. If it was not, your verdict must be for the plaintiff. * * *

But if you believe that the defendant has been in the adverse continuous possession of the land for ten years, you will give him a verdict for so much of the land as he has had possession of, if you can find it."

The exceptions of appellant to this charge which raise questions of law are as follows:

1st. That his honor erred when, to illustrate his idea of adverse possession, he said: "If at any time the (defendant) moved all those rafts away, that he broke his possession." And again: "If at any time the premises were cleared, that broke his possession." The effect of which was to impress the jury with the belief that there could be no right acquired by adverse possession, where the adverse right was claimed by the use of land for keeping lumber used in the business of a shipbuilder, if that lumber was used for the purpose for which it was kept on the land.

2nd. That his honor erred when he said to the jury, that if at any time he, the defendant, moved all those rafts away, that broke his possession, and led to the conclusion that, however short the interval of time between the use of one raft and replacing it by another, a new start for the adverse possession commenced with each successive raft of timber.

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*3d. Because his honor erred when he said to the jury that, "If the poles were put there simply for the purpose of fastening the rafts there occasionally, that would not constitute notice that he claimed the land," when by this instruction the jury were led to accept this as the construction by the judge of the testimony, and such construction was not that which the testimony required.

The other exceptions raise no questions, but are rather in the nature of allegations as to what had been proved and what the defendant claimed.

It will be observed that the general proposition of law laid down by the Circuit Judge as to adverse possession, to wit, that it must be continuous, adverse, and of such character as to give notice to the true owner, is not contested in the appeal. We assume, then, that proposition to be the law of the case. The appellant, however, complains in his first ground above of the manner in which the judge illustrated his idea of "continuous" possession. When the charge is read as a whole, as it was delivered to the jury, it will be seen that the judge endeavored to draw a distinction between repeated trespasses and a constant holding after having once taken possession, with the view to im-

¹These were suits between other parties.—REPORTER.

press upon the minds of the jury the principle upon which the one would not give title and the other would. There was certainly no error in pointing out this difference, because, while it is admitted that continuous, adverse, and notorious possession for ten years will ordinarily give title, yet it is equally certain that no number of sporadic trespasses will have that effect.

The locus claimed by the defendant by his adverse possession was a peculiar one. It seems to have been covered mostly by water, and the surface was not used at any definite spot continuously to float timber for the use of the mill near by, and as the defendant presented no color of title, his claim was necessarily confined to his *pedis possessio*. Where that was, it was no doubt difficult to tell; hence the pertinency of the judge's charge where he said to the jury, "But if you believe that he (defendant) has had ten years' continuous adverse possession of that land, you will give a verdict for so much of the land as he had possession of, if you can find that out." It being the purpose of the judge to point out the difference between re-

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peated acts of trespass and actual continued possession, and how possession might be broken, we do not think that the language used by him, and objected to, was calculated to mislead the jury, as stated in the exception; especially as he submitted it to the jury to determine whether the possession was continuous or in the nature of repeated trespasses.

What is said above applies also to the second exception. The judge said: "If at any time the premises were cleared, that broke the possession." That is, if there was no other indication of ownership or possession except the presence of floating rafts, when all these were cleared away, all evidence was gone, and the possession broken. But the judge went on to say, with the view to point out clearly the difference between repeated acts of trespass and a constant holding for use, that after the lot was thus cleared, the defendant putting rafts back there six months after, or a year after, was not a continuance of the first trespass; and upon the whole he left it to the jury to say whether the possession of the defendant was a holding for constant use by him, or whether the lot was used just as occasion and his necessities required, each use thereof being a separate trespass.

The third exception objects to what the judge said in reference to the poles, on the ground that the jury might have been led thereby to the conclusion that the poles were put there simply for the purpose of fastening the rafts, and if so, that would not constitute notice. We do not see that this followed, or was probable from the judge's remark. He said: "If the poles were put there simply

to fasten the rafts, that would not constitute notice that he claimed the land;" but whether they were put there for that purpose or not, the judge did not intimate. He left that to the jury.

No error has been pointed out to us in the argument growing out of what the judge said in reference to the Cleland grant (6th exception). The other exceptions contain allegations of facts claimed to have been proved on the trial. This being a jury case, the facts were for them.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. *260

*CAROLINA, CUMBERLAND GAP & CHICAGO RAILWAY COMPANY v. TRIBBLE.

(April Term, 1886.)

[1. *Taxation* ⚭535.]

A tax voted by the people of a township to aid in the construction of a railroad, is not a State, county, or municipal tax; and therefore a manufacturing company paying such tax is not entitled to have it refunded under the act of 1873, directing manufacturing companies to be repaid the amount of their State, county, and municipal taxes.

[Ed. Note.—Cited in *Floyd v. Perrin*, 30 S. C. 20, 8 S. E. 14, 2 L. R. A. 242.]

For other cases, see *Taxation*, Cent. Dig. § 993; Dec. Dig. ⚭535.]

[2. *Taxation* ⚭535.]

If the manufacturing company were entitled to such repayment, it could not be made out of the money raised to pay the railroad subscription, for by the terms of the act authorizing this subscription, the moneys so raised were to be paid over to the railroad company.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 991-995, 1012, 1015; Dec. Dig. ⚭535.]

[3. *Taxation* ⚭535.]

And the county treasurer was not protected in such repayment by an order of the comptroller general fixing and determining the amount to be repaid to the manufacturing company on account of this township tax, and directing the county treasurer to refund that amount.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 991; Dec. Dig. ⚭535.]

[This case is also cited in *Congaree Construction Co. v. Columbia Tp.*, 49 S. C. 539, 27 S. E. 570, and distinguished therefrom.]

Before Pressley, J., Anderson, April, 1885.

The opinion sufficiently states the case. The Circuit judgment was as follows:

Under act of 1882 Williamston township voted a subscription of \$6,000 to the stock of said company. It was levied by tax, in two installments, on the property in said township, including that of the Pelzer Manufacturing Company. It claimed a return of a portion of its tax, under the manufacturers' act of 1873, and on its petition to the comptroller general, to whom by said act jurisdiction was given to "fix and determine" said

matter, he fixed that \$1,105 46-100 of said tax should be returned to said company, and by his order said amount was so paid by defendant. Plaintiff now sues him on his bond as treasurer of Anderson County, claiming that said amount was duly levied and collected for plaintiff's use under act of 1882, which plainly requires said treasurer to pay the sum so collected to the plaintiff or his treasurer. As defendant was not liable to pay said amount more than once, plaintiff contends that the payment to the Pelzer Company was unlawful.

One ground is, that it was a mere assessment for local purposes, and therefore was

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not a "county or municipal" tax contemplated by the act of 1873. That position seems to me untenable. The act under which it was levied calls it a tax; the proceeds are not required to be used for any improvements within the township, made a corporation by said act; the levy was by the county commissioners, and the collection was by the county treasurer, "in the same manner as the other State and county taxes." It was, therefore, either a county tax, or a municipal tax by the township in its special corporate capacity.

Plaintiff further urges that, as the act which authorizes this tax directs the proceeds to be paid to plaintiff, that is, pro tanto, a repeal of so much of the act of 1873 as required that it be refunded to the Pelzer Company. This position is untenable, because the act of 1873 is a contract, and the legislature cannot repeal it so as to affect rights already vested at the time of the repeal. I must, therefore, construe both acts together, so as to give full effect to all provisions of each act, and under that rule it seems plain to me that the act of 1882 required the commissioners to levy an amount sufficient to pay said subscription, and also to return to the Pelzer Company the amount it was entitled to under the act of 1873.

Plaintiff further urges that the Pelzer Company was not entitled to said return of any portion of its taxes, because it fails to distinguish in its tax returns between that portion of its property so exempt from taxation and that portion which was not exempt. This ground is untenable, because the comptroller general, whose duty it was to "fix" and "determine" that matter, has done so upon a showing satisfactory to himself.

Further, it is contended that under art. 9, sec. 4, of our Constitution, this money could not be lawfully paid to the Pelzer Company without special appropriation to that purpose by act of the legislature. My judgment on this point is, that the act of 1873 as clearly appropriates this money to the Pelzer Company as can be claimed for the plaintiff under the act of 1882. In each case the appropriation is under the general act, and

if the one be good, the other cannot be bad. Plaintiff, therefore, could not recover in this case, if his constitutional objection be tenable. There is no appropriation in its favor which differs in any respect from that to the Pelzer Company.

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*Finally, it is objected that the act of 1873 is unconstitutional and void. I would not so decide were that question rightly before me in this case. It has been decided that a county or township tax to pay subscriptions to the stock of a railroad company is constitutional, and if public money raised by taxation can rightly be appropriated for that purpose, I cannot perceive why it should not follow that it may also be appropriated to draining low-lands, digging the Columbia canal, encouraging manufacturers, or to any other internal improvements which the legislature may deem wise and proper. But this question is not involved in this case. This is a suit on defendant's bond to the State, and he is not in default when he obeys—as he did in this case—the plain letter of the law. If a mere ministerial officer in such case were to assume to judge of the constitutionality of the law under which he acts, we would soon have anarchy in all the State offices.

The complaint is therefore dismissed.

Messrs. Child & Boggs and G. E. Prince, for appellants.

Messrs. Wells & Orr, contra.

July 14, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. Under an act of the general assembly of this State, passed in 1882, Williamston township, in Anderson County, voted a subscription of \$6,000 to the capital stock of the Carolina, Cumberland Gap & Chicago Railway Company, the plaintiff. This subscription was to be paid in two equal annual instalments. The first instalment seems to have been collected and paid in full to the plaintiff. When the second instalment was collected, and before paid over to the plaintiff, the Pelzer Manufacturing Company, a company located and doing business within the Williamston township, claimed the benefit of the act of 1873, to encourage and aid manufacturers, re-enacted as subdivision 23 of section 169, General Statutes. The comptroller general referred the question to the attorney general, who advised that the Pelzer Company was entitled to the benefit of the act of 1873. He then instructed the treasurer that the tax should be paid, with a pe-

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tion from the company to have it *refunded. This course appears to have been followed and the county treasurer paid the amount, fixed and determined by the comptroller as proper, to wit, \$1,105.46, back to the company.

Shortly thereafter, the railway company commenced the action below against M. P. Tribble, county treasurer, and the other defendants, his bondsmen, for the recovery of this sum with interest. The case was heard by his honor, Judge Pressley, without a jury, who dismissed the complaint. The appeal of the plaintiff is founded upon numerous exceptions. From the view which we have taken of the case, however, it will not be necessary to consider these exceptions seriatim. In our opinion, the main questions in the case, those upon which it must turn, are: 1st. Does the act of 1873 apply to a tax like the one raised upon the township voting this subscription? 2nd. If so, was the county treasurer authorized to refund the amount paid in by the Pelzer Company, back to said company, out of the subscription money voted by the township, and collected by him, thereby diminishing the subscription to that extent? If either of these propositions is negative, then it was error in the Circuit Judge to dismiss the complaint, and a new trial must follow.

The act of 1873, upon this subject, provides, that any person engaged in manufacturing shall, for a period of ten years from the date of his investment, be entitled to receive from the treasury of the State a sum equal to the aggregate amount of State, and, from the county treasurer the aggregate amount of county, taxes and from all municipal corporations, a sum equal to the aggregate amount of municipal taxes, which shall be levied and collected upon the property or capital employed, or invested directly in such manufactures or enterprises, not including herein the tax levied upon the land upon which the factories may be erected. Gen. Stat., § 169. And in the charter of the Pelzer Company, it is provided, that said company is entitled "to the benefits enumerated and contained in the act entitled, 'an act to aid and encourage manufacture,' approved December 20, 1873, for a term of ten years from the date of its organization."

It is clear that the act of 1873, and the provision in the Pelzer Company's charter, supra, entitles that company to receive from the treasury of the State, or from the coun-

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ty treasurer, or *from municipal treasurers, as the case may be, an amount equal to any tax which may be levied and collected upon its property for State, county, or municipal purposes. This the act in express terms provides for, and so plainly that there is no room for question or doubt. And if it be that the tax collected by the defendant, county treasurer, is either a State, county, or municipal tax, then the first question is solved. But is it either in the sense of those terms as used in the act of 1873? There is no doubt on the question of its being a tax. Chamblée v. Tribble,

Treasurer, 23 S. C., 70. It is equally certain that it is not a State or municipal tax. Is it a county tax in the sense of the act? The term county has a well defined meaning. By act the State has been divided into a certain number of territorial boundaries called counties. Each county is a body politic and corporate for certain purposes, among which are to purchase and hold for the use of the county lands and personalty within the limits thereof, to make all contracts, and to do all acts in relation to the property and concerns of the county necessary thereto. County commissioners are provided for, who are the officials of the county, and represent it. These officials regulate the county finances, and ascertain and report the amount of county taxes necessary to be raised for county purposes, upon which report the collection is authorized by act of the legislature.

Now, Williamston township, which voted the subscription upon which the tax herein was collected, is located in Anderson County, but does that fact make the tax in any sense a county tax? This tax was laid on Williamston township, not upon the report of the county commissioners, not by act of the general assembly, not for county purposes, but by a vote of the people of that township under the authority of an act of 1882, passed, we must suppose, at the instance of said people, and for the purpose of enabling them to assist a private enterprise, true a great enterprise, and one which, if it could be completed, would, no doubt, be of great public benefit, but still an enterprise in which neither the State nor the county had any official connection, or interest, and therefore a private enterprise. Now, how can a tax thus assumed by this township upon the voluntary vote of the taxpayers themselves under an act passed at

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their instance *and assumed for the purpose of assisting the plaintiff in an enterprise which it was supposed, no doubt, would be of a great benefit to said township, be regarded as a county tax in the sense of those terms as used in the act of 1873? The act of 1873 was intended to exempt manufactures from the ordinary State, county, and municipal taxes. The terms employed do not carry the act beyond such taxes, and we have no authority or power to extend these terms beyond their ordinary and common meaning. When the act of 1882 was enacted authorizing the township in question to vote a subscription to this road, then was the time to have provided for refunding so much of the tax voted as might fall on this manufacturing company, if it was to be exempt. This, however, was not done, and we do not think that now the act of 1873 can be invoked to that end. Such a tax, we are satisfied, was not in the contemplation of the legislature at the time the

act of 1873 was passed. It is not within the meaning of the terms of the act, and it would be ultra vires for this court to interpolate the act and embrace this tax.

But if we are mistaken in the conclusion above, yet we think that the appeal must be sustained upon the second question. Was the county treasurer authorized to draw from the sum collected on the township subscription the amount of the Pelzer Company's tax for the purpose of refunding the same to said company, even supposing that said company was entitled to a rebate under the act of 1873? Was this rebate a charge upon the subscription, and to that extent diminishing it? The act of 1882 provides in its 6th section that the townships of Belton and Williamston, in Anderson County, may, by vote of a majority of the voters therein, authorize the county commissioners to subscribe such sum, not to exceed \$6,000, to the capital stock of plaintiff company. And after such vote, if in favor of the subscription, the said county commissioners were required to make the subscription in behalf of the township so voting. § 9. And in section 11 it is provided that all moneys collected on account of any subscription made under this act shall, as soon after collected as practicable, be turned over by the county treasurer aforesaid to the treasurer of said company, or their legally authorized agent.

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*Now, it appears that a vote was had in Williamston township under this act, the result of which authorized the county commissioners to subscribe on behalf of this township the sum of \$6,000. This subscription was made, and no doubt stock to that extent issued "in behalf of the township." The tax for the amount of the subscription was levied and collected as provided in the act. When thus collected, we cannot see why it did not become immediately subject to the operation of the 11th section, *supra*, which imperatively declares that all moneys collected on account of any subscription made under the act shall, as soon as practicable, be turned over by the county treasurer to the treasurer of said company. Any other construction would defeat, or might defeat, and entirely abrogate the act. Suppose the tax of the Pelzer Company had been much greater than it was, amounting to one-half, two-thirds, or, to take an extreme case, the whole of the subscription, how could the subscription ever have been met, if the treasurer was bound, as soon as it was collected, to return it to the taxpayer, as contended for by the respondent. A construction which works such a result cannot be the correct one.

We think the vote of the township authorizing the subscription of \$6,000 to the capital stock of the plaintiff company was in the nature of a contract on the part of the town-

ship, and that sum must be paid to said company, and the money raised under the act to meet this subscription by virtue of section 11 of the act virtually belonged to the plaintiff, and should have been turned over to the treasurer of the company "as soon as practicable" after collection. This conclusion does not necessarily repeal the act of 1873, admitting that it covers a tax of the kind under consideration. Because, if under the act of 1873 the Pelzer Company is entitled to the rebate, even against a subscription as here, there is nothing in that act which requires that this rebate shall be had out of the subscription money, thereby diminishing the subscription, while in the act of 1882 there is an imperative injunction that all moneys collected under the subscription shall be at once turned over to the treasurer of the railroad company.

Can the action of the comptroller in this

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matter shield the *treasurer? Under the act of 1873 the comptroller is authorized and empowered to "fix and determine" the sum of money to be repaid to manufacturers, the State tax to be paid by the State treasurer on his warrant, and the county tax by the county treasurer on his order; but he is nowhere empowered to direct the particular fund out of which this repayment shall be made, nor do we understand that the comptroller gave any order to that effect. He fixed and determined the amount, which he had the right to do, and, supposing that the act of 1873 applied, he gave the order that the amount thus fixed and determined should be refunded. This he had also the right to do under the supposition that the act of 1873 was applicable, but he had no authority (nor do we see that he has attempted to do so) to direct that this repayment should be made out of a fund collected and, in substance, already appropriated to a different and a special purpose, and over which other parties had a special claim.

Having reached the conclusion above upon the two questions suggested in the beginning, it is unnecessary to discuss the other questions raised in the exceptions.

It is the judgment of this court, that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

25 S. C. 267

HUFEMAN v. STORK.

(April Term, 1886.)

[1. *Appeal and Error* ⇨78.]

An order confirming the clerk's taxation of costs is not the final judgment in the cause, in the sense that on an appeal therefrom the prior judgment dismissing the complaint, and other previous orders may be excepted to and reviewed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 480; Dec. Dig. ⇨78.]

[2. *Costs* ⇨158.]

Consent by defendants to an order of reference "to take the testimony and report the same to the court," was not an election as to the manner of trial or the waiver of any defects or irregularities; and defendants having obtained judgment, their attorneys were entitled to the costs of all references held under such order, notwithstanding they disregarded at the final hearing the testimony so taken.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 579; Dec. Dig. ⇨158.]

[3. *Costs* ⇨158.]

The complaint having been dismissed with costs and no appeal taken, the plaintiffs were liable for all the costs of the references in the

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action, *even though the judge reached his conclusion without considering the testimony taken at such references.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 579; Dec. Dig. ⇨158.]

[4. *Clerks of Courts* ⇨11.]

Attorneys attending before the clerk at the taxation of costs are not entitled to the costs of a reference; nor is the clerk entitled to costs for making report of his taxation.

[Ed. Note.—For other cases, see *Clerks of Courts*, Cent. Dig. § 33; Dec. Dig. ⇨11.]

Before Witherspoon, J., Richland, April, 1885.

The opinion sufficiently states the case.

Mr. R. A. Lynch, for appellant.

Messrs. W. H. Lyles and L. F. Youmans, contra.

July 16, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Maurice Goldsmith and Peter Kind, composing the firm of "Goldsmith & Kind," conducting the Phoenix Iron Works, of Columbia, became embarrassed in their affairs and on March 1, 1878, made an assignment (with schedule of property attached) to A. Stork, in trust to sell the property and apply the proceeds to their debts. Among the creditors of Goldsmith & Kind was one J. N. Huffman, who refused to accept under the assignment, and sued them to judgment, April 26, 1880. Execution issued on the judgment was returned by the sheriff "nulla bona." J. N. Huffman, the judgment creditor, died, and the plaintiffs, his administrators, instituted these proceedings, alleging that the assignment was fraudulent and void, and the assignee, Stork, was conspiring with G. Dierck and one Kleinbeck, another judgment creditor, to defraud the other creditors, and praying that the assignment should be set aside, for injunction, the appointment of a receiver, &c. The debtors, Goldsmith & Kind, were not made parties by process. Kleinbeck answered by his attorneys, Bachman & Youmans. Dierck answered by his attorneys, Monteith & Ladson. And Stork answered by his attorneys, John T. Sloan, jr., and Wm. H. Lyles. The latter, after a general denial of most of the allegations in the complaint,

pleaded that he had already instituted proceedings in the court, entitled Abram Stork, assignee, v. Jesse E. Dent, sheriff, et al., in

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the nature of a creditor's bill, to settle *the assigned estate, which had all been turned over to be administered by the court, under a call for creditors to present and prove their demands.

On motion of Messrs. Lynch & Bauskett, counsel for the plaintiffs, it was "referred to J. T. Seibels, Esq., master for Richland County, to take the testimony offered by the various parties, and to report the same to this court." Accordingly the master held a reference to take testimony on January 8, 1884, and pursuant to adjournment another on January 11, and another on January 15, on January 28, and on February 6, 7, 11, 12, 14, 15, 20, 26, 27, and on March 4, 7, 14, 18, 25, and on April 8, on which day there was an adjournment to April 25; but before that day arrived, viz., on April 24, Judge Fraser ordered, "That unless Goldsmith and Kind were made parties by the 20th day of May next, either of the other defendants shall have the right to move to have the complaint dismissed. Proceedings under order of November 19 [to take testimony], above referred to, will be suspended until further order of the court. All questions as to costs are reserved for the further order of the court." Maurice Goldsmith and Peter Kind, who had previously required that they should be served with process, were formally made parties, and Goldsmith answered by his attorney, Newman K. Perry, and Kind answered by his attorneys, John T. Sloan, jr., and Lyles & Haynsworth.

At the November term of the court for Lexington, the plaintiffs made a motion before Judge Wallace that, as the order of Judge Fraser had been complied with as to making parties, the references might be continued, but this order was refused; and at the same term of the court for Richland County, December 2, 1884, Judge Wallace "dismissed the complaint with costs."

Soon after, the defendants made application to the clerk to tax the costs, which, after due notice, was done. (See the taxation fully stated in the "Brief.") The clerk reports with the taxation as follows: "No objection was made to the attorneys' costs. No objection was made to the clerk's costs. Mr. Lynch admits so much of the sheriff's costs as calls for the fees for the service of summons and complaint. As to the remainder, he claims that the defendants should pay, because the parties, having elected to try

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the cause before the mas*ter, and they having withdrawn it from the master before the plaintiff had closed his testimony, and elected to try the cause before the court, they should pay all the costs which had ac-

crued before the master. Unless otherwise directed by the court, the prevailing party is always entitled to have all the costs taxed in his favor. I therefore overrule these objections. Mr. Lynch objects to the master's costs, because only parts of several days were spent in the different references. Where the master spends any part of a day, however small, in the business of a reference, I hold that the master is entitled to his fees as for a whole day," &c. (Exception taken.)

From the taxation of the clerk the plaintiffs appealed to the Circuit Court; and after argument there, Judge Witherspoon refused to correct the taxation. The plaintiffs appealed from this order, and in doing so, embraced also appeals from the order of Judge Fraser, April 24, 1884, and that of Judge Wallace, December 2, 1884—claiming that the order of Judge Witherspoon, refusing to overrule the taxation of costs by the clerk, was the final decree in the case, and that the other former decrees referred to were intermediate only, and might be reviewed, in considering the appeal upon the subject of costs. This court did not take that view, and upon motion to dismiss the appeal did dismiss it as to the orders of Judge Fraser and of Judge Wallace, as not taken in time; leaving only for our consideration so much of the appeal as relates to the taxation of the costs. The exceptions upon that subject are as follows:

I. Because the defendants, Stork, Dierck, and Kleinbeck, by consenting in writing to the reference ordered November 19, 1883, determined the mode of trial in the cause; and having appeared and taken part in the trial, thereby waived any and all irregularities; and having chosen to determine the reference by the order of April 24, 1884, the plaintiffs cannot be taxed with the costs which had accrued up to that time.

II. Because Goldsmith & Kind, having entered a voluntary appearance by their attorney, and served their answer upon the plaintiffs, all the parties were properly before the court when the order of Judge Fraser was passed, and the plaintiffs cannot be called upon to pay costs of references

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which were disregarded by the defendants, and were not used in determining the issues between the parties, as the trial was de novo before his honor, Judge Wallace, at the November term of the court on other evidence.

III. Because the said taxation is inequitable and works a hardship on the plaintiffs.

It seems to us that the first exception is founded upon a misapprehension as to a matter of fact. The consent of the defendants to the order of reference made by Judge Aldrich, November 19, 1883, did not in any way make an election or "determine the mode of trial." The order was made on the motion of plaintiffs' counsel, and the defendants sim-

ply consented to it. Besides "the trial of the case" was not thereby referred to the master as referee. The order did not even authorize him "to decide the issues of law and of fact," but merely to take "the testimony and report the same to the court," which, of course, was still to try the case. That in no way changed the rule, that the successful party has the right to tax his costs against the unsuccessful party. Consent as to the manner of taking the testimony was no admission as to the right of the plaintiffs to recover, or an election as to the manner of trial, or a waiver of any defects or irregularities.

As to the second exception. We cannot understand the view, that the plaintiffs had the right to escape the ordinary consequences of failing in their action, merely for the reason that the judge did not think it necessary to have before him all the mass of testimony taken on nineteen separate days, under the order directing the master to take the testimony. Upon the testimony before the judge, he dismissed the complaint "with costs"; and if that was error—if he rendered his decree upon insufficient testimony or a mistaken view of what was necessary to sustain the action—we know of no way in which that error could be corrected, except upon appeal from that judgment. The loss of the case, no matter upon what ground or upon what evidence, entailed upon the plaintiffs the penalty of having all the proper and legitimate costs of the defendants taxed against them, unless otherwise ordered by the court; and the only order made upon the subject was that of Judge Wallace, dismissing the complaint "with costs."

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*The third exception is very vague and general, that "the said taxation is inequitable and works a hardship on the plaintiffs." But, inasmuch as no compensation is allowed for services in conducting or defending a suit in court, independently of that which is provided by statute, and the party laying claim to costs must lay his finger on some statutory provision expressly, or by necessary implication, allowing them, we have looked carefully through this bill of costs. We confess, we do not see clear warrant of law for the three last supplementary items in the taxation, amounting to the small sum of \$13. Ten dollars of it were taxed for solicitors attending "reference before the clerk," as we suppose, on the "taxation of the costs." The law giving a defendant's solicitor compensation for attending a reference is in these words: "Each day's attendance on reference before clerk, master, or referee, five dollars."

Was the taxation of costs by the clerk a "reference" in the sense of the act? We hardly think so. The taxation in this case was not expressly referred to the clerk by the court, but was simply one of the duties

incident to the office of clerk. See *Guignard v. Harley*, 11 Rich. Eq., 1, in which the court says: "There may be, and is, much difficulty in defining the meaning of this term (reference). But in theory of law, it always implies that the matter referred has been before the court, and comes from the court to its commissioner; and this is the true idea, even in cases where the legislature has authorized the commissioner to grant orders of reference. He grants them in place of the court. * * * Another charge of solicitors objected to, is attendance upon 'a reference to tax costs.' This relates to the taxation of costs by the commissioner of Barnwell. The parties by solicitor laid before him their bill of costs, and supported them against objection. But this was no reference, and the solicitors are not entitled to the charge." &c.

The same view applies to the three dollars allowed the clerk for "report on costs." We do not understand that such report was necessary, or can be properly said to be "making up and returning report on reference, three dollars," as stated in the fee bill. See sections 2428 and 2431, of General Statutes, and section 326 of the Code.

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*The judgment of this court is, that the judgment of the Circuit Court, with the modification herein indicated, be affirmed.

25 S. C. 273

GREEN v. SPANN.

(April Term, 1886.)

[1. *Homestead* ⇨107.]

The Circuit Judge may endorse upon a judgment that it was given for the purchase money of specified property, even though no such allegation be contained in the complaint.

[Ed. Note.—Cited in *Burnside v. Watkins*, 32 S. C. 248, 10 S. E. 960; *Odom v. Burch*, 52 S. C. 308, 29 S. E. 726.

For other cases, see *Homestead*, Cent. Dig. § 172; Dec. Dig. ⇨107.]

[2. *Exemptions* ⇨78.]

And such endorsement may be made, under section 2001 of the General Statutes, at a term subsequent to that at which the judgment was rendered, upon the fact being made to appear.

[Ed. Note.—Cited in *Willingham v. Willingham*, 55 S. C. 445, 33 S. E. 500; *Holladay v. Hodge*, 84 S. C. 114, 65 S. E. 1019.

For other cases, see *Exemptions*, Cent. Dig. § 104; Dec. Dig. ⇨78.]

Before Wallace, J., Richland, December, 1884.

This was an appeal from an order rendered in open court. The opinion states the case.

Mr. Preston L. Melton, for appellant.

Mr. D. Augustus Straker, contra.

July 16, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff sued the defendant on a promissory note for \$155, and the defendant allowed judgment for the whole sum to be taken against him by default. Execution was issued thereon and the sheriff attempted to levy the same upon a mule of the defendant, when he claimed said mule as exempt under the homestead law. Thereupon the sheriff desisted and the plaintiff, by affidavits showing that \$82.29 of said judgment was due him as part of the purchase money of a mule in the possession of the defendant, made two motions as follows: First, That the complaint in the action be amended by inserting an allegation that the sum of \$82.29, evidenced by the aforesaid promissory note, was balance due on purchase of a mule now in the possession of the defendant; and, second, that the following endorsement be made on the judgment recovered against the said defendant, "Eighty-two dollars and

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twenty-nine *cents of this judgment is balance due on the purchase money of a mule bought of plaintiff by defendant."

After hearing all the affidavits, Judge Wallace granted both motions, giving leave to amend the complaint by inserting the proposed allegation, and making the proposed endorsement as to \$82.29, on the judgment; and the defendant appeals to this court upon the grounds: First, that the judge erred in permitting the plaintiff after judgment, to amend his complaint as stated; and, second, in directing the endorsement to be made on the judgment, "that the sum of \$82.29 was balance due on the purchase of one mule in possession of the defendant."

From the view which the court takes, it will not be necessary to consider the first ground of appeal, as to the right of the plaintiff, after judgment, to amend his complaint in the particular indicated. That amendment could only have been asked for, in the view that it was necessary to sustain the proposed endorsement on the judgment, that \$82.29 of the judgment was in part the consideration of the mule. But in order to sustain such a collateral endorsement, we do not think that it was necessary that the complaint should contain such an allegation; and therefore we will not go into the subject as to what amendments are or are not allowed in the interest of justice after judgment has been rendered.

As to the second exception. The Circuit Judge found as matter of fact (and we agree with him), that eighty-two dollars and twenty-nine cents (\$82.29) of the judgment was purchase money of the mule, and ordered an endorsement to that effect to be certified on the judgment. Assuming the fact to be as found, we cannot say that this was error. Section 2001 of the General Statutes declares, "that the exemption contained in the preceding section of this chapter shall not extend

to an attachment, levy, or sale on any mesne or final process to secure or enforce the payment either of taxes or of obligations contracted for the purchase of said homestead, &c.; provided, the court or authority issuing said process shall certify thereon that the same is issued for some one or more, and no other of said purposes," &c. If the fact as to the consideration of the note (to the extent of \$82.29) had appeared at the time of the trial, we suppose there could hardly

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*be a doubt as to the right of the court to make a statement of the fact upon the judgment. There is no limit as to time in the act, and we do not see why it could not be as well made afterwards, when the fact appeared.

The judgment of this court is, that so much of the order below as authorized a certificate to be entered on the judgment, "that \$82.29 of this judgment is balance due on the purchase money of a mule purchased by the defendant from the plaintiff," be affirmed.

25 S. C. 275

TEDERALL v. BOUKNIGHT.

(April Term, 1886.)

[1. *Judicial Sales* ⇨53.]

It is the policy of the law to maintain judicial sales, and therefore a purchaser is not affected by irregularities in the proceedings or error in the judgment; but he is bound, at his peril, to see that the court had jurisdiction of the subject matter, and that the proper parties were before the court.

[Ed. Note.—Cited in *Johnson v. Cobb*, 29 S. C. 378, 7 S. E. 601; *Iseman v. McMillan*, 36 S. C. 36, 15 S. E. 336.

For other cases, see *Judicial Sales*, Cent. Dig. § 105; Dec. Dig. ⇨53.]

[2. *Partition* ⇨40.]

A partition ordered by the Probate Court prior to the decision of *Davenport v. Caldwell* (10 S. C. 317) will not be declared void for want of jurisdiction in the Probate Court over the subject matter.

[Ed. Note.—Cited in *Parr v. Lindler*, 40 S. C. 199, 18 S. E. 636; *Hartley v. Glover*, 56 S. C. 74, 33 S. E. 796.

For other cases, see *Partition*, Cent. Dig. § 97; Dec. Dig. ⇨10.]

[3. *Evidence* ⇨386.]

A judgment of the Probate Court, regular on its face and showing proper service on the parties to it, cannot be contradicted by parol testimony in a collateral proceeding; or from the judgment itself, it may be, that the court would assume that the summons had been properly issued and served.

[Ed. Note.—Cited in *Gardner v. Cheatham*, 37 S. C. 78, 16 S. E. 368; *Ruff v. Elkin*, 40 S. C. 78, 18 S. E. 220; *Connor v. McCoy*, 83 S. C. 170, 65 S. E. 257.

For other cases, see *Evidence*, Cent. Dig. §§ 1678-1697; Dec. Dig. ⇨386.]

[4. *Infants* ⇨78.]

But where the record itself showed that no summons had been issued, and that no application for appointment of guardian ad litem had been served, the record affirmatively shows that

an infant defendant under fourteen years of age was not a party to the cause, and not bound by the judgment therein.

[Ed. Note.—Cited in *Carrigan v. Drake*, 36 S. C. 364, 15 S. E. 339; *Robertson v. Blair & Co.*, 56 S. C. 106, 107, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see *Infants*, Cent. Dig. § 203; Dec. Dig. ⇨78.]

[5. *Infants* ⇨80.]

An infant defendant not personally served as required by statute, is not bound by the answer filed by her guardian ad litem.

[Ed. Note.—Cited in *Robertson v. Blair & Co.*, 56 S. C. 106, 107, 34 S. E. 11, 76 Am. St. Rep. 543.

For other cases, see *Infants*, Cent. Dig. § 214; Dec. Dig. ⇨80.]

Before Witherspoon, J., Edgefield, March, 1885.

The facts of this case are stated in the opinion of the court. The Circuit decree was as follows:

There can be no doubt that when infants are properly made parties, they are bound by the judgment or decree in such cause, and cannot impeach it collaterally. They are,

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however, not *bound by proceedings in which they have not been properly made parties. Was plaintiff properly made a party to the proceedings before the Probate Court for partition? In the case of *Finley v. Robertson* (17 S. C., 435) the court say: "A due and tender regard for the rights and welfare of infants requires that the statute shall be strictly followed." What are the formalities then required by statute for making an infant a party to an action? All civil actions in courts of record shall be commenced by service of a summons. Code, § 148. If the action be against a minor under the age of fourteen, a copy of the summons shall be served by delivery to such minor personally, and also to his father, mother, or guardian. Code, § 155, subd. 2.

It is not contended that plaintiff was ever served, or any copy of summons or notice was delivered to her personally in the proceedings for partition. The plaintiff, on the other hand, swears that no papers in the partition case were served upon her; that she had no knowledge of the proceedings in the Probate Court; that she had no notice of the appointment of Wm. Brooks as her guardian ad litem; that Wm. Brooks is dead; that she never received from him, nor from any one else, any of the proceeds of the sale of the land by the Probate Court.

The defendants rely upon the cases of *Bulow v. Witte*, 3 S. C., 309; *Walker v. Veno*, 6 Id., 459; and *McCrosky v. Parks*, 13 Id., 91, to show that plaintiff is bound by the proceedings in the Probate Court. It will be observed that the proceedings in these cases were had under the old equity system of procedure, in which there was no mode prescribed by statute for making an infant a

party, except his appearance by a guardian ad litem. No notice of process was then required to be made upon the infant personally. In *Finley v. Robertson*, supra, the court held that an infant seventeen or eighteen years old was not bound by the judgment even when he had accepted service of the summons. I must conclude under the authority of this case that the judgment of the Probate Court in 1874, decreeing a sale of the land described in the complaint, is not binding upon plaintiff, and does not conclude her rights in the premises, as plaintiff was not properly made a party to such proceedings as required by statute.

In this view of the case, plaintiff would not

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only be entitled *to her share of the land as herein adjudged, but also the same proportion of the rents and profits of the land since January, 1875, after deducting taxes paid thereon by defendants. There is no testimony as to the amount of taxes paid on the land, and the testimony with reference to rents and profits is not sufficiently definite to enable the court to determine the rents and profits plaintiff should be entitled to. It must be referred back to the master to take further testimony and report as to the amount of rents and profits due by defendants to plaintiff, after deducting taxes paid.

Having concluded that plaintiff was born in July, 1861, she attained her majority in July, 1882. I do not, however, think that defendants should be held liable to account to plaintiff for rent from the date of her majority in July, 1882, to November 14, 1883, when this action was brought, as defendants are bona fide purchasers, and had reason to believe that they had a good title.

I conclude as matter of fact: (1) That plaintiff was born in July, 1861, and was under fourteen years of age in October, 1874. (2) That no summons or notice of the proceedings for partition in the Probate Court was served upon plaintiff, or that she then had any knowledge of such proceedings, or of the appointment of Wm. Brooks as her guardian ad litem. (3) That plaintiff has never received any of the proceeds of the sale of the land by order of the Probate Court.

I find as matter of law: 1. That plaintiff, as the sole heir at law of her father, W. Mastin Stewart, is entitled to eleven-fortieths, undivided share or interest in the tract of land described in the complaint, and the same proportion of the rents and profits from said land, after paying taxes from July 1, 1875, with the exception of the period from July, 1882, to November 14, 1883, and that defendants are entitled to the remaining undivided share or interest in said land.

It is ordered and adjudged, that a writ in partition do issue according to the usual practice in this court, to divide the land described in the complaint, so as to allot to

plaintiff eleven-fortieths undivided part of said tract, and to the defendants the remainder thereof; provided such division can be made without injury to the rights of either of said parties, &c.

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*From this decree defendants appealed upon the grounds stated in the opinion.

Messrs. Sheppard Bros., for appellants.
Mr. C. W. Creighton, contra.

July 16, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Many years ago (1826) William Stewart, of Edgefield County, died, leaving a will, by which he gave a tract of land in said county, containing 130 acres, more or less, to his brothers and sisters, among whom was his sister Desdemona (Desdemony), who was never married, but having an illegitimate son, William Mastin Stewart. She conveyed her interest in the said land to him, and in 1873 he died intestate, leaving as his sole heir at law one child, Mary Stewart, then under thirteen years of age. The said Mary afterwards intermarried with one Tederall, and finding that the aforesaid tract of land, in which she was informed she had an interest, was in the possession of strangers, viz., the defendants, Joseph H. Bouknight and John D. Eidson, she instituted these proceedings against them for partition of the land, and to recover her interest, whatever it might be.

The defendants, claiming the land as their own, made vigorous defence, and among other defences alleged as follows: "That in the year 1874 proceedings were filed in the Probate Court for Edgefield County by certain of the heirs (devisees) of William Stewart for the partition of the tract of land described in the complaint, and that the plaintiff herein was a party to said proceedings in the said Probate Court in the case of W. D. McCarty et al. v. Mary Stewart et al.; that under said proceedings an order for the sale of said land was made by the said Probate Court on October (November) 2, 1874; that under said order a sale was made of said land, and that at said sale it was purchased by the defendants, who paid into the Probate Court the full amount of the purchase money, and that they have been since that time the joint owners of said land; and that plaintiff is concluded and estopped from claiming any interest in the said land by said proceedings." &c.

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*It was referred to the master, S. S. Tompkins, Esq., to ascertain "the quantum of the interest claimed by the plaintiff, and to take the testimony, reserving for the court all the questions of law and fact." The master ascertained that the interest claimed by the plaintiff was thirty-three one-hundred-and-twentieths ($\frac{33}{120}$), or $\frac{11}{40}$.

He reported the record of the proceeding in probate, and the facts connected therewith, that the land was sold under it and purchased by the defendants for full value, which was paid to the probate judge, and he executed titles (December 7, 1884) to the purchasers, who have been in possession of the same ever since, claiming it as their own. Notwithstanding "the record," the plaintiff was allowed to swear that "no papers in the partition case were ever served on her; that she had no knowledge of the pendency of the action for partition, and never received from William Brooks, or any other person, any of the proceeds of the sale of said lands," &c.

The Circuit Judge held that the plaintiff, Mary, being at that time an infant, was not properly made a party in the probate proceedings for partition, and was not bound by the judgment in that case, or the sale under it, and decreed that she was entitled to recover eleven-fortieths (11-40) of the land, and rents and profits for certain years in the same proportion. From this decree the defendants appeal upon the following grounds: 1. Because his honor erred in deciding that the plaintiff, as the sole heir at law of her father (W. Mastin Stewart), is entitled to 11-40 undivided interest in the tract of land described in the complaint, and the same proportion of the rents and profits for certain years. 2. Because his honor erred in holding that the proceedings in the Probate Court in the case of McCarty et al. v. Mary Stewart et al. for partition of the land, which is the subject matter of this action, are not binding on the plaintiff, Mary Stewart, now Mary Tederall. 3. Because his honor erred in holding that the said proceedings in the Probate Court could be attacked collaterally by the plaintiff.

The Circuit Judge states that no objection below was made to "the quantum" of the plaintiff's interest as reported by the master, and as the point was not pressed in argument here, we suppose that the first exception is abandoned.

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*The second and third exceptions, charging error in the ruling that the sale under the judgment of the Probate Court was, as to the plaintiff, illegal and void, are pressed most earnestly. It is urged with force that the defendants, having purchased the land and paid for it at a judicial sale, cannot be affected by any secret vice in the judgment authorizing the sale of which they had no notice, but that all the parties to the probate proceeding are bound by it and estopped from assailing it. It is undoubtedly the policy of the law to maintain judicial sales, wherever it can be done without violating principle or doing injustice; and in this view it is held that a purchaser at such a sale is in no way responsible for mere irregularities

in the proceedings, or even error in the judgment, under which the sale is made.

There are, however, two matters as to which purchasers are required at their peril to make inquiry, viz., that the court ordering the sale had jurisdiction of the subject matter, and that all proper parties were before the court when the order was made. *Trapier v. Waldo*, and authorities, 16 S. C., 282. The partition proceedings in the Probate Court, under which the sale was made, were prior to November 27, 1878, when the judgment in the case of *Davenport v. Caldwell* [10 S. C. 317] was filed; and therefore it would seem that under the authority of *Herndon v. Moore* (18 S. C., 339), we must consider the case precisely as if the act of the legislature, which gave to the Probate Court the power to partition lands, was constitutional and valid. It follows that, so far as the rights of the parties before the court are concerned, it must be assumed that the Probate Court, which ordered the sale, had jurisdiction of the subject matter.

But it is alleged that the plaintiff, then a minor of tender years, was not properly a party before the court in the probate proceeding, and therefore the sale as to her was, and is, utterly void. It is familiar doctrine that a judgment binds only those who are parties and their privies; but a judgment is in its character final and conclusive, and how can the allegation that a particular person was not made a party be shown? The judgment presumes it until the contrary appears. It is held that a judgment, "regular on its face," must be taken to be an absolute verity, and is beyond the reach of contradiction or assault in a collateral man-

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*ner, as in this case. That is to say, as we understand it, such a judgment can only be assailed by a direct proceeding instituted for that purpose. Therefore, if the proceedings in the Probate Court were "regular on their face," it was error to admit parol testimony tending to contradict the record and to annul the sale as to the plaintiff. It is settled that a purchaser for value at a judicial sale, without notice of the extrinsic facts, which are relied on to impeach the judgment, cannot be affected thereby; that such a purchaser without notice, under proceedings regular upon their face, and had in a court of competent jurisdiction, is not affected by any mere error of the court for which judgment might be reversed on appeal, nor for any secret vice in the judgment not appearing on the face of the record, and which can be made to appear only by the production of extrinsic evidence. See *Turner v. Malone*, 24 S. C., 398, and *Quinn v. Wetherbee*, 41 Cal., 247.

The question, then, is whether the probate proceedings "were regular on their face," showing that Mary Stewart was properly made a party. This must be determined by

an inspection of the record itself, which was introduced by the defendants, and in such issues is always admissible, whether the proceeding is collateral or direct. At that time Mary Stewart was an infant, as the judge found, under fourteen years of age. In such case the law is very exacting, requiring that a copy of "the summons shall be delivered to the infant personally, and also to his father, mother, guardian, &c., or if there be none within the State, then to any person in whose service he may be employed," &c. Code, § 155, subd. 2. When an infant has been thus made a party, he can only appear by guardian ad litem, appointed, if the infant is under fourteen years, upon the application "of any other party to the action, or of a relative or friend of the infant, after notice of such application being first given to the general or testamentary guardian of such infant, if he has one; if he has none, then to the infant himself, if over fourteen years, * * * or if under that age, &c., to the person with whom such infant resides," &c. Code, § 137.

In view of these express requirements of the law, were the probate proceedings in partition "regular on their face," showing

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*that Mary Stewart was properly made a party? The record does show that Mary was named in the petition as one of only two defendants, the other being William Brooks, as administrator of the estate of her father (W. M. S.), but not her general guardian; that Brooks petitioned the probate judge to be appointed her guardian ad litem, stating therein that his said granddaughter "is desirous of having a guardian ad litem appointed to appear and answer in her behalf," that he was so appointed and answered, submitting her rights, and for himself, as administrator, consenting to the partition prayed for. The record, however, failed to show that the petition prayed for any process to bring the two defendants into court—that any "summons" was issued at all, or that notice was given of the appointment of guardian ad litem. If, however, this were all, and the record in all other respects was regular, it may be that the court would presume that a "summons" issued and was served, and that proper notice was given of the appointment of Brooks as guardian ad litem, upon the ground that the Probate Court having rendered judgment in the case, it will be assumed that, before doing so, it took care to require the performance of everything made necessary to have the parties named as defendants brought before the court.

But upon a careful examination of the whole record, it appears upon its face that the application of Brooks to be appointed guardian ad litem, his appointment as such,

his answer and consent to the partition, and the final order of the probate judge (no commission issued) directing sale of the land, were all filed on the same day, viz., November 2, 1874, and the land was actually sold on the succeeding salesday of December. Notwithstanding a strong disposition to support judicial sales, we cannot resist the conclusion that these facts appearing in the record itself fully rebut any presumptions arising from the existence of the judgment, and show affirmatively that the probate partition was a mere consent proceeding on the part of Brooks, the only adult defendant, who undertook to act for his little granddaughter, Mary, and that she had in fact no notice whatever, either of the proceeding, or that he had procured himself to be appointed her guardian ad litem. It may be that it was considered unnecessary to perform what

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seemed to be an unmeaning ceremony *in serving a copy of summons, and in giving notice to an infant incapable from her years of comprehending the transaction or its purpose and object. But the provisions of the law upon the subject are minute and positive. The court, always anxious to protect the rights of infants, must assume that there was some good reason for all the requirements, and enforce them. At all events, we have not, for the reason assigned, or any other, the dispensing power.

The cases in our own Reports principally relied on for the defendants were *Bulow v. Witte*, 3 S. C., 309; *Walker v. Veno*, 6 Id., 459; and *McCrosky v. Parks*, 13 Id., 92. It will be observed, however, that all these cases involved the question as to what was necessary to make infants parties under the old practice in chancery and the court of ordinary, which prevailed before the adoption of the code in 1870. But the case of *Finley v. Robertson*, 17 S. C., 435, and the late case of *Riker v. Vaughan*, 23 S. C., 187, were decided under the provisions of the code cited above.¹ In the latter case the court held that "jurisdiction of the person of an infant can only be obtained by pursuing the mode prescribed by statute." We agree with the Circuit Judge, that the proceedings in the Probate Court were not "regular on their face," but, on the contrary, show that Mary Stewart, named as an infant defendant, was never legally made a party, and that the judgment and order of sale in probate were, as to the said Mary, *coram non jure*, and void.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

¹ See, also, *Genobles v. West*, 23 S. C., 154, and *Whitesides v. Barber*, 24 Id., 373. This question must surely now be regarded as settled.—REPORTER.

25 S. C. 283

HARVEY v. HARVEY.

(April Term, 1886.)

[1. *Escheat* ⇨2.]

Section 11, of article X., of the Constitution, which gives "the proceeds of all estates of deceased persons who have died without leaving a will or heirs" to the State School Fund, applies as well to those dying after the adoption of the constitution as to those dying before:

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*and an act of the legislature vesting such an estate in an individual is repugnant to this constitutional provision.

[Ed. Note.—For other cases, see *Escheat*, Cent. Dig. § 2; Dec. Dig. ⇨2.]

[2. *Constitutional Law* ⇨93.]

Where a person claims under the statute and demands partition of such estate, the opposing party may resist plaintiff's claim by asserting this invalidity in his title.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 194; Dec. Dig. ⇨93.]

[3. *Judgment* ⇨233.]

After a complaint is dismissed, there cannot be a decree adjusting rights of co-defendants; but the Circuit Judge erred in dismissing this complaint without passing upon all the issues involved.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 412; Dec. Dig. ⇨233.]

Before Cothran, J., Spartanburg, June, 1885.

This was an appeal from a Circuit decree which dismissed a complaint for partition under the authority of *In re Malone's estate*, 21 S. C., 435. The opinion states the case.

[For subsequent opinion, see 26 S. C., 608, 2 S. E. 3.]

Messrs. Wofford & Jennings and Stanyarne Wilson, for plaintiff, his brothers and sisters.

Messrs. Duncan & Sanders, for Wm. Harvey.

Mr. J. S. R. Thomson, for Jonas Swink.

July 19, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The facts of this case, as found by the referee, are as follows: The defendant, Jonas Swink, in 1853, with a view to support his son, Jonas Harvey, an illegitimate son of Caroline Harvey, executed a paper under seal, in the presence of two witnesses, in which he stipulated that the rents and profits of a certain tract of land therein described, and which he stated therein that he had that day given to said Jonas Harvey, should go to the support of the said Jonas Harvey, provided that he should not conclude to sell said land, and apply the interest of the money to the same use; and in the event if he should not live to see the said Jonas Harvey arrive at age, then the paper should be authority to any one with whom it might be deposited, to apply the rents and profits to the use of the said Jonas Harvey until of age, and to call upon the executor or administrator of the

said Jonas Swink for a full deed of the land to the said Jonas Harvey, binding himself and his heirs to the performance of the con-

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ditions, provided, however, that he, *Jonas Swink, should have the power to sell the said land, putting the money at interest until Jonas Harvey should arrive of age, and "then give him the principal instead of the land." This paper was recorded, and Caroline Harvey and her child, Jonas Harvey, went into possession, and remained together in possession until Jonas Harvey, some twenty years afterwards, moved to the State of Arkansas, where he died in August, 1874, being then over the age of twenty-one. Caroline, the mother, remained in possession of the land until her death in December, 1882.

That in February, 1882, an act of the legislature was passed, vesting all the property, real and personal, of which Jonas Harvey, deceased, was seized, in the said Caroline Harvey, her heirs and assigns; that the plaintiff, Joseph C. Harvey, and the defendants, Jemima Harvey, John H. Harvey Franklin Harvey, and Canada McCray, are brothers and sisters of Caroline Harvey, and her only heirs at law; that in August, 1881, the defendant, Jonas Swink, commenced action against Caroline Harvey, A. H. Ward, and Jemima Harvey, for the recovery of this land; that this action abated by the death of Caroline Harvey, as to her, but a verdict was rendered thereafter as to A. H. Ward and Jemima Harvey in favor of Jonas Swink; that the defendants, Jane Ward, A. H. Ward, and William Harvey, never claimed the land except through and under Jonas Harvey and Caroline Harvey.

Under the above state of facts the action below was commenced by the plaintiff, demanding partition of this land between himself and the other brothers and sisters of Caroline Harvey, some of the defendants, her only heirs at law. Jonas Swink was made a party defendant, as also A. H. Ward, Jane Ward, and William Harvey, in possession. Swink answered, claiming the land in fee, and stating that he had lately recovered judgment for the possession as against A. H. Ward and Jemima, or Mima Harvey, a sister of Caroline Harvey; that Jane Ward was now unlawfully in possession, and he demanded judgment that he be adjudged owner in fee and entitled to immediate possession as against all and every of the parties to this action. Jane Ward and William Harvey answered, claiming ownership and alleging possession and pleading the statute of limitations.

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*The referee, upon the above facts, found as matters of law: 1st, that Jane Ward, A. H. Ward, and William Harvey had no interest in the land and were not entitled to re-

main in possession; 2d, that the instrument executed by Jonas Swink in 1853, was not a deed, but an agreement to convey the land in dispute to Jonas Harvey on his arriving at the age of twenty-one; 3d, that the plaintiff and the defendants, Jemima Harvey, John H. Harvey, Franklin Harvey, and Caroline McCravy, are the legal heirs of Caroline Harvey, who was the sole heir of Jonas Harvey, and as such heirs are entitled (except Jemima Harvey) to demand from the defendant, Jonas Swink, a good and sufficient conveyance each to one undivided fifth interest in the land in dispute; that the defendant, Jemima Harvey, is estopped by the judgment of Jonas Swink, above referred to, from making such demand. And he recommended that the possession of Jane Ward, A. H. Ward, and William Harvey be adjudged unlawful; that the conveyance above suggested from Jonas Swink be executed; and that after said conveyance, that the parties, heirs at law of Caroline Harvey, be allowed partition according to their rights.

This report upon exceptions was heard by his honor, Judge Cothran, who, holding that the act of 1882, by which the estate of Jonas Harvey was vested in his mother, Caroline Harvey, was unconstitutional, decreed that the plaintiff and the defendants who stood with plaintiff, claiming partition of the land, had no status in court. He therefore dismissed the complaint with costs, passing by all the other questions in the case, including those raised in the answer of defendant, Jonas Swink, as against the other defendants. After the decree of his honor, dismissing the complaint, was announced, a consent decree settling the rights of the defendant, Jonas Swink, and the defendant, Jane Ward, was proposed, whereby it was agreed that the land should be sold, and the proceeds divided, after payment of costs, between the said Jonas and the said Jane, as follows, to wit: 9-10ths to Jonas and 1-10th to Jane. This his honor declined; because the complaint having been dismissed, any further attempt to adjudge the matters in controversy would be irregular and illogical; and, moreover, the parties being sui juris, could

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make their own settlement. This order was afterwards presented to his honor, Judge Wallace, who declined to consider it, on the ground that Judge Cothran had declined it.

All parties have appealed; the plaintiff on the ground that his honor erred in holding that the enabling act of 1882 is in conflict with art. X., sec. 11, of State Constitution, and conferred no rights upon these parties; and in holding that the other parties hereto are in a position to take advantage of the unconstitutionality of the act. Jonas Swink gave notice that in his appeal he would move this court to modify and amend the decree of Judge Cothran by incorporating therein the proposed consent decree, which he alleg-

es that both Judge Cothran and Judge Wallace erred in not adopting; and failing in this, that this court would modify the decree of Judge Cothran and adjudge title and right of possession in the said Jonas Swink, on the ground of numerous alleged errors in the ruling of Judge Cothran in not sustaining objections to referee's report, &c. William Harvey also appealed upon grounds hereafter to be noticed, if necessary.

The first question presented is as to the constitutionality of the act of 1882, whereby the rights of Jonas Harvey were vested in his mother, Caroline Harvey. This question depends upon the construction which shall be given to section 11, article X., of the Constitution. That section is as follows: "The proceeds of all estates of deceased persons who have died without leaving a will or heirs, shall be securely invested and sacredly preserved as a State school fund, and the annual interest and income of said fund, together with such other means as the general assembly may provide, shall be faithfully appropriated for the purpose of establishing and maintaining free public schools, and for no other purposes or uses whatever."

Now, did the framers of the constitution intend that this section should apply only to those who had died previous to the adoption of that instrument, or did they intend to include those who might at any time die with the conditions and circumstances surrounding them as therein mentioned? The words producing doubt, or rather demanding interpretation, are these: "Of all deceased persons who have died without leaving a will or heirs, shall be securely invested." Under a

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very strict and technical construction of these words, it might be thought at first that they referred entirely to the past, and only included such deceased persons as had died before the adoption of the constitution; but when we look at the conditions and circumstances attached and which were to determine the disposition of the estates of such deceased persons, we will at once see that they had no reference to time, but simply referred to the conditions and circumstances, and was the same as saying, that where one having died at any time leaving no will or heir, his estate should be securely invested, &c. This view is sustained by the further consideration, that the former construction would render the section almost nugatory and useless. We concur with the Circuit Judge, that the act of 1882, referred to, is in conflict with section 11, article X., of the Constitution, and therefore failed to invest Caroline Harvey with the rights of Jonas Harvey, and therefore that her heirs at law, plaintiffs and defendants, claiming through her, have no status in court.

But it is urged that the defendants have no right to raise this question; that only one whose rights are involved and whose inter-

ests are to be affected, can urge the unconstitutionality of an act of the legislature—citing *Cool. Con. Lim.*, 163. This is sound doctrine, and should not be disregarded. Respect for the legislature, as well as sound policy and principle, demand that acts should not be hastily and unnecessarily pronounced invalid. In this case, however, the heirs of Caroline Harvey claim through the act of 1882. It is a link, and the most important link, in their chain of titles. Before they can claim successfully a partition of the real estate in question, they must prove title, and claiming through this act as one of the links in the chain, they themselves necessarily bring it under the review of the court; and being thus brought under review, the court must pass upon it. We think there was no error in the Circuit Judge in considering the question, nor in ruling thereon.

Nor was there error in declining to incorporate the proposed consent decree, after he had dismissed the complaint. The decree of dismissal put the case beyond his jurisdiction, and also beyond the jurisdiction of his honor, Judge Wallace. It was substantially out of court.

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*We, however, think it was error on the part of the Circuit Judge to dismiss the complaint without deciding the other questions presented in the case, and especially those arising between the defendants, and the exceptions to the referee's report on the part of the defendants. And with the view to have these questions adjudicated.

It is the judgment of this court, that the judgment of the Circuit Court dismissing the complaint be reversed, and that the case be remanded for the hearing of those questions arising in the pleadings between the defendants.

25 S. C. 289

HAYNE v. IRVINE.

(April Term, 1886.)

[Wills. ⚡506.]

Property was bequeathed to E. and M., but if they or either of them died without lawful issue, the property was given to the lawful heirs of H. and I. to be equally divided between the children of said H. and I., to them and their heirs forever. I. died, then P., a son of I., leaving children, and afterwards E. and M. died without issue. *Held*, that "lawful heirs" was used in the sense of children, and that the children of P., not being children of I., took no part of the estate after the death of E. and M.

[Ed. Note.—Cited in *Gourdin v. Deas*, 27 S. C. 490, 4 S. E. 64; *Archer v. Ellison*, 28 S. C. 242, 5 S. E. 713; *Tindal v. Neal*, 59 S. C. 18, 36 S. E. 1001; *Duckett v. Butler*, 67 S. C. 131, 15 S. E. 137; *Tindal v. Richbourg*, 91 S. C. 111, 74 S. E. 332; *De Bose v. Flemming*, 93 S. C. 184, 76 S. E. 277; *Church v. Moody*, 98 S. C. 239, 82 S. E. 430.

For other cases, see *Wills*, Cent. Dig. § 1093; Dec. Dig. ⚡506.]

Before Witherspoon, J., Greenville, March, 1886.

This was a controversy without action between Paul T. Hayne, as trustee of Mary McMahan, and the children and grandchildren of Mrs. Frances Irvine, deceased, submitted January 6, 1886. The case involved the construction of the following codicil to Daniel McMahan's will: "It is my will and desire, and I so direct, that in case my daughters Mary and Elizabeth, or either of them, should die without issue lawfully begotten and living at their or either of their deaths, then and in that case all the property, both real and personal, and moneys and choses in action which they may then have left from the provisions by me made for them in my said will, shall be given to the lawful heirs of my daughters, Mrs. Nancy Hill, the wife of Wm. R. Hill, and Mrs.

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*Frances Irvine, the wife of Dr. O. B. Irvine, to be divided equally between the children of my said daughters, Mrs. Hill and Mrs. Irvine, to have and to hold to them and their heirs forever share and share alike."

The Circuit decree was as follows:

The question submitted for the determination of the court is, whether the children of Pinckney take under the codicil the share that their father would take if living, or, do the children of Frances Irvine, deceased, living at the death of Mary McMahan, take to the exclusion of Pinckney's children?

It will be observed that the provision made by testator in his will for his daughters, Mary and Elizabeth, was not limited to the lives of the daughters with remainder over, but the entire estate provided for them under the will was given to them by testator. The codicil only provides, in the event of the death of Mary and Elizabeth without issue, what disposition shall then be made of the property "which they may then have left from the provisions by me made for them in said will." It seems to me that under the codicil no rights or interests could attach to the children of Mrs. Hill and Mrs. Irvine until the death of Mary and Elizabeth without issue. In this view I do not think that Pinckney, at the time of his death, had acquired under the codicil such an interest as would descend to his children. But for the use by the testator of the terms "heirs" in the codicil, the case of *Wessenger v. Hunt*, 9 Rich. Eq., 464, would be conclusive upon the point submitted to the court.

In this case Chancellor Wardlaw upon Circuit says: * * *

Under the codicil the time fixed for distribution is at the death of Mary and Elizabeth without issue, which was a time future to the death of the testator. The testator could not have intended to use the word "heirs" in the codicil in its technical sense, as the children of Mrs. Irvine could take under the codicil, upon the death of Mary and Eliza-

both without issue, whether their mother was then living or dead. I am satisfied that the testator used the word "heirs" as synonymous with the word "children" in the codicil, as the description of a class of persons, whom he intended to take, upon the death of his daughters, Mary and Elizabeth, without issue. In my judgment there is nothing in

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the *codicil in conflict with this view, construing the word "heirs" to mean "children."

I construe, under the authority of *Wessenger v. Hunt*, supra, that the children of Mrs. Irvine, who were living at the death of Mary McMahan, take under the codicil, to the exclusion of the children of Pinckney, and it is so ordered and adjudged.

From this decree the children of Pinckney appealed upon the following grounds: I. Because Pinckney Irvine, having been living at the date of the codicil to the will of Daniel McMahan, and also at the time of his death, took such an interest under said codicil as entitled his children, the said defendants, to inherit the same through him at the death of Mary McMahan. II. Because the judge erred in holding that the testator used the word "heirs" in said codicil in the sense of "children," and thus construing the gift to the heirs of Nancy and Frances as a gift to their "children" living at the death of Mary. III. Because the testator expressly gave the property in question to the heirs of Nancy and Frances, and his reference to the children was simply to show the manner in which, or the quantity of estate which, said heirs should take respectively, and therefore his honor should have held that the children of Pinckney, as heirs of Frances, took among them the share which Pinckney would take if living.

Messrs. Bellinger & Clyde, for appellants.
Messrs. Stokes & Irvine, contra.

July 19, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. This case was heard below upon an agreed statement of facts, from which it appeared that one Daniel McMahan, by will dated in 1845, bequeathed certain property to his two daughters, Mary and Elizabeth. Thereafter, in 1846, by codicil to this will he directed "that in case Mary and Elizabeth, or either of them, should die without lawful issue, at their death, or at the death of either of them, then in that case the said property * * * which they may have left, shall be given to the lawful heirs" of two of his other daughters, Mrs. Nancy Hill and Mrs.

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Francis Irvine, to be equally divided * "between the children" of his said two daughters, "to them and their heirs forever share and share alike." Mrs. Francis Irvine died before either Mary or Elizabeth; a son of

hers, Pinckney, also died before Mary or Elizabeth, but after his mother; then both Mary and Elizabeth died without issue. Upon these facts, the question submitted to the court below was, whether the children of Pinckney (defendants) could take the share that their father would have taken, had he survived Mary and Elizabeth, or do the children of Mrs. Francis Irvine living at the death of Mary take to the exclusion of Pinckney's children? The Circuit Judge held, that the children of Mrs. Irvine living at the death of Mary took to the exclusion of the children of Pinckney. The appeal renews this question before us.

The difficulty arises upon the use of the terms, "heirs" and "children" in the codicil. Had either of these terms alone been used, there could not have been much doubt as to the construction. For instance, take the term "heirs," as employed by the testator without the subsequent use of the term "children"; then Mrs. Irvine having died before Pinckney, he, Pinckney, would probably have been one of her heirs and, therefore, entitled to a share in the property, which upon his death would have descended to his children, the defendants. Or take the term "children" alone; then under the case cited by the Circuit Judge, *Wessenger v. Hunt* (9 Rich. Eq., 464), where it was held that a bequest to be distributed at a future time to the death of the testator, to wit, at the death of an intermediate life tenant, all who answer the description at the time of the distribution are the parties alone entitled. The children of Pinckney not answering the description of the term children of Mrs. Irvine, at the death of Mary could not take, but her children, then in existence, would take to the exclusion of Pinckney's children, as held by the Circuit Judge.

Both of these terms, however, are used in the codicil, producing a conflict, unless they can be harmonized. The Circuit Judge construed the word heirs as synonymous with children. We are inclined to think this is the correct construction, and in accordance with the intention of the testator; otherwise the division of the property could not have taken place until the death of Mrs.

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*Irvine, as no one can have heirs before death. It is true, Mrs. Irvine is dead now, and the difficulty suggested does not arise here; but suppose that she was still alive. If the word "heirs" is to have its technical effect, none of the parties could claim, although Mary and Elizabeth have both died without issue living. The time, however, for the distribution has arrived, and in the event that no one could take but heirs, if Mrs. Irvine was still alive, there could be no distribution.

We must conclude, that the testator intended that the division should be made at the death of Mary and Elizabeth, one or both, and as the children of Mrs. Irvine and

Mrs. Hill could take at that time whether their mothers were dead or alive, when "heirs" could not, the intention of the testator could not be carried out except by the construction of the Circuit Judge, to wit: that the term "heirs" was not used in its technical sense, but was used synonymously with the term "children." Having reached this conclusion, we are of opinion that the case of *Wessenger v. Hunt* is conclusive of the question involved.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 293

SARTOR v. BEATY.

(April Term, 1886.)

[1. *Executors and Administrators* ⇨80.]

In the distribution of an intestate estate, the equitable doctrine of retainer for barred debts due to the estate by a distributee does not apply to the interest of such distributee in the real estate of the intestate, or in the proceeds of the sale thereof.

[Ed. Note.—Cited in *Stokes v. Stokes*, 62 S. C. 349, 40 S. E. 662.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 333; Dec. Dig. ⇨80.]

[2. *Executors and Administrators* ⇨294.]

But such doctrine does apply to the personal estate, even though (1) the distributee has been discharged in bankruptcy as to such debt, (2) the note was held and claimed by the intestate for over twenty years as heir at law of the deceased payee, but without administration, or (3) the debt was assigned to the administrators of the intestate as a part of his distributive share in the deceased payee's estate, after the distributee debtor had assigned his distributive share to third parties.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1173; Dec. Dig. ⇨294.]

[3. *Limitation of Actions* ⇨147.]

The admission of a debt in a bankrupt's schedule of liabilities, is sufficient to rebut the presumption of payment. So, too, is a judgment obtained.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 589; Dec. Dig. ⇨147.]

[4. *Executors and Administrators* ⇨294.]

After twenty years without acknowledg-

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ment, the law presumes that the debt has been paid; for such a debt, therefore, the share of a distributee in the creditor's estate cannot be retained.

[Ed. Note.—Cited in *Lauderdale v. Mahon*, 41 S. C. 101, 19 S. E. 294; *Latimer v. Trowbridge*, 52 S. C. 197, 29 S. E. 634, 68 Am. St. Rep. 895.]

For other cases, see *Executors and Administrators*, Cent. Dig. § 1173; Dec. Dig. ⇨294.]

[5. *Executors and Administrators* ⇨294.]

Where a distributee is indebted to the estate by a judgment having lien on lands, his interest in the proceeds of the real estate may be retained on account of such judgment.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 1172; Dec. Dig. ⇨294.]

6. *Wilson v. Kelly*, 16 S. C., 216, affirmed.

[7. *Witnesses* ⇨74.]

The master should not testify as to facts which he is called upon to decide.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 188; Dec. Dig. ⇨74.]

Before Witherspoon, J., Union, October, 1885.

This was an action by Mrs. M. A. E. Sartor, widow of John P. Sartor, against the administrators of said J. P. Sartor, and his nieces and nephews, for the partition and settlement of his estate. John P. Sartor died intestate January 16, 1884, possessed of a considerable estate, real and personal, leaving as his distributees and heirs at law, his widow and several nieces and nephews. Among the nephews were Robert Beaty, jr., W. S. McJunkin, and John W. Sartor, against whose interest in this estate the administrators alleged certain claims, based upon the facts below stated as to each.

Robert Beaty, jr., gave his sealed note for \$3,437.73, in November, 1861, to William Sartor, son of John P., payable at one day. Said William died intestate and unmarried in August, 1862, leaving as his heirs at law his father and one brother, James W. This note then passed without administration into the possession of John P. In 1868, Beaty was adjudged a bankrupt, and in 1870 received his discharge. In his schedule of liabilities he stated this note as a debt due by him to "John P. Sartor;" and said John P. received dividends thereon. James W. Sartor died in 1881, leaving his father, John P., his sole heir at law. The amount due on this note October 1, 1885, was \$8,580.49.

W. S. McJunkin gave his sealed note for \$39.70 to John P. Sartor in November, 1862, payable at one day. On April 24, 1869, James W. Sartor obtained a judgment against said McJunkin for \$5,100.45. On April 25, 1884, the administrator of James W. Sartor assigned this judgment, as a part of his distributive estate, to the administrators of

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John P. Sartor. McJunkin *went into bankruptcy, but was never discharged. On January 22, 1884, he assigned all his interest in the estate of his uncle to his (McJunkin's) children.

John W. Sartor (nephew of John P.) gave his two sealed notes to said John P.—one for \$200, payable July 28, 1860, and one other for \$200, payable August 11, 1861, credited with \$12.25 on January 13, 1864.

Some of the defendants alleged that the personal estate of the intestate had been unfairly sold by the administrators, and that articles were purchased by them at an undervalue. Upon this subject the master testified in behalf of the administrators.

The master reported that all of the above named defendants must account for the above amounts out of their distributive shares in the estate; and that the sale of

the personalty was fair and for full value. Upon exceptions by Beaty, McJunkin, and John W. Sartor to this report, the Circuit Judge passed the following decree:

The first, second, and third exceptions, in substance, allege that the master erred in finding and recommending that Robert Beaty, jr., should account for his note given to William Sartor out of his distributive share of the estate of the intestate, John P. Sartor. It is contended that the doctrine of equitable set-off or retainer does not apply 1. Because the debts are not in the same right. 2. Because the debt has been discharged in bankruptcy. 3. Because the debt has been discharged by presumption of payment arising from lapse of time.

The payee of the note, William Sartor, died intestate in 1862, leaving as his distributees his surviving brother, James W. Sartor, and his father, John P. Sartor. John P. Sartor, the intestate, had the note in his possession, claiming it as his own at his death, and for a long time prior to his death. From the lapse of time, administration, or an assignment of the note, or anything else, would be presumed to give efficacy to the possession of the note by the intestate, John P. Sartor. In rendering a schedule of the list of his creditors, under oath in bankruptcy, Robert Beaty, jr., designates John P. Sartor as the owner and holder of said note. John P. Sartor and his son, James W. Sartor, the other distributee, both received div-

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idends on said note in *bankruptcy, in the name of John P. Sartor. James W. Sartor died intestate, leaving his father, John P. Sartor, the intestate, as sole distributee.

As John P. Sartor was at least the equitable owner of said note at the time of his death, Robert Beaty, jr. would not be permitted, under the circumstances, to deny that said note is part of the assets of the estate of John P. Sartor, in a proceeding in equity, in which he is demanding a distributive share of said estate. In *Falconer v. Powe*, Bail. Eq., 156, the court say: "Equity will enforce a discount of mutual demands between the parties really interested, although the demands are not in the same legal right, and therefore could not be set up in discount at law." The doctrine of equitable retainer is based upon the principle that he who seeks equity must do equity. Under the authority of *Wilson v. Kelly*, 16 S. C., 216, the discharge in bankruptcy cannot avail the defendant, Robert Beaty, jr., in this action.

More than twenty years elapsed between the maturity of the note and the death of John P. Sartor, the intestate. If there has been no payment by the debtor, or acknowledgment of the debt during this interval, the note must be considered paid, notwithstanding the fullest conviction that it never has been paid. *Riddlehoover v. Kinard*, 1 Hill Eq., 380. In the case of *Stover v. Du-*

ren, 3 Strobb., 450 [51 Am. Dec. 634], the court say: "Even an admission that payment has not been made, cannot of itself destroy the effects which considerations of public policy have given to a certain period of time, whether payment has or has not been made." In *Shubrick v. Adams*, 20 S. C., 51, it is held that the artificial force of the presumption of payment arising from lapse of time is conclusive, unless overthrown by testimony of the character required to resist a debt barred by the statute of limitations.

Whilst the statute of limitations merely affects the remedy, it appears from these and other decisions in this State, that the artificial force of the presumption of payment affects the debt in cases where the force of such presumption is not overthrown by testimony of the character indicated. The only evidence that can remove the presumption of the payment of the debt of Robert Beaty, jr., is his written admission under

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oath in bankruptcy as *to the existence of the debt. I conclude that this would be sufficient in this proceeding in equity, to rebut the presumption of payment from lapse of time, as to the note of Robert Beaty, jr.

It is further contended, under the eighth exception, that the doctrine of equitable set-off or retainer can only apply to the personal estate, as the title to the land descended to the heirs at law upon the death of the intestate. In this case the land has been sold, and the proceeds are in court to be distributed under the order of the court. In the case of *Wilson v. Kelly*, supra, it was held that until the son (W. D. F. Kelly) accounted for his indebtedness, he was not entitled to receive any portion of his father's estate. In the more recent case, *In re Covin's estate*, 20 S. C., 475, it is held that a note of a devisee, barred by the statute of limitations, could not be set off against the devisee, but his interest in the residue of lands and personal property directed to be sold by the executors should be retained.

The reason given for the distinction is that the will gave the devisee title against everybody except creditors; and the note, even if not barred by the statute, could not be counter-claimed against the land. But his interest in the residue, the court says, is in a different position. The will directs the residue to be sold and the proceeds equally divided. The devisee's portion of the proceeds of sale will be in the hands of the executors—his creditors—and they (the executors) will have the right to apply it to the debt he owes. This right is accorded to the executors as the creditors of the devisee, having funds in their hands, to a portion of which the devisee is entitled under the will. If the title of the devisee to the land devised is protected against all claims except creditors, it would seem that the title of the heir at law to intestate's land, cast by operation of law at

intestate's death, should have the same protection except as to creditors.

The administrators in this case could only be regarded as creditors of the distributees to the extent of the personal estate in their hands for distribution. The administrators alone in this case seek to have the doctrine of equitable set-off or retainer applied. The intestate's estate is entirely solvent. Under such circumstances the administrators invoke the aid of the court to do what they can't do, to wit: to subject the real estate of

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the heir *at law to equitable retainer. According to the reasoning of the court in the case *In re Covin's estate*, supra, I conclude that the doctrine of equitable set-off or retainer should not be applied to the interests of the distributees in the land of the intestate, John P. Sartor. I, however, concur with the master, and conclude that the doctrine of equitable set-off or retainer should apply to the distributive interest of Robt. Beaty, jr., in the personal estate in the hands of the administrators of John P. Sartor. The master's report must, however, be modified to conform to these views.

The fourth and fifth exceptions refer to the indebtedness of W. S. McJunkin, under the judgment obtained against him, April 30, 1860, by James W. Sartor, the intestate son of John P. Sartor. The grounds relied upon by the assignees under their exceptions are payment, as well as discharge in bankruptcy. The assignment by W. S. McJunkin of his distributive interest was made subsequent to the death of John P. Sartor. In no event could the assignees occupy a better position than their assignor, the distributee. The judgment referred to has been assigned by the administrator of James W. Sartor, to the administrators of John P. Sartor, who was at his death sole distributee of his son, James W. Sartor. The judgment debt, therefore, became assets in the hands of the administrators of John P. Sartor for distribution.

Whilst the discharge of W. S. McJunkin in bankruptcy would prevent the judgment creating a lien upon the distributive share of W. S. McJunkin in the estate of John P. Sartor, yet the judgment overthrows any presumption of the payment of the debt arising from lapse of time. Under the authority of *Wilson v. Kelly*, supra, the debt is not discharged by bankruptcy. I conclude that the debt of W. S. McJunkin, evidenced by the judgment in favor of James W. Sartor, assigned to the administrators of John P. Sartor, should be set-off against the distributive share of W. S. McJunkin, in the personal estate of John P. Sartor; but not as to the real estate. To this extent the master's report must also be modified.

Under the sixth and ninth exceptions, the sealed note debts of W. S. McJunkin and John W. Sartor will be considered. The plea of payment has been interposed by the

assignees, as to these notes. The master concludes that there is no difference, in prin-

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ciple, between a note barred by the statute and a lapse of time raising a presumption of payment, in the application of the doctrine of equitable set-off or retainer. As the debt must be regarded as paid, and the artificial presumption, arising from lapse of time, must be regarded as conclusive, until overthrown by testimony of the character heretofore indicated, and as the statute of limitations merely affects the remedy and not the debt, I cannot concur in this view of the master.

The master only recommends that the debt of James W. Sartor should be off-set against his distributive interest in the personal estate of the intestate. The sealed note of W. S. McJunkin became due November 3, 1862, and the two sealed notes of John W. Sartor became due July 27, 1860, and August 10, 1861, respectively, each payable to the intestate, more than twenty years prior to his death. It does not appear from the testimony that there has ever been any payment or acknowledgment of either of these notes for more than twenty years prior to the intestate's death, and the only ground upon which the master held these notes subject to equitable set-off seems to be the analogy that he held to exist between the effect of a bar by the statute and the presumption of payment from lapse of time. This point was not considered in *Wilson v. Kelly*, or in the case of *In re Covin's estate*, supra; but from my view of the decisions as to the effect of the presumption arising from lapse of time, I conclude that the doctrine of equitable set-off or retainer cannot apply to the note of W. S. McJunkin and the two notes of John W. Sartor above referred to. The master's report as to these notes must be overruled.

The seventh exception alleges that the master erred in concluding that the purchases by the administrators at the sale of the personal property were made at the value of the articles purchased. The finding of the master is supported by the testimony, and will not be disturbed. This exception is overruled.

It is ordered and adjudged, that, except as overruled or modified by this decree, the master's report herein, filed October 3, 1885, be confirmed and made the judgment of this court.

From this decree, Beaty and McJunkin appealed upon the following exceptions:

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*1. For that his honor held that the note given by Robert Beaty, junior, to William Sartor, was subject to the rule of equitable retainer, out of Robert Beaty, junior's, share of the personal estate of John P. Sartor, deceased.

2. For that his honor held that the discharge in bankruptcy cannot avail the defendant, Robert Beaty, junior, in this action.

3. For that his honor held that the doctrine of equitable set-off or retainer, should apply to the distributive interest of Robert Beaty, junior, in the personal estate in the hands of the administrators of John P. Sartor's estate.

4. For that his honor held that the debts of W. S. McJunkin, evidenced by the judgment in favor of James W. Sartor, assigned to the administrators of John P. Sartor, should be set off against the distributive share of W. S. McJunkin in the personal estate of John P. Sartor.

5. For that his honor held as follows: "The finding of the master—as to the value of articles sold—is supported by the testimony, and will not be disturbed." When the referee himself testified upon the issue he was considering, upon a matter material to the issue.

6. For that his honor did not set aside the finding of the referee, as to the value of the articles sold, because the referee acted as witness and judge of an issue of fact in the same case.

7. For that his honor did not hold that John P. Sartor's receiving a dividend from the bankrupt estate of Robert Beaty, junior, prevented the operation of the doctrine of equitable retainer.

8. For that his honor held that the claim presented by the administrators of the estate of John P. Sartor, deceased, of the note given to William Sartor by Robert Beaty, junior, was in the same right as the claim of Robert Beaty, junior, for his distributive share of the personal estate of John P. Sartor, deceased—as regards the doctrine of equitable retainer.

9. For that his honor did not refer the matter of the value of the articles sold at the estate sale to a new referee.

Plaintiff and the administrators also appealed upon the following exceptions:

Because his honor, it is respectfully sub-

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mitted, erred in hold*ing as follows, to wit: 1. That the administrators in this case could only be regarded as creditors of the distributees to the extent of the personal estate in their hands for distribution.

2. That the doctrine of equitable set-off, or retainer, should not be applied to the interest of the distributees in the land of the intestate, John P. Sartor.

3. That the debt of W. S. McJunkin, evidenced by the judgment in favor of James W. Sartor, assigned to the administrators of John P. Sartor, should not be set-off against the distributive share of W. S. McJunkin, in the real estate of John P. Sartor.

4. That the doctrine of equitable set-off, or retainer, cannot apply to the note of W. S. McJunkin and the two notes of John W. Sartor.

5. That the interest of Robert Beaty, jr., and W. S. McJunkin in the proceeds of the

sale of the real estate of John P. Sartor should not be applied to the debts of said parties to the estate of the intestate.

6. That the doctrine of equitable set-off, or retainer, did not apply when the debt of a distributee was evidenced by a sealed note more than twenty years past due.

7. That W. S. McJunkin had been discharged in bankruptcy.

8. That the administrators alone in this case seek to have the doctrine of equitable set-off, or retainer, applied.

9. For that his honor erred, it is respectfully submitted, in not holding as follows, to wit: That there was no difference, in principle, between a note barred by the statute of limitations and one barred by lapse of time, in the application of the doctrine of equitable set-off.

10. That the whole interest of those distributees who are indebted to the estate of the intestate was liable for the debts of such distributees, and that the interest of such distributees in the proceeds of the sale of the real estate was liable for such debts, as well as the respective interests in the personal estate.

Mr. J. H. Rion, for Beaty and McJunkin.

Mr. David Johnson, jr., for the administrators.

July 19, 1886. The opinion of the court was delivered by

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*Mr. Chief Justice SIMPSON. It will be sufficient for the understanding of this case, to state the questions which are before us on appeal, with the further statement that the pleadings are in proper form to have these questions adjudicated, and that the facts involve them. These questions are as follows:

1st. Can the equitable doctrine of set-off or retainer be allowed to an administrator against the share of a distributee in the personal estate or against an heir at law as to his share in the real estate, one or both, by virtue of a sealed note held by said administrator on said distributee and heir, due more than twenty years before the action, which note was originally given to a third party, but had been in possession of the intestate for years before his death and up to his death, and had reached the possession of the administrator by virtue of his office as administrator, the said distributee having enumerated this note in a petition for bankruptcy, filed within twenty years, as unpaid, and as belonging to the intestate, and having since been discharged in bankruptcy, and the intestate having received dividends on said note from the bankrupt's assets? Under these facts, can the administrator claim the right at settlement of the estate to retain from the personal assets and the real estate of the intestate, so much of the share of the distributee (debtor), as may be

necessary to discharge the note in question? Or can this right be resisted and defeated on the ground, either of want of mutuality in contract, bankruptcy, or presumption of payment by lapse of time, one or all?

2nd. Can retainer be allowed an administrator against a distributee and his assignee on a judgment obtained within twenty years by a third party, and which the said administrator has become possessed of by transfer to him in payment of the interest of his intestate in the estate of the judgment creditor, since deceased? Can the claim of retainer be defeated for the want of mutuality in the contracts, preventing set-off?

3rd. Can this doctrine of retainer be applied on sealed notes held by the administrator on distributees, and heirs of more than twenty years standing? Or will the presumption of payment extinguish the notes and prevent the retainer?

As to the first question, the Circuit Judge held, 1st, that the doctrine of retainer did not apply to the interest of a distributee

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*debtor, in the real estate of the intestate, subject to partition, nor in the proceeds thereof. 2nd, that it did apply as a general proposition to the interest of the distributee debtor, as to his share in the personal estate. 3rd, that discharge in bankruptcy of the distributee would not prevent the retainer, relying upon *Wilson v. Kelly*. 4th, that an acknowledgment of the debt by the distributee, within twenty years before action, in a petition filed for the benefit of the bankrupt act, was sufficient to prevent the presumption of payment from arising; and lastly, that the debts were in the same right, or sufficiently so, to authorize the set off, or retainer. As to the second proposition, he held that the judgment having been obtained within twenty years before action, no presumption of payment could arise, and the administrator being the legal holder of the judgment, as administrator, he could claim a set off, or retainer, even against the assignee of the distributee. As to the third proposition, he held that the presumption of payment arising from the lapse of the full period of twenty years before action, was conclusive, extinguishing the notes, and therefore leaving no room or ground for the claim of retainer—different in this respect from the statute of limitations, which only suspends the remedy, but does not presume payment.

The ruling of his honor upon the first proposition, that the doctrine of retainer did not apply to the interest of the distributee in the real estate of his ancestor, is supported by the case of *In re Covin's Estate*, 20 S. C., 475. That it did apply to the personal estate, and that bankruptcy would not prevent its application, is supported by *Wilson v. Kelly*, 16 S. C., 216. And it is hardly

necessary to cite authority in support of the proposition, that the enumeration of the debt by the bankrupt in his sworn petition for the benefit of the bankrupt act, within twenty years before action brought, in which petition the bankrupt acknowledged the debt to be unpaid, and set it down as one of the claims entitled to a portion of his assets, was sufficient to prevent the presumption of payment, the acknowledgment giving a new starting point for the currency of the presumption. His honor held, further, that the objection, that the debts were not in the same right could not avail here.

Even admitting, for the sake of the argu-

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ment, that the claim *of the administrator here, was not, and could not be, set up as a legal set off or counter claim to the distributee, yet that is not the principle upon which the doctrine of retainer is founded in a case like that before the court. "The right of retainer depends upon the principle, that the legatee or distributee is not entitled to his legacy or distributive share while he retains in his own hands a part of the funds out of which that and other legacies or distributive shares ought to be paid, or which is necessary to extinguish other claims on those funds. And it is against conscience that he should receive anything out of such funds without deducting therefrom the amount of the funds which is already in his hands as a debtor to the estate. And the assignee of the legatee or distributee in such case takes the legacy or distributive share subject to the equity which existed against it in the hands of the assignor." The above is an extract from the case of *Smith v. Kearney* [2 Barb. Ch. (N. Y.) 533], in which Chancellor Walworth delivered the opinion, and in which most of the authorities upon the subject are referred to and discussed, and especial reference is made to this case and the cases there cited, as being applicable not only to the immediate point now under consideration, but also to several other points involved in the case at bar. It was there held, that this doctrine did not apply to funds arising from the sale of real estate which descended to the debtor as one of the heirs at law, the proceeds of real estate converted into personality being still considered as real estate. *Smith v. Kearney*, 2 Barb. Ch. [N. Y.], 534.

The same principle as that found in the extract above, has been perhaps more directly and clearly expressed by Lord Cottingham in *Cherry v. Boulton* (4 Myl. & Cr., 412-447), as follows: "It must be observed that the term set off is very inaccurately used in cases of this kind. In its proper use it is applicable only to mutual demands, debts, and credits. The right of an executor to retain a sufficient part of a legacy given by the creditor to the debtor to pay a debt due from him to the creditor's estate,

is rather a right to pay out of the fund in hand, than a right of set off; such right of payment, therefore, can only arise where there is a right to receive the debt so paid, and the legacy or fund so to be applied in payment of the debt must be payable by the

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*person entitled to receive the debt." Whether, then, the claim in the hands of the administrator could be set up or not, as a strict counter claim, yet it being a debt against the distributee and a debt which he holds as administrator, the right of retainer under the above principle as to the personal estate seems to us to be complete, both against his distributee and his assignee.

This disposes of all of the questions embraced in the rulings of his honor above, except the one arising out of that ruling in which his honor differentiated a case where the debt of the distributee was barred by the statute, and a case where it was presumed paid by the lapse of twenty years or more before action, his honor holding in the latter case, that the presumption of payment was a bar to the retainer. We concur with this ruling. The lapse of twenty years, as has been said in several cases, has an artificial force, and extinguishes the debt, as effectually as absolute payment. In the absence of all such testimony, which in law would revive an unsealed note barred by the statute of limitations. *Boyce v. Lake*, 17 S. C., 481 [43 Am. Rep. 618], and the cases there cited. Such being the effect of the presumption, we think his honor was correct in holding in this case, that the retainer could not be claimed by the administrator against the sealed notes of over twenty years standing.¹

In the application of these principles to the case at bar, Robert Beaty, jr., was held accountable for his note to the extent of his interest as a distributee in the personal estate of the intestate. So, too, the share of W. S. McJunkin in the personal estate was held subject to the judgment in the hands of the administrator against him, but the sealed notes against the said McJunkin and John W. Sartor, being presumed paid by the lapse of twenty years, were adjudged extinguished, and therefore could not give foundation to the right of retainer. It is stated in the decree of the Circuit Judge that W. S. McJunkin had been discharged in bankruptcy. This seems to have been a mistake, as admitted in the argument on both sides; that question, therefore, does not arise as to him. The judgment against McJunkin was obtained in April, 1869, and we do not see why this judg-

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ment did not *have lien on the interest of McJunkin in the real estate of the intestate, thereby giving the administrator the right to have that interest subjected to its payment.

in addition to the right of retainer as to his share in the personal estate, if necessary.

The counsel of defendants, appellants, has, by permission, reviewed the case of *Wilson v. Kelly*, supra. We have carefully considered the grounds presented in opposition to that case, and have not found them sufficient to overrule it. Previous to that case it had been decided, that a debt barred by the statute of limitations could still be claimed out of a legacy or distributive share of the debtor in the estate to which he was thus indebted, under the law of retainer as set forth above. This was upon the principle that the statute of limitations did not extinguish the debt, but only prevented a bar to an action thereon: the moral obligation to pay still remaining, which obligation would support a promise to pay. See the cases referred to in *Wilson v. Kelly*. This principle, it was thought, applied to a discharge in bankruptcy: that the discharge did not pay the debt, but prevented any further action for its recovery, leaving the debt unpaid and the moral obligation unaffected. In fact, that a debt due by a discharged bankrupt occupied almost the exact position of one barred by the statute, and could, like a debt barred by the statute, be paid out of a legacy or distributive share of the debtor in the estate to which he was indebted, by retainer.

In the case of *Cherry v. Boulton* (4 Myl. & Cr., 18 Eng. Ch. R., 448), which the counsel claims overruled *Ex parte Man*, where the bankruptcy was held not sufficient to prevent the retainer, the facts were that the assignee in bankruptcy was claiming the legacy of the bankrupt as part of his assets, and the court held that inasmuch as the assignee was only liable on the debt to the extent of the dividend to which the creditor was entitled, the retainer could be allowed only to that extent, and that as to the balance of the debt a retainer could not be enforced. This was upon the ground that the party claiming the legacy, to wit, the assignee, did not owe the debt, except as to the dividend, and consequently the remainder of the legacy after the dividend was paid therefrom was due the assignee with no counter claim against it. The Lord Chancellor, in delivering the opinion in

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*that case, said: "In the present case, however, the bankruptcy of the debtor having taken place in the life time of the testatrix, her executors never were entitled to receive from the assignee more than the dividends upon the debt, and although the bankrupt had not obtained his certificate and the liability incident to that state remained upon him, yet he, for the same reason, was never entitled to receive the legacy, and consequently there was never a time at which the same person was entitled to receive the legacy and liable to pay the entire debt. The right, therefore, of retaining a sufficient sum out of the legacy to pay the debt, can never have

¹ See *White v. Moore*, (S) 23 S. C., 456.—RE-PORTER.

been vested in any one. The assignee who claims the legacy would, indeed, have been liable to the payment of any dividend upon the debt, had it been proved, and the master of the rolls proposed to the executors to make provision for deducting the amount of such dividend from the amount of the legacy." And he further says: "That in all the cases, except that of *Ex parte Man*, the liability to pay the debt and the right to receive the money had been at some time vested in the same person, and all that the court did in these cases was to consider that the party liable to pay the legacy had actually done what the law considers him entitled to do, namely, to apply a sufficient part of the legacy to the payment of the debt."

The facts in *Ex parte Man*, the Lord Chancellor says, were as nearly as possible the same as in the case he was discussing. *Ex parte Man* is reported in *Mont. & McA.*, 210. This volume has not been within our reach, but we suppose it was a case like *Cherry v. Boulton*, *supra*, where the assignee of the bankrupt was claiming the legacy, and consequently a case like *Cherry v. Boulton*, where the liability to pay the entire debt and the right to claim the legacy never vested in the same person, and consequently, as in *Cherry v. Boulton*, the administrator or executor had no foundation to retain the legacy for said entire debt. In the case at bar, however, the distributive share in the estate of the intestate is claimed by the distributee himself. He owes the entire debt and he claims the distributive share. Thus the two are vested in the same person, and the state of things exists, the absence of which authoris-

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ed the judgment in *Cherry v. Boulton*, *overruling *Ex parte Man*, and which, had they existed in that case, would have no doubt resulted in a different judgment.

It is urged that the creditor here having received dividends out of the bankrupt assets, should prevent the retainer and Orpen in *re Beswick v. Orpen*, 16 L. R. Ch. Div., 202, is referred to as sustaining this proposition. In that case, at a meeting of creditors by resolution, a composition of 2s. 6d. was accepted in satisfaction of the debts due to them. The executors did not prove the debt under the composition, and the debtor assigned his share in the estate to a third party, who sued the executor. The executor claimed the right to retain for the full amount of the debt. It was held that he could retain only to the amount of the composition, the court holding that the debt was within the scope and operation of the resolution of the creditors passed under the bankrupt act, and was bound by them, the 2s. 6d. being accepted as satisfaction of the whole debt. We do not understand that proving the debt and receiving dividends in bankrupt proceedings, is the same thing as resolution of composition, where the creditors agree to accept a certain

amount in satisfaction of the whole, and, therefore, we do not regard the case of *Orpen v. Beswick* as applicable here.

Upon the whole, we sustain the Circuit Judge except as to the liability of W. S. McJunkin's share in the proceeds of the real estate to the judgment against him. This judgment having lien upon this share, it should be applied so far as may be necessary to the payment thereof.

As to the exception that the referee should not have testified on the matter of the value of the property purchased at the sale by the administrators. The principle contended for is doubtless correct. Eliminating this testimony from the case, that remaining seems quite sufficient to sustain the findings of fact on that subject.

It is the judgment of this court, that the judgment of the Circuit Court be modified to the extent of subjecting the share of W. S. McJunkin in the proceeds of the real estate to the judgment against him; and in every other respect that said judgment below be affirmed.

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*PALMETTO LUMBER COMPANY v.
RISLEY.

(April Term, 1886.)

[1. *Corporations* ¶514.]

An allegation in the complaint of the corporate existence of the plaintiff is no part of the cause of action, and is therefore not put in issue by a general denial.

[*Ed. Note.*—Cited in *Kerr & Co. v. Cochran*, 29 S. C. 61, 63, 6 S. E. 905; *Rembert v. South Carolina Ry. Co.*, 31 S. C. 313, 9 S. E. 968; *Walpole v. City Council*, 32 S. C. 553, 11 S. E. 391; *Land Mortgage Investment & Agency Co. v. Williams*, 35 S. C. 372, 14 S. E. 821; *Ober v. Blalock*, 40 S. C. 36, 18 S. E. 264; *Hankinson v. Charlotte, C. & A. R. Co.*, 41 S. C. 16, 19 S. E. 206; *Mickle v. Congaree Const. Co.*, 41 S. C. 397, 19 S. E. 725; *Stoddard v. Aiken*, 57 S. C. 137, 35 S. E. 501; *Blackwell v. British American Mortgage Co.*, 65 S. C. 116, 43 S. E. 395; *Montgomery v. Seaboard Air Line Ry.*, 73 S. C. 595, 53 S. E. 987.

For other cases, see *Corporations*, *Cent. Dig.* § 2057; *Dec. Dig.* ¶514.]

[2. *Trusts* ¶84.]

Where the president of a corporation takes a deed of conveyance to himself in settlement of a debt due to the company by the grantor and erects improvements thereon at the expense of the company, afterwards charging his own account with such debt and expenditures, a trust in such property results to the company.

[*Ed. Note.*—For other cases, see *Trusts*, *Cent. Dig.* § 125; *Dec. Dig.* ¶84.]

[3. *Reference* ¶15.]

A reference as to counsel fees to plaintiff's attorneys, is a mere order of inquiry, and not legal error, whether the counsel fees are allowable or not under the authority of the court.

[*Ed. Note.*—For other cases, see *Reference*, *Cent. Dig.* § 30; *Dec. Dig.* ¶15.]

Before Fraser, J., Georgetown, May, 1885.

The appeal in this case was from the following Circuit decree:

The action has been brought by the plain-

tiff as an incorporated company. The defendant, David Risley, does not distinctly admit or deny the fact of incorporation, but in his answer several times refers to plaintiff as "said company." The organization with officers was that of an incorporated body, and not that of a partnership, and the testimony nowhere discloses the names of the partners, if there were such, but all persons referred to as interested in the property of the company are referred to in such terms as are entirely consistent with the idea of their being stockholders in a company. I therefore conclude that the plaintiff is, as alleged, an incorporated company. The defendant, David Risley, was its president, and had the management of its affairs at the mill at Georgetown.

On April 21, 1881, Francis S. Parker, Eliza T. Parker, and others, conveyed to David Risley a certain parcel or lot of land described in the complaint, and called the "Parker lots." The consideration on which the said conveyance was made was that it was in payment of certain accounts due on the books of said company by James R. Parker, Rutledge Parker, and Arthur M. Parker, amounting in all to five hundred and ninety-six \$8-100 dollars.¹ After the conveyance was made David

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Risley erected *on the "Parker lots" a large number of tenement houses, with material and labor furnished and paid for by the company. The account of these transactions was kept and charged to the "Parker lots," and all rents credited on the same account. On June 11, 1883, the amount of balance against the "Parker lots" was \$4,199.76, and this amount was then charged, by order of David Risley, to his own individual account.

According to the manner in which this account was kept, it does not, when compared with other accounts, indicate with any certainty whether they were kept as the individual account of David Risley, or of the company. In my view it is not important. The account of David Risley, amongst other things, shows that on August 31, 1880, an amount of \$5,831 16-100 was credited to him. The deed for the "Parker lots" was made on April 21, 1881, and on June 30, 1882, the same amount of \$5,831.16, covering the same items, was, by David Risley's consent, charged against him in his account. There was a crisis in the affairs of the company June 11, 1883, and after this entries were made on the account of David Risley, including \$12,076.19 "interest on stock," and other large items to his credit, by which there is a large apparent balance in his favor.

I have come to the conclusion, however, that at no time during which these funds were being drawn from the company assets for the purchase and improvement of the "Parker lots," was there any legitimate bal-

ance in favor of David Risley, which he had a right on his own volition to draw and appropriate to his own use. If it be admitted that King and other officers of the company knew that David Risley was making these investments for his own use and benefit, which I think has not been established, it cannot give validity to the transaction. There has been no act of the company which authorized it, so far as appears in the evidence, nor has there been any authority conferred by any corporate act on any of the officers to make such use of the assets. It does not appear who are the copartners or stockholders, whether Risley, Lloyd, and King, or whether a much larger number. Whoever or how many there may be, there should in my view have been some act of the corporation as such to authorize such use of its assets.

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*I therefore find that David Risley, president of the company, used the assets of the company to purchase and improve the "Parker lots," not having a right so to use the said assets, he being in debt to the company at the time, and not having the authority of the company to use the assets for the purchase of property for his own use.

Having come to the conclusion that the Palmetto Lumber Company was not a partnership, but an incorporated company, it is not important to consider what would be the effect of the withdrawal by one partner of all or a part of his interest in the assets, and the investment of it in property in his own name, without the consent of the other members of the firm. We must consider the case of the president and business manager of a corporation, who invests its assets, by his own will, in property in his own name and for his own use, and the effects of such transaction on the property thus purchased. Whether the practice, which seems to have been a common one with this company, of allowing its officers, and perhaps its stockholders, to use the funds and accounts for the ordinary expenses of living, and perhaps as a substitute for money, was a proper one, cannot affect the question here.

The general and well-settled rule is, that when one person furnishes, at the time of the purchase, the consideration, and another takes the title, it is a question of intention whether or not there is a resulting trust. If the title is made to certain relatives, the presumption is that it is a gift. If the title is made to a stranger, the presumption is that there is a resulting trust in favor of him who furnishes the consideration. In either case, however, it is a question of intention on the part of the person who furnishes the consideration, an intention which may, notwithstanding the presumption, be shown by parol testimony. There is, however, a large class of trusts, constructive trusts, which do not in any way depend on intention, and are

¹But the deed only recites a consideration of "six hundred dollars."—REPORTER.

declared and enforced by the court contrary to the express intention of the party who took and holds the title. It is perhaps too narrow a view to say that in all cases the court gives relief on the ground of fraud.

Besides other cases, "a constructive trust

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arises" whenever "another's property has been "wrongfully appropriated and converted into a different form. If one person having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust funds into a different species of property, taking to himself the title; or if an agent, or bailee, wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name; in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while in the hands of the original wrong-doer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a bona fide purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust, who has been thus defrauded." Pom. Eq., § 1051. It seems to me that the facts bring this case clearly within the principle thus laid down, and that there is a constructive trust in favor of the plaintiff in the Parker lots, and the improvements put upon them since the purchase.

Under this view of the case the judgment of the defendant, Mrs. Risley, whether bona fide or not, should not be enforced against the property.

It is therefore ordered and adjudged, that the defendant, Mrs. Georgie H. Risley, be perpetually enjoined from enforcing in any way against the said Parker lots her judgment against her codefendant, David Risley. It is further ordered and adjudged, that the plaintiff is entitled to a constructive trust in the said Parker lots, and that the same be, and is hereby, established and declared. It is further ordered that the sheriff of Georgetown County do proceed to sell, &c.

From this decree the defendant, David Risley, appealed upon several exceptions raising the points decided by this court.

Mr. Richard Dozier, for appellant.

Messrs. Walter Hazard and Simonton & Barker, contra.

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*August 2, 1886.² The opinion of the court was delivered by

²The cases are generally reported in the chronological order of their filing, but owing to the confusion incident to the removal of the Supreme Court records from the State House, it has been found impossible to preserve this order with the succeeding cases of this volume, without delaying its publication.—REPORTER.

Mr. Justice McGOWAN. This was an action in the nature of a bill in equity, instituted by the plaintiff company against David Risley and his wife, Georgie H. Risley, to set up a resulting trust in certain parcels of land known as the "Parker lots," and to enjoin the sale of them as the property of David Risley under a judgment confessed by the said Risley to his wife, Georgie H. Risley. The plaintiff alleged that the "Palmetto Lumber Company is a body corporate under the laws of this State," doing business in Georgetown in the manufacture and sale of lumber; that about the year 1881, one Parker, being indebted to the corporation in the amount of \$600, made an arrangement with the company, by which certain parcels of land known as the "Parker lots," were to be conveyed to them in payment of the debt; that David Risley was then the president and active business man of the company, and he caused the conveyance of the same to be made to himself individually, and kept the deed from the record, while he was putting costly improvements on the lots at the expense of the company; that in June, 1883, the directors and stockholders, having, as they supposed, discovered that there was something wrong, took measures to secure themselves, whereupon David Risley placed the deed on record, falsely claiming the lots as his individual property, and confessed a fraudulent judgment to his wife, Georgie H., which was levied upon the same, &c. The plaintiff prayed that a resulting trust in the said lots might be declared in their favor; that the levy made upon the "Parker lots" as the property of David Risley be set aside, and the judgment of the wife, Georgie H. Risley, be perpetually enjoined as fraudulent and void, &c.

Georgie H. Risley demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. David Risley answered to the merits, "denying each and every allegation in said complaint contained not hereafter specifically

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"admitted." He answered fully, denying that he purchased the aforesaid "Parker lots" as president, for and in behalf of the company, but for himself individually, claiming that as president he had no right to purchase lands for the company; that in the accounts he charged himself with the "Parker debt," and all expenses incurred for improvements on the "lots," and that therefore "the purchase money and all sums expended for improvements were his own money and means," &c., but in his answer he did not specifically deny the allegation of the complaint that the "Palmetto Lumber Company" is a corporate body under the laws of this State.

The cause came on for a hearing before Judge Fraser. The plaintiff offered no proof of their charter of incorporation, but confined themselves to the merits of the case. The

judge held that the plaintiff, as alleged in the complaint, was an incorporate company, and that the defendant, David Risley, was its president and had the management of its affairs at the mill at Georgetown. He also decreed upon the testimony that the plaintiff corporation had a resulting trust in the "Parker lots," enjoined the enforcement of the levy on the execution of the wife, Georgie H. Risley, and ordered the land sold, &c. From this decree the defendant, David Risley, appealed upon numerous exceptions, which, being long and in the "Brief," need not be set out here. The defendant, Georgie H. Risley, did not appeal, and therefore the demurrer goes out of the case.

The first three exceptions of David Risley make the point that the Circuit Judge erred in not dismissing the complaint, for the reason that the plaintiff, having offered no proof of its charter as a corporate body, failed to show legal capacity to sue. This raises, in an equity suit, a question analogous to that of non suit in a law case for lack of proof; and involves the consideration of the point as to what proof was necessary under the pleadings. One of the first rules of pleading under the code is, that "every material allegation of the complaint, not controverted by the answer, as prescribed in section 170. * * * shall, for the purposes of the action, be taken as true." Code, § 189. Section 170, as to the manner in which allegations must be "controverted," provides that "the answer of the defendant must contain a gen-

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eral *or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief," &c. The plaintiff in the complaint alleged that it was "a body corporate" under the laws of the State; and the defendant in his answer did not make specific denial of the fact alleged, but in general terms denied "each and every allegation in the complaint contained not specifically admitted."

Did this answer sufficiently "controvert" the allegation, so as to put the plaintiff to proof of its corporate existence? As the allegation concerned only the legal capacity of the plaintiff to sue, we think it was necessary for the defendant to controvert it by an express specific denial, not difficult to make, in order to put the fact properly in issue. It is true that a "general denial" puts in issue all the material allegations constituting the cause of action. Pom. Rem., § 666. But, strictly speaking, an allegation of corporate existence is no part of the cause of action, but has reference rather to the means and manner of enforcing it. Want of legal capacity to sue is one of the matters stated in section 165 of the Code, as causes of demurrer. When it appears on the face of the complaint, the objection can be made only by demurrer; but it may be made by answer,

when it does not so appear. When the objection is made by demurrer, there is no doubt whatever that it "must distinctly state the grounds of objection;" and we cannot see why less should be required when it is allowed to be made by answer. "Under a general denial the defendant cannot insist that plaintiff has not legal capacity to sue, where that fact does not appear on the face of the complaint." Wait. Ann. Code, 248 and notes; Insurance & Banking Company v. Turner, 8 S. C. 111; Steamship Company v. Rodgers, 21 Id., 33.

It is urged that this case is not at all analogous to that of the Steamship Company v. Rodgers, supra, for the reason that there the words of the answer were, "has no knowledge or information sufficient to form a belief as to the truth of the allegations of the complaint," and here they are "denying each and every allegation in the complaint contained," &c. In respect to requiring the plaintiff to make proof of its corporate existence, we

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think *that both statements have the same effect; and that, being only different forms of stating a "general denial," neither is sufficient to put the plaintiff to the proof of its corporate existence. A special denial is necessary in an answer as well as in a demurrer. "An answer alleging that defendant has not 'knowledge or information sufficient to form a belief,' &c., makes a complete denial." Wait. Ann. Code, 244 and notes.

But in the particular indicated, this case is precisely similar to that of the Insurance & Banking Company v. Turner, supra. In that, as in this, the defendant in his answer "denied each and every allegation of the complaint." In that case, after calling attention to section 167 of the [old] Code, which sets out the objections that must be taken by demurrer, when the matter appears upon the face of the complaint, the opinion of the court proceeds as follows: "The clear intention of these sections is that the defendant shall give, by his demurrer or answer, specific notice that he intends to rely on one or more of these specific defences, if he wishes to make them available. A general denial of all the facts in the complaint is not a compliance with these requirements of the code. The object of these provisions is to relieve the plaintiff from any necessity of preparing to meet such objections on the trial, unless notified by the pleadings that the defendant intends to rely on one or more of them," &c. If the defendant means to rely on the defence that the plaintiff has no corporate existence, it is very easy to say so specifically, and thus notify the plaintiff. We cannot say that the Circuit Judge committed error in ruling that under the pleadings and evidence the plaintiff, as alleged, was an incorporated company, and organized and officered as such.

All the other exceptions but the last, make

the objection in various forms, that it was error in the judge to declare a trust in favor of the plaintiff in the "Parker lots." Although the findings of law and fact are not kept separate, it is manifest that this question is largely one of fact, which has been decided by the judge below. We have read the testimony carefully, and it seems that, briefly stated, the following facts were proved: that the business of the company was to deal in lumber and shingles; that David Risley was president and the active manager;

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that the company held a claim against one Parker for about \$600, and Risley, without any express authority for that purpose, used this debt in the purchase of certain lands, known as the "Parker lots," upon which he had houses built at the expense of the company; that the "account as to the Parker lots," including the original purchase money (Parker debt), and the costs of improvements, was at first kept separate to itself, without distinctly showing who claimed to be the real owner, but finally Risley put on record a conveyance of the lots to himself individually, and about June, 1883, after the suspension of the company, had himself charged with the "Parker debt" and the costs of improvements, and claimed that the said lots were his own property, purchased for himself with his own money, and subject to be levied and sold under the judgment confessed to his wife, Georgie H. On this state of facts, we cannot say that the Circuit Judge erred in declaring a trust in favor of the plaintiff in the lots known as "Parker lots," and claimed by the said David Risley as his individual property.

There can be no doubt of the general rule, that where one furnishes the money to purchase land, and the title is taken in the name of another, a trust results in favor of the person furnishing the money. It is very clear that in the purchase of the "Parker lots," Risley used the claim of the company against Parker, and took title in his own name, and we cannot see any good reason why the case should not fall under the operation of the general rule as to "resulting trusts." It is true that the Parker debt was, at least in part, the property of Risley as corporator, and that as president he was the agent and manager of the business. But it does not strike us that these facts could give him the right to charge himself with the Parker debt, and then in effect to draw it out of the till, and invest it in property for himself, without raising a resulting trust in the property so purchased. But we do not think the case makes it necessary for us to go into that subject. It seems to us enough to say, that as president and agent of the company, Risley was already a trustee for the company, and that it was a breach of that trust to use the money or securities of

the company in the purchase of lands, taking title in his own name. "It is well settled that whenever a trustee or agent deals on his own account and for his own benefit,

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with the subject submitted to his charge, he becomes chargeable with the purchase as a trustee." 4 Kent (6th edit.), 306; Perry Trusts, § 127; Pom. Eq., § 1051.

Risley as president was certainly never expressly authorized by the company to use the Parker debt for his own purposes, and it was therefore wrongful and a breach of trust for him to use it in the purchase of lots, taking title in his own name—something like the case of a watchman placed to guard property, taking it himself. We do not see that this wrong was in any way cured by the trustee charging himself on the books with the Parker debt and the costs of the improvements placed upon the lots; for there may be a great difference between owning the land itself, and having only an account for the amount paid for it, which account possibly may be, and in view of the judgment confessed to Mrs. Risley, most probably is, entirely without value.

The Circuit Judge (as the plaintiff may be in failing circumstances) referred it to the clerk of the court "to inquire and report any facts which will enable the court to determine whether a counsel fee shall be paid out of the fund to attorneys for plaintiff and what is a proper fee to be allowed." This was purely a reference of enquiry, and decided nothing. We cannot say that in making it, the judge committed error of law; but we reserve our judgment as to whether a counsel fee should be allowed under authority of the court.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 318

DILLARD v. SAMUELS.

(April Term, 1886.)

[1. *Justices of the Peace* ⚭46.]

A trial justice has jurisdiction of an action for the claim and delivery of personal property and damages for the detention thereof where the amount involved does not exceed one hundred dollars.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 179; Dec. Dig. ⚭46.]

[2. *Replevin* ⚭33.]

In action of claim and delivery, the plaintiff is not required to give bond unless he demands immediate possession of the property.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. § 139; Dec. Dig. ⚭33.]

[3. *Justices of the Peace* ⚭90.]

In a trial justice's court the pleadings are not required to be in any particular form.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 306; Dec. Dig. ⚭90.]

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[4. *Justices of the Peace* ⇨105.]

*The trial justice erred in refusing to permit defendant to cross-examine generally a witness produced by the plaintiff; and a new trial was granted, notwithstanding the defendant afterwards produced and examined this same witness in his behalf.

[Ed. Note.—Cited in *Dial v. Valley Mt. Life Ass'n of Virginia*, 29 S. C. 578, 8 S. E. 27; *Owens v. Gentry*, 30 S. C. 497, 9 S. E. 525; *State v. Howard*, 35 S. C. 202, 14 S. E. 481.

For other cases, see *Justices of the Peace*, Cent. Dig. § 346; Dec. Dig. ⇨105.]

[5. *Appeal and Error* ⇨1031.]

[Where it is difficult to affirm that an error committed by the trial judge in limiting defendant in the cross-examination of a witness was neither material or prejudicial to defendant, the judgment will be reversed.]

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4041; Dec. Dig. ⇨1031.]

Before Witherspoon, J., Fairfield, June, 1885.

To the case as stated in the opinion, it may be added that the witness Groeschel was the clerk and brother-in-law of defendant and was put up by plaintiff only to prove the execution of a receipt on the back of a mortgage.

Mr. O. W. Buchanan, for appellant.

Mr. J. W. Hanahan, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action of claim and delivery of personal property before a trial justice and a jury. No bond was given by the plaintiff. An amendment was allowed inserting in the summons an allegation claiming as damages eight dollars for detention of the property. The words of the summons were "that L. Samuels is in unlawful possession of certain personal property of him the said Thomas Dillard, viz., a one-horse wagon, which has been converted into a two-horse wagon," &c. The defendant denied that the courts of trial justices have jurisdiction of an action for claim and delivery of personal property; but if so, this action could not be maintained, for the reason that the summons did not state "that the plaintiff was entitled to the possession of the wagon," and the plaintiff was not required to give bond before action brought. The court overruled the objections, holding that the code gave the jurisdiction, that the summons sufficiently stated plaintiff's title to the property; and, as immediate possession of the wagon was not demanded, a bond by the plaintiff was unnecessary.

There was much testimony on both sides, and during the progress of the trial, "I, Groeschel, agent of the defendant in the action, was called by the plaintiff as a witness. Counsel for defendant then proposed

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to ask him (witness) questions tending to bring out the defendant's case. It was ruled

that it was proper to defer the examination of witness as to these matters until after plaintiff had closed, and that while such examination was entirely proper after the plaintiff had closed, yet at this particular stage of the proceeding it was improper. (Defendant excepted.) After the plaintiff had rested, the witness, Groeschel, was fully examined by counsel for the defendant." The trial justice charged the jury "that they had the right to take into consideration their own knowledge of the character of the witnesses offered by the other side; that in determining what weight they should give to the testimony of the witnesses, they could take into consideration their character as known to themselves, even if there was no testimony offered as to their reputation for truthfulness or untruthfulness," &c. The jury found for the plaintiff "the wagon in dispute, and, if it cannot be found, fifteen dollars."

The defendant appealed to the Court of Common Pleas, and the Circuit Judge having affirmed the judgment below, he appeals to this court upon the following exceptions: I. That his honor erred in holding that a trial justice court has, under the constitution, jurisdiction of the action of claim and delivery of personal property, where there is also a claim for damages in the action, for the detention of the property. II. That his honor erred in holding that the defendant had not been prejudiced by the refusal of the trial justice to allow cross examination of an important witness to bring out the defendant's case, save and except as to matters brought out on the direct examination; whereas said ruling was erroneous, and if the cross examination had been allowed, the plaintiff would not have been allowed to impeach the witness by asking him and other witnesses if he had not made different and contradictory statements; and such action on the part of the trial justice did cause prejudice to the rights of the defendant. III. That his honor erred in holding that the trial justice's summons was sufficient; whereas it does not state on its face that the plaintiff was entitled to the possession of the property, and although this objection had been raised in the court below, and also argued before his honor. IV. That his honor erred in confirming said action of the court below, that the jury had a right to judge of

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the character of the witnesses from their own knowledge of them, even in the absence of testimony to that fact, and although said objection was argued before his honor, and in substance was one of the exceptions to the judgment below.

First, Sub-division 11 of section 71 of the Code, gives jurisdiction to trial justices in "an action to recover the possession of personal property claimed, the value of which, as stated in the affidavit of the plaintiff, his

agent or attorney, shall not exceed the sum of one hundred dollars." We do not see that this provision is in conflict with that of the Constitution, section 22, article IV., which declares that "justices of the peace shall have such jurisdiction as may be provided by law in actions ex delicto, when the damages claimed do not exceed one hundred dollars." The constitution limits the power to give jurisdiction to cases where the damages claimed do not exceed one hundred dollars, and the code only undertakes to give it when the property does not exceed in value that sum. If we assume that the provision of the code contemplated the value of the property in the light of damages, then the only effect would be to limit the jurisdiction to cases in which the value of the property added to the specific damages claimed, would not exceed one hundred dollars. In this case the value of the property was stated to be twenty, and the damages for detention eight dollars. We think the trial justice court had jurisdiction.

Second. As to the third exception. The same section of the code above cited does provide that the plaintiff may, at the time the action is brought, but not after, "claim the immediate delivery of the property," and if he does so, he must enter into an undertaking with sureties, &c. But if he makes no such claim, it is enough, as we understand it, that the affidavit of the plaintiff should state the value of the property, &c., and that "the plaintiff is the owner, or entitled to the immediate possession of the property claimed." The summons stated "that L. Samuels is in unlawful possession of certain personal property (describing it) belonging to him, the said Thomas Dillard," &c. This was not in the exact words of the law, that "the plaintiff is the owner," but it was substantially the assertion of title to the property. The trial justice court is not a court of record.

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Pleadings are *not required to be in any particular form, but must be such as to enable a person of common understanding to know what is intended. "Upon hearing the appeal (from the judgment of a trial justice) the appellate court shall give judgment according to the justice of the case, without regard to technical errors and defects, which do not affect the merits," &c.

Third. But while technicalities are overlooked, there are some requirements as to the forms of procedure in trial justice courts. Sub-division 15, of section 88, of the Code positively declares, "that the provisions of the code of procedure, respecting forms of actions, parties to actions, the rules of evidence," &c., shall apply to these courts. The rule of evidence is well settled in this State, "that in the cross-examination of a witness, counsel may ask him questions bearing upon the whole case, so as to bring out matters of independent defence, and are not confined

to the matters testified to in the examination in chief." *Kibler v. McIlwain*, 16 S. C., 551. According to this rule, it was error in the trial justice to refuse the defendant's counsel permission to cross-examine generally the witness (Groeschel), when put on the stand and examined as a witness by the plaintiff; and the Circuit Judge, upon that ground, should have ordered a new trial.

It did appear in the argument for the plaintiff in this court, that the Circuit Judge, after dismissing the appeal, made a statement as follows: "With reference to the second ground of appeal, I stated before signing the order that the trial justice had erred (as was admitted by plaintiff's counsel) in limiting the defendant in his cross-examination of plaintiff's witness, Groeschel, to matters brought out on the direct examination. But as it appeared from the testimony as well as the report of the trial justice, that the witness had subsequently been examined fully by the defendant, I did not regard this error as material or prejudicial to defendant," &c. We have no doubt whatever, that the Circuit Judge honestly thought that the error was not "material or prejudicial to defendant." But the defendant complains that it did prejudice his case, and it is difficult to affirm with certainty that it did not. We can well understand how it might do so in several ways, and as it was admitted er-

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ror, we think it the *safer course to require compliance with the admitted rule upon the subject.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for such orders as may be proposed in conformity with the conclusion herein announced.

25 S. C. 323

CONTINENTAL INSURANCE COMPANY v.
BOYKIN.

(April Term, 1886.)

[Insurance ⚡187.]

Defendants insured their residence with the plaintiff company against fire for five years at long rates, payable annually in advance, giving their note for the deferred premiums, with a stipulation that the whole note should become due on failure to pay any instalment at maturity. The policy provided that on non-payment of a premium the policy should be void, and on non-payment of an instalment the policy should not be binding during the period of such default. Defendant failed to pay his second instalment. *Held*, that the plaintiff was entitled to recover the full unpaid balance of the note.¹

[Ed. Note.—Cited in *Continental Ins. Co. v. Hoffman*, 25 S. C. 333.

For other cases, see *Insurance*, Cent. Dig. § 399; Dec. Dig. ⚡187.]

¹See next case infra. Same plaintiff against Hoffman.—REPORTER.

Before Hudson, J., Kershaw, September, 1885.

The opinion states the case. The Brief does not show when the action was commenced, the first paper dated being the master's report of August 21, 1885.

Messrs. Kennedy & Nelson, for appellants.
Mr. W. M. Shannon, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiffs insured the residence of the defendant, S. J. Boykin, situate in Kershaw County, against fire, under policy No. 2537, and dated November 16, 1880. The insurance was for five years, and was at the long rates of insurance, being twenty-five per cent cheaper than short rates. The policy contained, among other stipulations, the following, which are set forth in the "Case," as the only

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ones mate*rial here, to wit: 1st. * * * "If the assured shall have neglected to pay the premium, * * * then, and in every such case, this policy shall be null and void. 2d. The company shall not be liable for any loss or damage under this policy, if default shall have been made in the payment of any instalment of premium due by the terms of the instalment note. 3d. On payment by the assured or assigns of all instalments of premiums due under this policy and the instalment note given thereon, the liability of this company on this policy shall again attach, provided written consent of the superintendent of the Southern department be first obtained. * * * But this company shall not be liable for any loss happening during the continuance of such default of payment, nor shall any such suspension of liability under this policy on account of such default have the effect of extending such liability beyond the period of its termination; as originally expressed in writing hereon. * * * And, further, that no attempt by law or otherwise to collect the note given for cash premium, or any instalment of premium due upon any instalment note, shall be deemed a waiver of any of the conditions in this policy, or shall be deemed in any manner to revive this policy, but upon payment by the assured or his assigns of the full amount due upon such note and costs, if any there be, this policy shall thereafter be of force, unless the same be inoperative or void from some other cause than non-payment of such note. * * * Further, this company may at any time cancel this policy, returning the unexpired premium pro rata. The assured may at any time have the policy cancelled by paying the customary short rates for the expired time of full term."

In consideration of the insurance with the above stipulations, the defendants executed a note or contract, of which the following is

a copy: "\$150. For value received in policy No. 2537, dated the 16th day of November, 1880, issued by the Continental Insurance Company of New York, we promise to pay to said company, or order (by mail if requested), thirty-seven 50-100 dollars upon the 1st day of November, 1881, thirty-seven 50-100 dollars on the 1st day of November, 1882, thirty-seven 50-100 dollars upon the 1st day of November, 1883, and thirty-seven 50-100 dollars on the 1st day of November, 1884, without

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interest. And *it is hereby agreed and covenanted that in case of the non-payment at maturity on any one of the instalments herein named, the whole amount of instalments remaining unpaid on said policy shall become immediately due and payable."

The action below was upon this paper, the plaintiff alleging that no part of said note had been paid, except the first instalment, due the first day of November, 1881, and judgment was demanded for the balance, to wit, the sum of \$112.50. * * * The defendants admitted the execution of the paper sued on, and also that no other but the first instalment had been paid. They contended, however, that the policy constituted the contract between the parties, and that under said policy, upon their failure to pay the second instalment on November 1, 1882, there was no longer any risk carried by the plaintiff, but since then there has been an utter failure of consideration, the company carrying no risk upon the house insured. Wherefore they demanded judgment, that the complaint be dismissed with costs.

By consent the case was referred to the master, upon whose report, with exceptions thereto by plaintiff, the Circuit Judge, his honor, Judge Hudson, decreed that said exceptions be sustained, and that plaintiff have leave to enter judgment for the sum of \$112.50 and costs—the judge holding "that the express covenant in the note being so explicit as to prevent the court from any effort to relieve the parties to the note from the full consequences of failure or neglect to pay any instalment at maturity." The appeal assigns error to this ruling of his honor, and contends that the clause attached to the note, whereby on failure to pay any one of the instalments at maturity, the whole became due and payable, was in the nature of a penalty, and, as such, plaintiff could only recover the actual damage sustained.

The appeal requires construction of the two papers above referred to, to wit, the policy and the note. The policy contains the contract of the plaintiff, and the note that of the defendants. They were executed at the same time and refer to the same matter, and to be properly construed they must be read together. In the policy the plaintiff contracts to insure the residence of the defendant, S. J. Boykin, for a certain period, and upon certain conditions and stipulations,

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which are set forth above. These *stipulations are plain and easily understood, and even from a most cursory reading it will be seen that they were intended, not as a means of vacating the contract, but were inserted as conditions thereof, describing and indicating the character of the policy which the plaintiff was to issue, and did issue. The plaintiff took the risk of defendant's residence against fire for the period mentioned (at long rates) for the sum of \$150,² which was twenty-five per cent. less than short rates, this amount to be paid promptly in annual instalments, upon the condition that upon default of any instalment, not that the contract of defendant should end, but that the risk should cease during such default, with the privilege to the defendants to re-attach said risk upon certain conditions; and with the further privilege to defendants to cancel the policy by paying the customary short rates for the expired time of full term. For this policy, with such conditions and stipulations, the defendant agreed to pay \$150 in annual instalments, as stated above, with an express covenant incorporated in the note, that in case of non-payment of either instalment at its maturity, the whole amount remaining unpaid on said note should become at once due and payable.

When these contracts are thus read, the one after the other, it seems plain that defendants contracted to pay plaintiffs \$150 in instalments for policy of insurance covering defendants' residence for a period of years, with the contingency that plaintiffs' risk might cease during this period upon default of defendants in paying the instalments; not, however, with any stipulation that defendants should be relieved from any portion of the \$150, but, on the contrary, with, as we have stated above, an express covenant that upon the default of defendants, which was to discontinue the risk, the whole amount of the \$150 remaining unpaid was to become due and payable.

Now, we do not see that the plaintiff has failed in any respect to comply with its portion of the contract; on the contrary, it has furnished to the defendants all that the contract required, and the defendants have received all that they were entitled to. They could have continued the risk of the plaintiff

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for the full *period of the policy, had they chosen to do so, and if the plaintiff has been relieved from liability short of that time, it is the fault of the defendants in not complying with their portion of the contract. Upon this default, with full knowledge that the plaintiff would be released thereby, they covenanted to pay the whole insurance money. This contract may have been an unwise

²Besides one year's cash advance premium paid when the policy was issued.—REPORTER.

and improvident one, but still the defendants made it, and as was said by Judge Hudson in his decree: "It being so explicit, the court is prevented from any effort to relieve the parties from the full consequences thereof." See *Williams et al. v. Albany Insurance Company*, 19 Mich., 451 [2 Am. Rep. 95]; *American Insurance Company v. Isaac Stoy*, 41 Mich. 385 [1 N. W. 877]; *Wall v. Home Insurance Company*, 36 N. Y., 157.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 327

CONTINENTAL INSURANCE COMPANY v.
HOFFMAN.

(April Term, 1886.)

[Insurance ⇨187.]

Continental Insurance Company v. Boykin, ante, p. 323, approved, and the same construction given to a like contract.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 399; Dec. Dig. ⇨187.]

Before Kershaw, J., Fairfield, September, 1885.

The construction of the written contract in this case was submitted to the Circuit Judge, without a jury, who passed the following judgment thereon:

By the terms of the contract, on the failure of the assured to pay the first instalment of the note (as was the case here) the policy ceased to insure. In other words, the entire consideration of the promise to pay utterly and entirely failed. From that time there was no risk upon the company. Without risk to the company, there could be no consideration to the assured for the payment of the premium according to the promise, after default once made. It is true, it was provided that on payment of the amount due under the policy and the note, after default, the liability of the company should revive,

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but that was only on the *condition that the written consent of the superintendent of the Southern department, or other officer of the company, be first obtained. But, without such written consent, the payment of the premium would not have that effect. It remained optional with the company whether the policy should be revived or not. So long as that option remained with the company the performance by the assured of his executory contract to pay the premium could not be enforced by action.

If the note had been given and received as payment for five years indemnity, absolute and unconditional, then the action could be maintained under the conditions of the note, that all the instalments should be due on the failure of the assured to pay any one of the instalments at maturity, but here there is no such contract, no unconditional

insurance for five years, paid for by the premium note. If the company, upon the failure of the assured to pay the first or any subsequent instalment of the premium as promised, had tendered her the written consent of the superintendent of the Southern department, or other officer of the company, to the revival of the policy upon payment of the amount due for the same, accompanied with a demand of payment, an action might have been had against the defendants for a failure, after such demand, to pay the sum due. But that would have been an action for a breach of contract, not a simple action on a note. This is not a promissory note, payable absolutely and at all events, but a promise to pay money, conditioned by many things which do not appear on the face of the instrument, detached as it is from the paper of which it was originally a part.

The true nature of the contract is declared in the case of *The American Insurance Company v. Stoy*, 41 Mich. 385 [1 N. W. 877], a case nearly identical with the one at bar.

* * * In that case, the condition that on the failure of the assured to pay any one of the instalments of the note, the whole should become due, is contained in the charter of the company, which was made a part of the contract by express words to that effect; while here, the condition is upon the face of the note. It was held there, that the condition did not bind the defendant, being in the charter merely, and not on the note.

I can see no reason why the provision here

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should at all affect the conclusions arrived at, nor why it should have made any difference in that case. Before the company could avail itself of the provision it must place itself in a position to offer an equivalent for the sum demanded. The time when the sum might be demanded is not material, with reference to this question of the failure of consideration. The utmost that the company could claim, under the condition that the whole should become due on the failure to pay any instalment, would be that the premium for the entire period should be paid in advance from the time of such default; but, in order to enforce such claim, it would be necessary to offer, in return for the payment demanded, a policy in full force and effect for the whole period. It would not do to say to the assured—"Pay me the whole premium down as a penalty for your default, and if I see fit to give you my written consent, as 'nominated in the bond,' you may have a policy of indemnity, such as you contracted for, in return for such payment."

Here the action was not commenced until after the last instalment became due. The company, at that time, could offer no consideration for the payment demanded, except (with the written consent of its officer) to renew the policy for the remainder of the current year, because it was expressly pro-

vided that the payment of the premium note, after default, and consequent suspension of liability, should not have the effect of extending the policy beyond the period of its termination, as originally expressed in writing thereon. There could, therefore, be no revival of the policy, to extend beyond the termination of the same, as originally established; and herein this case differs from that of *Am. Ins. Co. v. Henley*, 60 Ind., 515. The construction contended for by the company would have the effect, in this case, of giving the company premiums for five years' insurance, in return for an indemnity for less than two years. If correct, the company, in case of a default like that here, could sit quietly by until the end of the term of five years, and then collect the unearned premiums for four years, absolutely without any equivalent whatever. Such a construction is inequitable and unreasonable, and ought not to prevail.

The failure of the company to assert its

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rights for so long a period, during which it had some equivalent to offer the assured, and its postponement to a time when it no longer had any, might well be considered a waiver of any right it might have had under the contract. At least, the utmost it could demand, would be the actual damages sustained, if any, in consequence of the failure of the assured to comply with the contract. The stipulation that "in case of the non-payment, at maturity, of any one of the instalments" of the premium note, "the whole amount of the instalments remaining unpaid on said policy shall be immediately due and payable," is a penalty, and intended to secure the payments of the instalments as they matured. Another penalty was that the policy thereupon "ceased to insure." To make the whole note collectible without an equivalent, would be to construe this as a stipulation for the payment of liquidated damages.

Says Lord Holt, in his note to *Barton v. Glover*, Holt's N. P. Rep., 43: "Where a sum of money, whether in the name of a penalty or otherwise, is introduced into a covenant or agreement, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed or contract, and the penalty only as accessory, and, therefore, only to secure the damages really incurred." Or, as most felicitously expressed by Judge Glover, in *Bearden v. Smith*, 11 Rich., 555, "the distinction between penalty and liquidated damages is, that the former is a security for, and the latter is to be paid in lieu of, the performance of the act to be done." If we apply these terse and comprehensive tests to the present contract, it will at once be manifest that the stipulation in question was a penalty merely, and would not authorize the recovery, on the instrument, of more than the actual loss suffered by the company, if

any. It follows from what has been said that the plaintiff has misconceived its remedy, and can have no relief in this action.

It is adjudged, that the complaint herein be dismissed on the merits, and that the defendants do recover of the plaintiff the costs of the action, to be inserted herein.

From this judgment, the plaintiff appealed.

Mr. O. W. Buchanan, for appellant.
Messrs. McDonald & Douglass, contra.

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*August 10, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action by the plaintiffs against the defendants upon a premium note given in consideration of a policy of insurance. The company covenanted to insure certain property against "loss or damage by fire and lightning" for a period not exceeding five years in the sum of \$4,000. At the time the policy was issued the defendants paid the sum of \$30.00 in cash, and gave a premium note for the sum of \$120.00, the entire premium being \$150.00. The contract of insurance was made on March 4, 1881, and on that day the cash payment was made and the premium note executed and delivered. In the note the defendants agreed to pay the amount in annual instalments of \$30 each, on the 4th days of March, 1882, 1883, 1884, and 1885, to be paid in advance. It is provided in the note, that, in case of non-payment at maturity of any one of the instalments, the whole amount of the instalments remaining unpaid shall become immediately due and payable. But the action was not brought until after the expiration of the whole term of five years.

The following condition or stipulation was attached: "It is also covenanted and agreed, that if default is made in payment at maturity of any of the instalments of premium, to be paid as stipulated in premium note given herewith, the whole amount of all instalments unpaid shall become immediately due and payable, and the policy of insurance issued thereon shall cease to insure, and the said company shall not be liable for any loss or damage which may accrue to premises, issued thereunder during such default, nor until said policy shall be revived by the written consent of the superintendent of said Company's Southern department or by an officer of said company, on payment to him of all dues thereon." It is further conditioned that "any suspension of liability under this policy, on account of such default, shall not have the effect of extending such liability beyond the period of its termination as originally expressed in writing herein [no such right therefore in this case]; that no attempt by law or otherwise to collect any premium due upon any instalment note shall be deemed a waiver of any of the conditions of this policy, nor shall it be deemed in any manner to revive this

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policy. This *company may at any time cancel this policy by returning the unexpired premium pro rata. The assured may at any time have the policy cancelled by paying the customary short rate for the expired time of the full term, (5 years)" &c.

The defendants refused to pay the first or any of the instalments of the premium note at maturity; and there was no proof before the court that the company ever made demand upon the defendants for payment of the said instalments or any one of them, and no evidence that notice was ever given by the company to the defendants through the mails or otherwise. There were no transactions between the plaintiff and defendants at any time between the date of the maturity of the first instalment of the note, and the date of the filing of the complaint in this action, July 24, 1885.

Upon the complaint and answer, and the facts as set forth, Judge Kershaw rendered a decree dismissing the complaint, upon the grounds therein stated, from which the plaintiffs appeal to this court upon the following grounds: I. For that his honor erred in holding that the instalment note therein was without consideration, null, and void; that the defendants should be allowed to avoid its payment, and that the policy for which the note was given was void; whereas, it is respectfully submitted, his honor should have held that there was a sufficient consideration and that said note was good and valid, due and payable, and that the policy was voidable and not void, and then only at the election of the insurance company. II. For that his honor erred in holding that said policy was void at the time of the suit brought herein especially, whereas it reads that it shall issue for five years from March 4, 1881, until March 4, 1886, the policy being the only evidence introduced upon that point by any one, and was taken by admission as what it purported to be on its face. III. That said decision was contrary to the law applicable therein, and that the decision, it is submitted, should have been in favor of the plaintiff.

This is certainly a very hard case. The insurance was avowedly for "five years." The company carried the liability only one year, for which they received the cash, but as to the other four years, the company carried

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nothing, carried no liability *whatever, for the reason that the instalments of the note were not paid at maturity, and yet now sues on those instalments, claiming that they are "good and valid, due and payable." At first view it would seem that this was a contract of insurance from year to year upon "the instalment plan" to run for a period not exceeding five years, as in the case of *The American Insurance Company v. Sloy*, 41 Mich., 385 [1 N. W. 877], cited in the judg-

ment of the court below. But it seems that this company (Continental Insurance) had what are called "long terms" and "short terms"; that they charged a larger premium for one year (short) than for five years (long), and that this difference was twenty-five per cent.; so that the defendants, in this case, by taking a long insurance for five years, secured insurance for the year which they paid, at twenty-five per cent. less than they would have had to pay if they had taken the insurance for a single year, as was the practical result; and that this difference of \$7.50, may be regarded as consideration for the note of \$120.00.

It is true that one of the numerous stipulations and conditions attached, was that the assured might at any time have the policy cancelled; but, however, upon the express condition of "paying the customary short rates for the expired time of the whole term," which was not done. The simple failure to pay the instalments as they fell due, without payment of the additional short rate premium for the time then expired, can hardly be regarded as "a cancellation" under the very particular terms of the agreement. This appears to have been the contract, and although, as it seems to us, it was one-sided, unequal, and unjust, yet if parties, who are of full age and of sound mind, without misrepresentation, imposition, or fraud, choose to make such a contract, we know of no principle or authority which would justify the court in denying the right to enforce it. The precise point has just been ruled by this court in another case of the same plaintiff, *Continental Insurance Company v. Boykin* (case next ante [323]), to which reference is made, as conclusive of this case.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded to the Circuit for a new trial.

25 S. C. *334

*MOORE v. GENTRY.

(April Term, 1886.)

[*Injunction* ⚡114.]

T. held a judgment against W., who owned four tracts of land in the same county. W. afterwards mortgaged Nos. 1 and 2, then sold No. 1, then No. 3, and then No. 4, and afterwards No. 2 was purchased by B. under a decree of foreclosure. T. then levied his execution on No. 2, whereupon B. instituted action against T. and the sheriff to require T. to first exhaust Nos. 3 and 4. *Held*, that W. and the purchasers of tracts 3 and 4 were necessary parties to the action.

[*Ed. Note.*—Cited in *Moore v. Trimmier*, 32 S. C. 513, 11 S. E. 548, 552.

For other cases, see *Injunction*, Cent. Dig. §§ 211, 212; Dec. Dig. ⚡114.]

Before Wallace, J., Spartanburg, December, 1885.

This was an action by Baxter H. Moore against L. M. Gentry, sheriff, and F. M. Trimmier. The opinion states the case.

Messrs. Bobo & Carlisle, for appellants.

Mr. Ralph K. Carson, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. In this case the plaintiff alleges in his complaint that on February 28, 1880, one John Winsmith executed to him and one A. G. Floyd a mortgage on two tracts of land, one known as the Nimrod Moore tract, and the other as the Tom Wofford place, to secure the payment of a note for ten hundred and seventy-five dollars; that said Winsmith was at the time the owner in fee of several other tracts of lands; that on May 17, 1881, he sold and conveyed the Nimrod Moore place to one C. E. Smith for the sum of two thousand dollars, and on August 12, 1882, he sold and conveyed a tract, known as the White Oak Spring place, to one L. A. Mills for the sum of twenty-five hundred and one dollars, and on October 24, 1883, he sold and conveyed another tract of land to one R. C. Hunter for six hundred and forty-two dollars—all of which land lies in Spartanburg County, State of South Carolina; that on March 13, 1879, the defendant, Trimmier, recovered judgment against said Winsmith for the sum of sixteen hundred and fifty-nine dollars and seventy-seven cents; that in December, 1884, "under a decree for the foreclosure of the mortgage, given to the plain-

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tiff *and A. G. Floyd as aforementioned, which had been subsequently transferred to A. G. Floyd, the Nimrod Moore tract and the Tom Wofford tract were sold by the sheriff of Spartanburg County, and the plaintiff became the purchaser of the Tom Wofford tract for the sum of \$1,310;" that in April, 1885, the sheriff levied upon the Tom Wofford tract as the property of said Winsmith under Trimmier's judgment, and advertised the same for sale; and that the property sold by the said Winsmith subsequent to the execution of the mortgage above referred to, is more than sufficient to satisfy said judgment. Upon this state of facts the plaintiff demands judgment that the defendants be enjoined from selling the Tom Wofford tract of land until they first exhaust the property sold by Winsmith subsequent to the execution of said mortgage.

The defendants demurred upon the ground that the complaint failed to state facts sufficient to constitute a cause of action; and Judge Wallace, who heard the case below, overruled the demurrer, and rendered judgment granting the injunction as prayed for in the complaint. From this judgment defendants appeal upon the several grounds set

out in the record, which need not be repeated here, as the sole question presented is, whether the plaintiff, under the facts stated in the complaint, has any equity to the relief demanded.

It is very manifest that the sole object and effect of the action and of the judgment rendered therein is to throw the defendant, Trimmier, first upon the lands sold by Winsmith, after the execution of the mortgage, to the relief of the land bought by the plaintiff under the judgment of foreclosure; for there can be no doubt that Trimmier's judgment being the first lien on all of the land, he could, if necessary for the satisfaction of his debt, sell every one of the tracts of land mentioned in the complaint. Hence the only question presented is as to the order in which the lands of the plaintiff and those of the other purchasers, shall be held liable, the plaintiff contending that the lands of those who purchased after the execution are primarily liable, and that his can only be resorted to after theirs is exhausted, upon the principle that, where a judgment debtor sells or encumbers different tracts of lands, at different times, to different persons, while

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*all of the lands are eventually liable to be sold for the satisfaction of the judgment, if necessary, yet that the senior purchaser or encumbrancer has an equity to require the judgment creditor first to exhaust the lands of the junior purchasers or encumbrancers, and that the lands must therefore be sold in the inverse order of the conveyances or encumbrances.

This being so, it is clear that those who purchased from Winsmith subsequent to the execution of the mortgage, through which the plaintiff claims, have a very material interest in the question involved; in fact, they are the only persons who have any real interest in the question; for though the judgment creditor is a necessary party to the action for injunction, yet he has no real interest in the question presented, for let it be determined either way, he loses nothing except by the delay to which he is subjected in realizing his money. We think, therefore, that those who purchased from the judgment debtor, Winsmith, subsequent to the execution of the mortgage, having such a material and vital interest in the issue presented, are necessary parties to the action, and that no final judgment can properly be rendered until they have an opportunity to be heard upon an issue so seriously affecting their rights and interests.

These purchasers not being parties to the action would, of course, not be bound by any judgment rendered herein, and therefore if the judgment appealed from is allowed to stand, then when Trimmier levies his execution upon the lands of Hunter and Mills, or either of them, we see no reason why they

could not, by their action for injunction, reopen the question raised by the plaintiff in this case, and contend that the plaintiff is, in fact, a subsequent purchaser to them, and that his purchase could not have relation back to the date of the mortgage, and thus invest him with the equity which the mortgagee may have had to require the judgment creditor first to exhaust the lands of those who purchased subsequent to the mortgage; thus subjecting the judgment creditor to further delay and expense. So that it seems to us, in any view of the case, all the necessary parties are not before the court, and for that reason alone, without intending to intimate any opinion either way, as to the merits of the question involved, the judgment appealed from cannot be permitted to stand.

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*Indeed, we think that in actions of this kind, whether brought by a mortgagee or a purchaser at a foreclosure sale, the mortgagor, as well as any person who has bought subsequent to the mortgage, is a necessary party, so that the court, having all the parties interested before it, may render such decree as will properly adjust all the equities of the several parties.

The judgment of this court is, that the judgment of the Circuit Court be set aside, with leave to the plaintiff to apply to that court for permission to amend, upon such terms as to said court may seem meet, by bringing in the necessary parties.

25 S. C. 337

MORGAN v. SMITH.

(April Term, 1886.)

[1. *Dower* ⇨14.]

In action for dower proof of the husband's possession during coverture is prima facie sufficient evidence of the husband's seizin, but this is rebutted by showing that he never had a legal title.

[Ed. Note.—Cited in *Ex parte Steen*, 59 S. C. 223, 37 S. E. 829.

For other cases, see *Dower*, Cent. Dig. § 47; Dec. Dig. ⇨14.]

[2. *Estoppel* ⇨78.]

A defendant in dower may be estopped from denying the title of the husband, under whom he holds by deed, but not so, where he never received deed under his contract of purchase, the husband himself having never had a legal title.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 206; Dec. Dig. ⇨78.]

Before ———, J., Greenville, ———.

The opinion states the case.

Mr. D. R. Speer, for appellant.

September 23, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This was a proceeding for dower, originally commenced in the

Court of Probate and carried thence, by appeal, to the Court of Common Pleas. The only issue involved was as to the seizin of demandant's husband. The facts are not controverted, and are as follows: Bayliss Morgan, the deceased husband of demandant, during his life-time and during coverture, purchased a tract of land and went into possession of the same. He paid a large portion

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of the purchase *money, but died before completing the payment, and before receiving a deed for the land. After his death "the parties in interest" (which we understand to mean his heirs at law or legal representatives) paid the balance of the purchase money out of the assets of his estate. Bayliss Morgan, during his life-time, sold a portion of the said land, out of which dower is claimed, to one Mayfield, but died before making him a deed. After the death of Morgan a proceeding, to which the petitioner and Mayfield were parties, was instituted in the Court of Common Pleas, under which specific performance of the contract between Morgan and Mayfield was decreed, and a deed was made to Mayfield under the order of the court for the land which he had contracted to buy from Morgan. Mayfield afterwards sold the land to the defendant in this action and put him in possession of the same.

Upon this state of facts the judge of probate decreed that the defendant was not entitled to dower, upon the ground, as we understand, that there was no legal seizin in her husband. From this decree the petitioner appealed, and the Circuit Court rendered judgment affirming the decree of the Court of Probate, from which this appeal is taken. By this appeal petitioner contends: 1st. That where her husband has been in possession during coverture, it is not necessary for her to prove a legal title in him, and the defendant can only impugn her husband's seizin by showing a paramount title in himself as against the husband. 2d. That the defendant having gone into possession, and claiming title through the husband, is estopped from disputing the seizin of the husband.

To sustain her first position, appellant cites *Smith v. Paysenger*, 2 Mill. Con. R., 59; *Forrest v. Trammell*, 1 Bail., 77; *Reid v. Stevenson*, 3 Rich., 66, and the recent case of *Stark v. Hopson*, 22 S. C., 42. While some of these cases do contain language which seems to support the position contended for, yet upon examination of the points really presented for decision in those cases, and upon consideration of other cases subsequently decided, it will be seen that they do not go to the extent claimed for them. They only decide that a demandant in dower need not make out a regular chain of title in her husband, but that proof of his possession during coverture

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is prima facie sufficient evidence of the husband's seizin, but is not conclusive of that

fact, as it may be rebutted, not merely by proof of title in the defendant paramount to that under which the husband held, but also by showing that although the husband was seized during the coverture, yet his seizin was of such a character as that his wife could not be endowed of the land, e. g., that the husband was seized as trustee (*L'ault v. Payne*, 2 Bail., 319), or that he held a leasehold and not a freehold estate in the land out of which dower is claimed (*Whitmire v. Wright*, 22 S. C., 446 [53 Am. Rep. 725]), or that the husband never had any legal title (*Bowman v. Bailey*, 20 S. C., 550).

To sustain her second position, the appellant cites the cases of *Gayle v. Price*, 5 Rich., 525; *Pledger v. Ellerbe*, 6 Rich., 206 [60 Am. Dec. 123]; *Plantt v. Payne*, 2 Bail., 319—relying on *McKnight v. Gordon*, 13 Rich. Eq., 223 [94 Am. Dec. 164], and *Horde v. Landrum*, 5 S. C., 213, to show that a purchase at sheriff's sale under an execution against the husband is the same in effect as a purchase directly from the husband. While it may be conceded that these cases do show that where a defendant in dower has gone into possession of the premises out of which dower is claimed under a deed from the husband, either directly or through the sheriff under a judgment against the husband, he is not permitted to deny that the husband had a legal title (though, as we have seen, he may show that such title was not of such a character as would support a claim of dower), yet we do not see how this will help the appellant, for it does not appear in this case that the defendant claims under a deed from the husband. On the contrary, the evidence conclusively shows that the husband never made any title to the defendant or to Mayfield, under whom the defendant claims, and hence the cases relied on do not apply.

Indeed, it appeals not only that the husband never had any legal title, but that he never was in a condition to demand one, for though he went into possession under a contract to purchase, and paid a part of the purchase money, yet having died before completing the payment, he never received a deed for the land, and was never entitled to demand one. Hence he never was in a condition to make a title to Mayfield, and he never undertook to do so. The payment of the bal-

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ance of the purchase money *out of the assets of his estate after his death by "the parties in interest," certainly could not have the effect of investing him with seizin during the coverture so as to entitle his widow to dower. The extent of the husband's right was a mere equity to enforce the specific performance of the contract under which he went into possession of the land, and the defendant not claiming under a deed from the husband, but under a conveyance made by order of the court after his death, is not precluded from showing, as he did show, that the husband

never had any seizin of the premises in question. *Secrest v. McKenna*, 6 Rich. Eq., 72. In the cases of *Gayle v. Price*, *Plantt v. Payne*, and *Pledger v. Ellerbe*, it appeared that the defendant claimed under a conveyance from the husband, either directly or through the agency of the sheriff, and therefore was not permitted to dispute the fact that the husband had legal title. Here, however, the defendant does not claim under any conveyance from the husband, and hence those cases do not apply.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 340

BOMAR v. GIST.

(April Term, 1886.)

[Trusts. ⚡206.]

It is a breach of trust by a trustee to use trust funds in part payment for land purchased for the estate, and give a mortgage for the balance of the purchase money; and the vendor, knowing of this breach, becomes a trustee for the cestuis que trust, and on foreclosing his mortgage must first account to them for their money before applying the proceeds to the mortgage.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 287; Dec. Dig. ⚡206.]

Before Witherspoon, J., Spartanburg, November, 1885.

This was an appeal from the following decree:

In determining the rights as between plaintiff and the cestuis que trust, under the issues presented by the pleadings, it will be proper to consider: 1. Whether or not it was a breach of trust for the trustee to invest the trust funds in the house and lot upon the terms above set forth. 11. If the trustee was

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guilty of *a breach of trust in making said purchase, did the plaintiff have knowledge of such breach at the time he received the \$550 cash payment and took the mortgage for the balance of purchase money?

It seems to me that under the provisions of the will of William H. Gist, and the large discretion therein conferred upon the trustee, the trustee was authorized to re-invest the proceeds of the sale of the trust land in real estate; otherwise the testator would not have directed the trustee to invest such proceeds of sale for the same uses that he had attached to the trust under said will. In this view I conclude that it would not have been a breach of trust for the trustee to have invested the proceeds of the sale of the Union County trust land in the house and lot purchased in Spartanburg from plaintiff. But it appears that the trustee has never sold the Union County trust land, and that the \$550 cash payment necessarily must have come from some other source. According to the

testimony of David C. Gist, and I conclude as matter of fact, that the \$550 cash paid was realized from sales of cotton produced upon the trust land in Union County. Then the question arises, was it a breach of trust for the trustee to invest the income of the trust land in the house and lot purchased from plaintiff? The income was money, the investment of which in real estate is not authorized by the provisions of the will creating the trust. To invest the income in the purchase of the house and lot and the giving of a mortgage for the unpaid balance of purchase money, was a breach of trust under the authority of *Mathews v. Heyward*.

If the plaintiff had notice, at the time of such breach of trust by the trustee in purchasing the house and lot, he must be held so far responsible for the trustee's breach of trust as to be regarded as a trustee for the cestuis que trust, and should be compelled to refund the \$550 cash paid by the trustee, with interest, and the cestuis que trust would not be affected by the mortgage. Had the plaintiff such notice? It appears that it was at the request of the trustee that the plaintiff conveyed the house and lot to the trustee, subject to the terms of the original trust under the will of William H. Gist. Plaintiff, by his deed, therefore became bound to take notice of the terms of the trust recited in his deed and in the will of William H. Gist. He was

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not, however, bound *to inquire beyond the trust recited in his deed and in the will, to ascertain the source from which the trustee derived the \$550 cash paid, and could only be affected by the breach of trust upon the ground that he had actual notice, or was put upon due inquiry in that direction.

The terms of the trust of which plaintiff had notice, would clearly indicate that the trustee, clothed with an almost unlimited discretion, was authorized to sell and invest proceeds of the 1,600 acres of land in Union County. Plaintiff and John Earle Bomar, the attorney who drew the papers, both testify that, according to their recollection, the trustee stated at the time that he either wanted to sell or had sold the Union County tract of land, and wanted to re-invest in the house and lot, and hence the request that the house and lot should be conveyed to the trustee, subject to the trust under the will. The defendant, David C. Gist, however, testifies that at the time he told plaintiff that the \$550 cash paid was the proceeds of rent cotton. Plaintiff and John Earle Bomar, Esq., both testify, according to their recollection, that no such statement was made by the trustee.

It seems to me that, under the circumstances, it would have been reasonable for plaintiff to conclude, either that the \$550 payment in cash was from the sale of the trust land, or that, in anticipation of the sale of the trust

land, this money was advanced by David C. Gist, to be reimbursed out of the sale to be made of the trust land. I cannot conclude from the testimony, that the plaintiff had such notice as would render him "responsible for the trustee's breach of trust," as to the rent money. In the case of Mathews v. Heyward, cited by defendants, it clearly appeared that the mortgagee had notice of the mortgagor's breach of trust, and upon this ground the mortgagee was held responsible for the breach of trust by the mortgagor.

It has been urged that if the money invested by the trustee in the house and lot had been the proceeds of the sale of the trust land, that under the authority of Mathews v. Heyward it would have been a breach of trust to encumber the property with a mortgage for the purchase money. As the only amount (\$550) paid by the trustee on the house and lot comes from rent cotton, and not from sale of the trust land, this is a hypothetical

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view of the case. But assuming that the \$550 cash paid by the trustee came from the sale of the trust land, it seems that the two cases are to be distinguished, as a large discretion was conferred upon the trustee in this case, who, under the terms of the trust, had 1,600 acres of land (at present prices worth from \$10 to \$12 per acre) with which, in the exercise of such discretion, he could at any time by sale relieve the house and lot of the mortgage. The terms of the trust under the will, of which plaintiff had knowledge, furnished this information as to the discretion and ability of the trustee at any time to prevent a sacrifice of the interests of the cestuis que trust, from the mortgage given for the balance of purchase money. No such facts appear in the case of Mathews v. Heyward. The real controversy between plaintiff and the cestuis que trust is over the \$550 of rent cotton applied as a cash payment on the house and lot by the trustee, in breach of his trust. Having held that plaintiff did not have notice of the trust character of the cash payment, he cannot be held responsible for any breach of trust committed by the trustee. It was further claimed that the purchase by the trustee was not made for the benefit of the cestuis que trust and was improvident. The defendant, David C. Gist, the only witness on behalf of the defendants, testifies that his wife was anxious for the purchase of the house and lot, in order that their children, the cestuis que trust, might enjoy the benefit of the schools at Spartanburg. I am convinced from the testimony that the house and lot was worth the \$2,200, the purchase money, and was yielding a rent of \$210 per annum. I conclude that one of the main objects of the purchase of the house and lot was to educate the cestuis que trust, and that the purchase by the trustee, under the circumstances, was not improvident. Under such circumstances, it seems to me that the

court would confirm the investment. If it should be considered improvident, it is the result of the large discretion with which the trustee is clothed by the terms of the trust.

I find as matter of fact: I. That the cash paid plaintiff by the trustee on the house and lot was derived from proceeds of sale of cotton from the trust land in Union County. II. That when plaintiff received the \$550 cash on the house and lot, he had no knowledge that it was proceeds of the sale of cotton

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from the trust land. III. That the house and lot sold the trustee by plaintiff was worth \$2,200.

I find as matter of law: I. That David C. Gist had the right, under the terms of the trust under the will of William H. Gist, to reinvest the proceeds of the sale of the trust land in the house and lot sold by plaintiff. II. That the trustee was not authorized to invest the \$550 cash, from the proceeds of cotton from the trust land, in the house and lot purchased from plaintiff, and that the same was a breach of trust. III. That the plaintiff is not responsible for the breach of trust thus committed by the trustee. IV. That plaintiff is entitled to a judgment of foreclosure upon his mortgage.

No personal judgment has been demanded against David C. Gist for any deficiency that may arise from the sale of the mortgaged premises. As the trustee has not exercised his authority to sell the trust land, this court will not order the trustee to sell the trust land to relieve the house and lot of the mortgage for the balance of the purchase money, but will direct the sale of the house and lot under plaintiff's mortgage, with a view, as far as practicable, to the protection of the rights of the cestuis que trust.

It is ordered and adjudged, that unless David C. Gist, trustee, shall in the meantime pay plaintiff the amount due upon the mortgage thereof, that the house and lot described in the mortgage of David C. Gist, trustee, to the plaintiff, William M. Bomar, dated November 3, 1883, in the city of Spartanburg, be sold; * * * that after paying the costs of this action the sheriff do apply so much of the proceeds of said sale as may be necessary to pay the balance of purchase money due plaintiff upon his mortgage debt against David C. Gist, trustee of the other defendants under the will of William H. Gist, and that he hold any surplus subject to the further order of this court.

From this decree the infant defendants appealed.

Mr. William Munro, for appellants.
Messrs. Bomar & Simpson, contra.

September 23, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Under the will of

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his father, the defendant, David C. Gist,

held certain lands in Union County in trust for his children, Laura Gist and others, his co-defendants, all of whom are minors. The terms of the trust are as follows: "For the use of his children, born and to be born, and their heirs forever, with power to said trustee to sell and convey the said tract at any time before the eldest of said children reaches the age of twenty-one years, and invest the proceeds thereof for the same uses." On November 3, 1883, the plaintiff sold and conveyed to the defendant, David C. Gist, as trustee as aforesaid, a house and lot in the city of Spartanburg for the sum of twenty-two hundred dollars, of which sum the said trustee paid five hundred and fifty dollars in cash, and executed to the plaintiff his three notes of five hundred and fifty dollars each, payable in one, two, and three years, secured by a mortgage of the premises. Upon default in payment of the first note and the interest on the other two, this action was commenced to foreclose said mortgage, the minor children of the trustee, beneficiaries under the trust, being made parties defendant.

David C. Gist, put in no answer, but the minors, by their guardian ad litem, answered, claiming that the cash payment was made with trust funds; that the land was conveyed to the trustee upon the same trusts as those declared in the will of their grandfather; that the purchase was not made for their benefit, but for the individual benefit of their trustee and as a residence for him; that said purchase was improvident and made without authority; and if carried out will result in loss of the trust money already paid; that all these things were well known to the plaintiff at the time of the purchase, and he thereby became a participant in the breach of trust committed by the trustee. They therefore demanded judgment that the purchase be rescinded, and the plaintiff required to refund to them the cash paid, with interest; or if a sale of the premises be ordered, that the said sum of money and interest be paid for the use of the minor defendants out of the proceeds thereof, before anything is paid to the plaintiff.

The testimony shows conclusively that the cash payment made by the trustee was made with money derived from the rents of the trust lands in Union; but there was a con-

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dict of testimony as to whether this fact was known to the plaintiff at the time of the purchase, he claiming that he was led to believe by the trustee that the money was derived from the sale of the Union lands, and not from the rents of those lands. The testimony also shows that the trustee had the means of supporting his children and providing them with a house, and hence he had no right to use their trust funds for that purpose. The manifest object of the purchase of the house and lot in Spartanburg was to obtain a family residence with access to the schools in that city, though it appears

that there was a residence on the Union lands, which had been occupied by the family, within reach of good schools, and we think it pretty clear that the real purpose of the purchase was, not so much as an investment of the trust funds, as it was to obtain the superior social and educational advantages afforded by a residence in the city.

The Circuit Judge found as a matter of fact that the cash payment was made out of the proceeds of the rents of the trust lands, but that this was not known to the plaintiff at the time of the purchase. And as matter of law he found that while the trustee, under the terms of the will, had the power to sell the Union lands and reinvest the proceeds thereof, or so much thereof as might be necessary for the purpose, in the purchase of the house and lot in Spartanburg, he did not have the power so to invest the rents of those lands, and such an investment was, on his part, a breach of trust; but that the plaintiff, having no notice that the cash payment was made out of the rents of the lands, could not be implicated in such breach of trust. He therefore rendered judgment that the house and lot be sold and the proceeds, after paying the costs of the action, be applied to the payment of any balance that may be due to the plaintiff on the purchase money, and that any surplus that may then remain be held subject to the further order of the court.

From this judgment the minor defendants appeal upon the several grounds set out in the record, which need not be repeated here, as in our judgment the whole case turns upon the single inquiry whether it was a breach of trust on the part of the trustee to use trust funds in making the cash payment on the property purchased, and at the same time en-

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cumbering the property with a mortgage to secure the payment of the balance of the purchase money. We do not suppose that there can be a doubt that it would be a breach of trust for a trustee to invest the trust funds in lands already encumbered with the lien of a mortgage, and we are unable to perceive the difference in principle between such an investment, and one in which, at the time of investment, the property is encumbered with a lien entitled to priority of payment; for in both cases the trust funds are imperilled, and unless the liens are removed, may be entirely lost. We understand the rule to be that where a vendor receives trust funds, knowing at the time that they are trust funds, in part payment of land, and takes from the trustee a mortgage to secure the payment of the balance of the purchase money, he thereby becomes a trustee to the extent of such cash payment, and when he forecloses his mortgage for the unpaid purchase money he must first account to the cestui que trust for the trust funds—the cash payment—before he can apply any portion of the proceeds of the sale of the

mortgaged premises to the unpaid purchase money. *Mathews v. Heyward*, 2 S. C., 239; *Elliott v. Mackorell*, 19 S. C., 238.

The fact that the trustee in this case held other trust property—the Union lands—by the sale of which the balance of the purchase money might have been paid, cannot affect the result. For it may be, and the testimony seems to indicate that such would have been the fact, that it would have required a sacrifice of the Union lands, or at least a great loss on their sale, if the trustee had been forced to sell them to obtain the means of paying the balance of the purchase money due on the mortgaged premises, in time to prevent a judgment of foreclosure; and thus, to save one portion of the trust funds, another portion would be jeopardized and perhaps sacrificed. Such a proposition certainly cannot be maintained. The breach of trust consisted in the investment of trust funds in property which was at the same time encumbered with a lien; and it was then that the plaintiff became trustee for so much of the trust funds as were used in making the cash payment, and as such must account for the same out of the proceeds of the sale of the property in which such trust funds were invested.

Under this view of the case it is wholly

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immaterial whether *the plaintiff, at the time of the purchase, knew that the funds used in making the cash payment were derived from the rents or the sale of the Union lands. He knew that they were trust funds, and that was all that was necessary to affect him with the trust. We think, therefore, that the Circuit Judge erred in decreeing that the proceeds of the sale of the mortgaged premises, after payment of the costs of the action, should be applied to the payment of the balance due the plaintiff for the purchase money, without first providing for the refunding of the trust funds used in making the cash payment, with interest thereon, to the trust estate.

The judgment of this court is, that the judgment of the Circuit Court be modified, in accordance with the views herein announced.

25 S. C. 348

HALL & CO. v. KLINCK.

(April Term, 1886.)

[1. *Corporations* ¶265.]

The liability of the stockholders of a corporation to its creditors being a creature of statute, the nature and extent of such liability depends upon the special terms of the statute, in each particular case. In this case the terms of the charter being that "each stockholder shall be jointly and severally liable to the creditors thereof in an amount besides the value of his share or shares therein, not exceeding ten per cent. of the par value of the share or shares held by him;"—one of the creditors might bring his individual action at law against one

of the stockholders, to recover his debt to the extent of ten per cent. of the par value of the defendant's shares.

[Ed. Note.—Cited in *Fleuniken v. Marshall*, 43 S. C. 82, 20 S. E. 788, 28 L. R. A. 402; *Buist v. Melchers*, 44 S. C. 63, 21 S. E. 449; *Sadler v. Nicholson*, 49 S. C. 9, 10, 26 S. E. 893; *Parker v. Carolina Savings Bank*, 53 S. C. 589, 31 S. E. 673, 69 Am. St. Rep. 888; *Lauraglen Mills v. Ruff*, 57 S. C. 55, 58, 59, 35 S. E. 387, 49 L. R. A. 448.

For other cases, see *Corporations*, Cent. Dig. § 1122; Dec. Dig. ¶265.]

[2. *Corporations* ¶237.]

Money advanced with no time stipulated for repayment is instantly due, and therefore is a demand payable within a year. And this is a question of fact, which, in a law case, is concluded by the finding of the Circuit Court.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 908; Dec. Dig. ¶237.]

[3. *Corporations* ¶240.]

A creditor of the corporation, even though an officer or agent thereof, may avail himself of this provision of the charter. And, it would seem, that a stockholder, if a creditor, might also enforce his demand against a co-stockholder; but in this case the creditor, a partnership, was not a stockholder, notwithstanding all the parties were.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 936; Dec. Dig. ¶240.]

[4. *Corporations* ¶262.]

Neither a compromise made by plaintiff with all the other stockholders, which to no extent increased the liability of defendant, nor an offer by plaintiff to compromise with de-

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fendant, which was refused, affected *plaintiff's right to recover from defendant the full amount due by him under the terms of the charter.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1082; Dec. Dig. ¶262.]

Before Pressley, J., Charleston, July, 1885. The opinion fully states the case.

Messrs. Mitchell & Smith, for appellant. Messrs. Smythe & Lee, contra.

September 23, 1886. The opinion of the court was delivered by

Mr. Justice MEYER. This was an action brought by G. Oliveras Hall, as survivor of W. P. Hall & Co., against the defendant as a stockholder in the Kiawah Phosphate Company, to recover ten per cent. of the amount of his stock under one of the provisions of the charter of said company. It appears that the Kiawah Phosphate Company was formed under the general law authorizing the formation of certain classes of corporations and received its charter from the clerk of the court on January 9, 1882. The capital stock of said company was seventy-five thousand dollars, divided into shares of five hundred dollars each, of which the defendant, at the time of the formation of said company, and ever since, held ten shares. The firm of W. P. Hall & Co. was not a stockholder, but the individuals composing said firm were all stockholders, not, however, in the same proportions as they

were interested in the firm of W. P. Hall & Co. One of these individuals, F. P. Salas, was the president, and another, W. P. Hall, was one of the directors of said company. The firm of W. P. Hall & Co. were duly appointed general agents of said company, and as such were charged with the financial affairs of the company, under the direction of the board of directors. These financial agents were authorized by the board of directors from time to time to borrow money for the use of the company as occasion might require, and under this authority the firm of W. P. Hall & Co. from time to time made large advances to the Kiawah Phosphate Company, exceeding in the whole the sum of fifty thousand dollars.

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*The operations of the company proving unsuccessful, it was determined to sell out the property and settle up its affairs. Accordingly the property was sold, and after applying the proceeds of the sale to the amount due W. P. Hall & Co., there still remained a very considerable balance due to them. To meet this balance, resort was had to the liability of the stockholders under one of the provisions of the charter, which will hereinafter be set out. At first it was erroneously supposed that this liability was five per cent. of the stock held by each stockholder, and after some had settled upon that basis, it was ascertained that the correct amount of the liability was ten instead of five per cent. After this discovery was made, and after some negotiations, the plaintiffs agreed, by way of compromise, to accept five per cent. In discharge of the stockholders' liability, provided that amount was paid; otherwise they would claim the ten per cent. Accordingly all the stockholders, except the defendant, paid five per cent., and this still left a balance of over four thousand dollars due by the company, for which balance suit was brought by W. P. Hall & Co. against the company and judgment recovered and the execution issued thereon was returned wholly unsatisfied.

After the defendant had been several times offered the privilege of settling his liability at five per cent., as the other stockholders had done, and notified that if he refused to accept this offer, suit would be brought in which ten per cent. would be demanded, and after his refusal to accept such offer, this action was commenced. It appeared in evidence from the books of the company that W. P. Hall & Co. were the only creditors of the company, and the testimony also showed that even if all the stockholders had paid ten instead of five per cent. of their stock, there would still be a balance due to the plaintiffs exceeding the amount now claimed from the defendant.

The case was docketed on calendar No. 1, and upon the call of that calendar a motion was made by the defendant to transfer the

case to calendar No. 2, upon the ground "that it was properly a case in equity, to which all the creditors and all the stockholders should be parties." The Circuit Judge refused the motion, holding that "the provisions of law applicable to the charter involved in this case differ from those of

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every other decided case *which I have been able to examine on same subject. They seem clearly to intend that every stockholder, to the extent of his liability, is subject to an action at law by any creditor who, after due effort, has failed to collect his debt from the company."

A jury having been waived, the case was tried by the court, when Judge Pressley, after hearing the evidence and the argument, rendered judgment in favor of the plaintiffs, saying: "The debt and insolvency of the company are proved. Plaintiff is sole creditor, and defendant is the only stockholder who has not settled his liability. The only serious issue of fact in the case is whether plaintiffs' debt was payable within a year from the time it was contracted. It was payable on call; the company had the right to pay, and the creditor the right to demand payment at pleasure—that I regard as a debt payable within the year."

From this judgment defendant appeals upon the several grounds set out in the records, which raise the following questions: 1st. Can this action be maintained at law, or is the remedy in equity alone where all the creditors and all the stockholders can be made parties? 2d. Was the debt due plaintiffs payable within a year? 3d. Does the stockholders' liability, under the charter, attach in favor of officers or co-stockholders in the company? 4th. Can the defendant be made liable for more than five per cent. of his stock?

As is said by Mr. Chief Justice Waite in *Terry v. Little*, 101 U. S., 217 [25 L. Ed. 864]: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is, therefore, what liability has been created. There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration. * * * Undoubtedly, under the provisions of some charters, suits at law may be maintained by one creditor against one or more of the stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability."

To determine, therefore, the first question presented by the grounds of appeal, we must

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look to the particular phraseology of *the statute creating the liability in this case.

That statute is now incorporated in the General Statutes as section 1362, and so much of it as relates to the questions here involved, reads as follows: "Each stockholder in the said corporation shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent. of the par value of the share or shares held by him at the time the demand of the creditor was created: Provided, that such demand shall have been payable within one year." Now, in the particular phraseology here used, several things are observable. The language is each stockholder—not the stockholders generally; the liability is joint and several, not joint only; the amount of the liability is a fixed and definite sum, not proportionate to the amount of debts due or the liability of others. In fixing the time to which reference must be had to ascertain the amount of the liability of each stockholder, we find the singular and not the plural number used—ten per cent. of the par value of the shares "held by him at the time the demand of the creditor was created." And, finally, in the proviso the singular and not the plural number is again used: "Provided that such demand shall have been payable within one year."

From this analysis of the language of the section it seems clear that where there is a creditor of a corporation holding an unsatisfied demand against it, which was payable within one year, a several liability is fixed upon each stockholder to pay such demand to the extent of ten per cent. of the par value of the shares held by him at the time such demand was created. Such liability rests upon contract, implied from the acceptance of a charter containing such provision (*Sullivan v. Sullivan Manufacturing Company*, 14 S. C., 494; 20 S. C., 79; *Flash v. Com.*, 109 U. S. 371 [3 Sup. Ct. 263, 27 L. Ed. 966]), and presents a clear case for enforcement by an action at law. The fact that under this construction of the statute it is barely possible that a single stockholder might be required to pay the total balance due by an insolvent corporation, after exhausting all of its assets, cannot affect the question. Our inquiry is limited to what is the proper construction of the language used by the legislature, and we have no power or disposition to question the policy

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of any of its acts. The question for *us to determine is, what is the remedy given to a creditor of a corporation against the stockholders by the act in question? If the remedy given operates harshly or inequitably as between the stockholders themselves, it is for them, and not the creditors, to invoke the aid of that tribunal which has the power to adjust the equities amongst themselves. *Ogilvie v. The Knox Insurance Company*, 22 How., 380 [16 L. Ed. 349].

So, too, the fact that under the construction which we have adopted, it is possible that one creditor may acquire an advantage over another by promptness of action, does not strike us as entitled to much, if any, consideration. It will be observed that the section of the act which we are called upon to construe, unlike many others which were designed to fix an individual liability upon the stockholders of a corporation for the protection of its creditors, contains no language indicating a purpose that the liability of the stockholders shall constitute a common fund to be applied to the payment of the creditors in proportion to the amount of their several demands. On the contrary, it fixes a liability to a definite, specified amount upon each stockholder to pay the demand of any creditor which shall have been payable within a year. It is, therefore, like the ordinary case of several creditors having demands against the same person, where, usually, the prompt and vigilant acquire an advantage over the dilatory and indifferent.

As has already been said, it is not to be expected that the various cases on this subject can be reconciled, because the phraseology used in the several charters which have been brought under review differ materially in declaring the liability of stockholders and directors, or trustees of a corporation. Hence we do not think that the cases mainly relied upon by appellant are applicable. For example, in *Pollard v. Bailey* (20 Wall., 520 [22 L. Ed. 376]), the language of the charter was: "Individual stockholders, having shares in said bank, shall be bound respectively for all the debts of the bank in proportion to their stock holden therein;" and the fact that the provision was for a proportionate liability, and not for a fixed sum, was held to be sufficient to show that such a liability could only be enforced by a proceeding in equity, to which all the creditors and all the stockholders

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should be made *parties, so as to enable the court to determine the proportionate liability of each stockholder. But in that very case the distinction between a provision for a proportionate liability, and one in which no such feature appears, was expressly recognized by the Chief Justice in delivering the opinion of the court, for he says: "The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts." How much more pointed would the distinction be if the charter provided, as in the case now under consideration, that each stockholder should be severally as well as jointly liable to the creditors for ten per cent. (a fixed and definite sum) of the par value of the shares held by him at the time the demand of the creditor was created; provided such demand was payable within a year.

So in *Terry v. Tulman* (92 U. S., 156 [23 L. Ed. 537]), the provision of the charter was for a proportionate liability, and the remarks just made will dispose of that case. But, in addition to this, it may be observed that the point was not raised in *Terry v. Tulman*; but the justice who delivered the opinion of the court simply remarked that under the case of *Pollard v. Bailey*, *supra*, the proper proceeding was in equity. In *Hornor v. Henning* (93 U. S., 228 [23 L. Ed. 879]), the provision of the charter was that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto, shall be personally and individually liable for such excess to the creditors of the company." So that there the liability was not for any fixed and definite sum, but for whatever amount the debts might be found to exceed the capital stock; and it was held that the true construction of the act was that the trustees who assented to such an increase of indebtedness beyond the amount of the capital stock were to be held guilty of a breach of trust, for which they were accountable to the creditors. Of course, such a liability could only be enforced by a proceeding in equity, and the case was again distinguished from those cases in which it had been held that an action at law might be maintained against a single stockholder by a single creditor; for there the liability of the stockholder, under the statute, is several and is limited to the amount

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of his stock, a fixed sum easily ascertained. It is very manifest, therefore, that the case of *Hornor v. Henning* is not applicable to the case now under consideration.

In *Stone v. Chisolm* (413 U. S., 302 [5 Sup. Ct. 497, 28 L. Ed. 991]), the provision of the charter was as follows: "The total amount of debts which such corporation shall at any time owe shall not exceed the amount of its capital stock actually paid in; and in case of excess, the directors, in whose administration it shall happen, shall be personally liable for the same, both to the contractor or contractors and to the corporation." The question was whether under this charter a single creditor could maintain an action at law against one or more directors, or whether such creditor must proceed by a creditor's bill in equity. The court held that the case could not be distinguished from *Hornor v. Henning*, and that the proper proceeding was in equity. We do not see, therefore, how the case of *Stone v. Chisolm* can be regarded as sustaining the view contended for by appellant.

On the other hand, the case of *Flash v. Conn* (109 U. S., 371 [3 Sup. Ct. 263, 27 L. Ed. 966]), cited by the counsel for respondents, seems to us more in point. The language of the charter there brought under review was as follows: "All the stockholders

of every company incorporated under this act shall be severally, individually, liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section." Now, although this language is not so strong as that used in the charter now under consideration, yet the court held that a single creditor could, under that charter, maintain an action at law against a single stockholder.

In delivering the opinion of the court, Mr. Justice Woods uses this language: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of *Pollard v. Bailey*, 20 Wall., 520 [22 L. Ed. 376]; *Terry v. Tulman*, 92 U. S., 156 [23 L. Ed. 537], to which we are referred in

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its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was, therefore, only liable for his proportion of the debts. This proportion could only be ascertained upon an account of the debts and stock, and a pro rata distribution of the indebtedness among the several stockholders. This the court held could only be done by a suit in equity. But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

It seems to us that the intention of the legislature, as derived from the language used in the charter now under review, was to protect the interest of creditors, and not stockholders, of the corporation, by affording the former a cheap and expeditious mode of enforcing the payment of their debts, thus ensuring, as far as practicable, the utmost good faith and the most prudent management on the part of those interested in corporations which, by virtue of associated capital, energy, and brains, necessarily acquire large advantages over the individual citizen. If the liability secured by this act could only be enforced by a proceeding in equity, oftentimes tedious and expensive, it would amount to a practical denial of the security intended to be afforded, in many cases, for creditors holding small demands would be deterred, by the expense and delay which

they would have to encounter, from availing themselves of the remedy provided. We think, therefore, that there was no error on the part of the Circuit Judge in holding that an action at law could be maintained in this case.

The second question being a question of fact, and this being an action at law, is of course concluded by the finding of the Circuit Judge. We may add, however, that we do not see how Judge Pressley could have reached any other conclusion. We suppose there can be no doubt that in any view of the testimony, an action could have been brought by W. P. Hall & Co. at any time within a year, to recover payment of the debt

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due them by *the Phosphate Company, for it is conceded on all hands that no definite credit was given for any definite time; and if so, it must necessarily follow that the debt was payable within a year, for certainly no action could be maintained to recover payment of a debt until the same had become payable.

As to the third question presented by the grounds of appeal, we do not see how a doubt can be entertained. The provision in the charter is in favor of all creditors without distinction, and, therefore, if an officer or agent of a corporation is capable of becoming its creditor, we see no reason why the plaintiffs may not avail themselves of this provision of the charter, even though they may have been officers or agents of the company. That an officer or agent of a corporation may become its creditor, is conclusively shown by the following cases: *Railroad Company v. Claghorn*, Speers Eq. 545; *Farrow v. Bivings*, 13 Rich. Eq., 25; *Albright v. Town Council*, 9 Rich., 399; *Twin Lick Oil Co. v. Marbury*, 91 U. S., 587 [23 L. Ed. 328]. It is true, as is said in the case last cited, that a contract made by an officer of a corporation with it, is like the dealings of one occupying a fiduciary relation with the subject of his trust or agency, subject to the jealous scrutiny of the court to see that fair dealing has been observed; yet when such a contract is not open to any imputation of fraud or want of conscientious fairness, it stands as any other contract with a stranger. The case of *Wardell v. Railroad Company*, (103 U. S., 651 [26 L. Ed. 509]), relied on by appellant's counsel, presented a clear case of fraud on the part of the directors of the company, and therefore the contract was set aside.

We have not deemed it necessary to inquire whether a stockholder or member of a corporation can avail himself of the remedy provided by the charter in this case against the other stockholders, for the evidence shows that the firm of W. P. Hall & Co. was not a stockholder in the company. The fact that all the individuals composing

the firm of W. P. Hall & Co. were stockholders cannot alter the case. In law the firm is a distinct person, different from the individuals composing it, with different rights, privileges, and liabilities, and must not be confounded with them. But even if the firm had been a stockholder, it would seem from the case of *Farrow v. Bivings*, above cited,

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*that it might still enforce this liability against the other stockholders.

The only remaining inquiry is, whether the defendant can be made to pay more than has been accepted, by the creditor, from the other stockholders by way of compromise. We do not think that anything can be plainer than that where a creditor offers a compromise which has been rejected, he is remitted to his original legal rights, especially when, as in this case, the offer is accompanied with a notice that if it is not accepted, the creditor will claim his full legal rights. The fact that the creditor has chosen to accept from others only a portion of their liability in full satisfaction of his demand against them, works no loss or injury to the defendant, for the evidence shows that even if the other stockholders had paid the full amount of their liability as fixed by the statute, there would still be a balance due to the plaintiffs largely in excess of the amount now claimed from the defendant as his liability under the express terms of the statute. So that whether the other stockholders have paid all or none of the liability imposed upon them, is a question which does not concern the defendant, but is a matter entirely between the plaintiffs and the other stockholders. If it had appeared that, by reason of the acceptance by the creditors from the other stockholders of only one-half of their liability, the amount necessary to be paid the plaintiffs by the defendant had been increased, then, perhaps, a different view might have been taken; but as this did not appear, it is not necessary for us to consider the case in that aspect.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 358

SHANKS v. MILLS.

(April Term, 1886.)

[1. *Pleading* ⚡369.]

An action for partition of land among the remaindermen in fee, after the death of the life tenant, and for an account and distribution of the estate of such life tenant, improperly joins two causes of action; and the Circuit Judge did not err in requiring the plaintiff to elect between the two.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1199; Dec. Dig. ⚡369.]

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[2. *Wills* ⚡551.]

*Under a devise to executors in trust for A. for life, "and at her death to the use of all

her five children and those she may hereafter have, and who may be then living, in fee simple," the children of A. living at her death, take, to the exclusion of a grandchild, whose parent was one of A.'s children, living at the date of the will and of testator's death, but who predeceased A.

[Ed. Note.—Cited in *Tindal v. Neal*, 59 S. C. 19, 36 S. E. 1004; *Tindal v. Richbourg*, 91 S. C. 410, 74 S. E. 932; *Dillard v. Dillard*, 95 S. C. 88, 78 S. E. 1037; *Id.*, 80 S. E. 849.

For other cases, see *Wills*, Cent. Dig. § 1188; Dec. Dig. *Ⓒ*551.]

Before Pressley and Cothran, JJ., Newberry, November, 1884, and February, 1885.

The order of Judge Pressley involved in this appeal is stated in the opinion of this court. Judge Cothran's decree was as follows:

The complaint of the plaintiff, the grandniece of the testator, John Paysinger, demands partition of the tract of land devised to her mother for life, the plaintiff claiming as a tenant in common with her uncle and aunts the share of the land to which her father, Martin, would clearly have been entitled if he had survived his mother, Mary Christina Mills. The clause of the will of John Paysinger to be construed is as follows: * * * Two of the five children of Christina, who were living at the time of the making of John Paysinger's will, and at the time of her death, have since died, one of whom, Martin, was the plaintiff's father.

If we were at liberty to interpolate the familiar expression, "the child or children of any child dying in the life-time of the mother (the life tenant) to take the share the parent would have been entitled to," &c., the claim of the plaintiff here could be sustained; but in the very teeth of the testator's expression—"and who may then be living," "the legal title (then) to vest in said surviving children," it would be pragmatism and unwarrantable to do so. Nor do I know of any technical and arbitrary rule of construction which would require the court to do such violence to the plain import of the words used by the testator. Authorities almost innumerable might be cited, but I am not familiar with a single one that would sustain the plaintiff's claim. *Bannister v. Bull* (16 S. C., 227), is one of the latest in which the term children used in a devise as here has been construed. It seems to me to be conclusive of this case.

The estate given to Mrs. Christina Mills

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was not conditional, *it was an estate for life, the title to remain until her death in the executors, per formam doni—proprio vigore, "without any act on the part of my executors," "the title was to vest in said surviving children." I do not see how the action can be maintained. It follows, therefore, that the complaint must be dismissed. And it is so ordered and adjudged, with

leave to the defendants to enter up judgment and issue execution against the plaintiff for the costs.

Mr. M. A. Carlisle, for appellant.

Mr. Y. J. Pope, contra.

October 11, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. John Paysinger died in 1844, leaving a will, by which he provided as follows: "I wish my executors to hold the legal title (which is hereby vested in them) to the tract of land on which my sister, Christina Mills, lives, purchased from Moses Riley, to the sole and separate use of my said sister during her life, and at her death to the use of all her five children, and those she may hereafter have, and who may be then living, in fee simple, the legal title to vest in said surviving children, without any act on the part of my executors," &c. At the time the will was written, and also at the death of the testator, Christina Mills had five children, but in 1848 one of them, Martin Paysinger, died, leaving a widow and one child, Mary J. Shanks. The life tenant, Christina Mills, died in 1881, leaving only three surviving children, Archy B. Mills, Mary Nichols, and Juliana Taylor, but one grandchild, Mary J. Shanks, daughter of Martin, the predeceased son, who instituted this action for the double purpose of requiring the executors of the will of Christina Mills to account for her estate, and also to partition the tract of land given as aforesaid by the will of John Paysinger to the said Christina for life with limitation over; claiming that, although her father, Martin, died during the life of the said Christina, she is entitled as tenant in common with her surviving uncle and aunts to the share her father, Martin, would have been entitled to, had he survived Christina, the life tenant.

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*The "surviving children" claimed that the account of the estate of Christina was in no way connected with the right of partition as to the land, which was purely a question under the will of John Paysinger, and therefore demurred upon the ground that the two causes of action were improperly united. Judge Pressley held with the defendants, and sustained the demurrer, but gave the plaintiff permission to elect which cause of action she would proceed upon. She elected to proceed for partition of the land, and the complaint was dismissed as to the claim for account. The plaintiff excepted, and the case proceeded for partition. Afterwards the cause for partition came on for a hearing before Judge Cothran, who dismissed the complaint.

The plaintiff appeals to this court, both from Judge Pressley's order sustaining the demurrer and requiring the plaintiff to elect upon which cause of action she would pro-

ceed: and also from Judge Cothran's decree dismissing the complaint: "I. Because Judge Pressley erred in sustaining defendants' demurrer, and compelling the plaintiff thereby to elect the branch of the case yet to be determined. II. Because Judge Cothran erred in dismissing the plaintiff's complaint. III. Because the judge erred in construing the will of John Paysinger to mean only those children of Christina Mills who should be living at her death. IV. Because the judge erred in construing that the will gave to Christina Mills not a conditional estate, but an estate for life, the title to remain until her death in the executors, and that the title was to vest in the surviving children, to the exclusion of the grandchildren of Christina Mills, who survived her grandparent. V. Because the judge erred in not holding that, under the will, the plaintiff, through her father, Martin, with the defendants, took a vested remainder in the land described in the will," &c.

First, as to the demurrer. The argument of the appellant's counsel proceeds on the assumption that the land belonged to Christina in fee, and after her death descended to her heirs as such. If this were true, the argument would be unanswerable, but the fact is otherwise. Christina had only a life estate in the land, and that of course ended at her death. It was not a case for the application of the rule in Shelley's case. None of the parties held as the heirs of Christina, but,

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on the contrary, as devisees under the will of John Paysinger; and the construction of his will had no such connection with the existence or nonexistence of personal estate of Christina as to authorize a union of the two causes of action. We see no error on the part of Judge Pressley in sustaining the demurrer for misjoinder of causes of action.

Second. The plaintiff's claim for partition of the land must be determined by the construction of the will of John Paysinger. What did the testator mean by the words: "And at her death (Christina) to the use of all her five children, and those she may hereafter have and who may be then living, in fee," &c.? Although the children of Christina living at the time the will was executed were numbered (5), they were not named or described, and those were added who might be afterwards born; so that we take it this was a limitation over to a particular class of persons at a particular time. In this view the rule is, that while any of the class remain, they take the whole interest, excluding the representatives of any of the class who may have died before the time indicated for distribution. *Clark v. Clark*, 19 S. C., 350. Besides, ordinarily, the word "children" means the immediate offspring, and does not include "grandchildren." *Bannister v. Bull*, 16 S. C., 220, and authorities there cited.

But in addition to these general rules of construction, the devise over in this case, by its express terms, was to take effect at the time of the death of Christina, and was limited to her children "who may be then living, the legal title to vest in said surviving children without any act on the part of the executors," &c.

The judgment of this court is, that the judgments of the Circuit Court be affirmed.

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GOURDIN v. TRENHOLM.

Ex parte FIRST NATIONAL BANK.

(April Term, 1886.)

[1. *Guaranty* ⇨106.]

Two co-guarantors on a number of bonds fixed by agreement as between themselves the amount of their relative liabilities, and bound themselves to pay each to the other any sum

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that might be paid by either *in excess of his portion, and interchangeably executed mortgages to secure the fulfillment of this agreement. *Held*, that one of these guarantors had no right of action against the other until his payments exceeded the portion so assumed by him, and then only for the amount of such excess.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 116; Dec. Dig. ⇨106.]

[2. *Guaranty* ⇨79½; *Judgment* ⇨735.]

One of these guarantors having, after maturity, endorsed upon the bonds taken up by his co-guarantor (but to an amount less than his proportion) an acknowledgment that he (the endorser) was liable for a proportionate part thereof, and that his mortgage was a security therefor, such acknowledgment was without consideration and not binding, and certainly could not affect the rights of his then existing creditors. This point was not decided nor even considered by the Supreme Court of the United States in construing this agreement in *Hampton v. Phipps*, 108 U. S., 260 [2 Sup. Ct. 622, 27 L. Ed. 719].

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 94; Dec. Dig. ⇨79½; *Judgment*, Cent. Dig. § 1263; Dec. Dig. ⇨735.]

[3. *Mortgages* ⇨27.]

As a consideration is necessary to the validity of a contract, it follows that an equitable mortgage based upon an agreement without consideration cannot be set up—certainly not to the prejudice of creditors.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 43, 45–53, 55; Dec. Dig. ⇨27.]

[4. *Principal and Surety* ⇨194.]

A surety cannot enforce contribution from his co-surety until the common debt, for which they are both liable, has been fully paid or satisfied.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 619; Dec. Dig. ⇨194.]

[5. *Bonds* ⇨74.]

These bonds, if ever negotiable, lost this quality after maturity; and being paid by one of these guarantors and then reissued by him, this reissue amounted only to an assignment of his rights thereunder.

[Ed. Note.—For other cases, see *Bonds*, Cent. Dig. § 73; Dec. Dig. ⇨74.]

6. Question reserved, whether a surety who pays a bond debt in the lifetime of his co-surety, ranks as a specialty creditor in claiming contribution from the estate of the deceased co-surety.

Mr. Chief Justice Simpson concurred in the result.

Before Cochran, J., Charleston, November, 1885.

The facts of this case are stated in the opinion. The report of Master Sass upon these facts was as follows:

The present claim is made on behalf of the holders of the B bonds, bearing the special endorsement, to be paid ratably from the fund of \$11,535.60, above stated to be the product of the sale of the mortgaged property of Welsman, in preference to the holders of other B bonds, likewise guaranteed by Welsman & Trenholm, but not bearing the same endorsement. The claim for this preference is resisted by the holders of the unendorsed B bonds, and it is upon this question that I have now to pass.

It is urged on behalf of the holders of unendorsed B bonds, that the special endorsement itself shows that Mr. Welsman was under a misapprehension as to his liability,

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when he made the endorsement; that as a matter of fact he was not liable, as therein stated, for 31-71 of each bond, but for \$310,000 of the whole debt of \$710,000; and that the liability of 31-71 applied to another class of indebtedness, as will be seen by reference to the printed memorandum of agreement in evidence; that under said agreement Welsman was not bound to contribute anything to any sums that Trenholm might pay, until Trenholm had paid, and over paid, the amount of \$400,000 for which he (Mr. Trenholm) was liable. And it is contended that this was such a misapprehension and mistake as will be regarded in equity as a ground for relief.

With this view I cannot agree. It must be observed that the fraction of 31-71 exactly expresses the proportion which \$310,000 bears to the whole debt of \$710,000, and there is therefore no necessity to suppose, because of the use of that fraction, that any confusion existed in Welsman's mind between his two liabilities upon the two classes of bonds. Granting the intention to apply the proportionate liability to each bond as stated in the endorsement, the fraction used is the proper fraction to express it. It will not be contended that Welsman's liability for the \$310,000 was subsequent to that of Trenholm for the \$400,000. They both subsisted together, and the proportion applied practically to each bond as fully as it did to the whole sum, if the parties chose so to apply it. I cannot therefore hold that Mr. Welsman "did not know what he was doing," and was inops consilii when he placed this endorsement upon these bonds. It seems to me from an

examination of the whole matter, that he intended to do what the plain language of the endorsement implies, to acknowledge his liability to Mr. Trenholm for 31-71 of each bond bearing the endorsement, and to declare Mr. Trenholm entitled pro tanto to the security of the general mortgage.

But whatever was Mr. Welsman's intention, the mortgages in question have received judicial construction from the highest court in the land, and it has been decided by the Supreme Court of the United States that the condition of the mortgages has not been broken, and that neither surety can claim indemnity against the other for an overpayment. As the bearing of this endorsement upon the question of the mortgages was clear-

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ly stated in the report of special master Lord as giving a practical construction of the contract by the parties themselves, and as this construction has been overruled by the decree of the Supreme Court reversing the report and decree below, I must hold the question to be res adjudicata, and it becomes necessary therefore to interpret the endorsement conformably with and in the light of the decision of the Supreme Court.

There is but one method by which the two can be reconciled. It must be taken for granted that the security of the mortgage spoken of in the endorsement was to take effect only when the condition of the mortgage should be broken, that is to say, when in the course of this process of redeeming the bonds one by one, the point should be reached at which Mr. Trenholm should have redeemed more than his proportion of the joint debt. This point never having been reached, the condition of the mortgage has never been broken, and Mr. Trenholm's right to enforce its security never took effect. So regarded, the endorsement becomes simply an acknowledgment by Welsman to Trenholm that the former's liability upon the bond had been paid by the latter.

Such being, then, the purpose and effect of the endorsement, with what rights did it clothe Mr. Trenholm? Plainly with the rights only of a simple contract creditor. Trenholm and Welsman were co-sureties upon the B bonds. They were jointly and severally liable for the payment of the whole issue. As between themselves they might agree to divide their liability in whatever proportions they pleased, but to the bondholders they were jointly and severally liable. Now, if one of two co-sureties pays the surety in default his proportion of the debt, but such claim ranks only as a simple contract debt. "A surety paying a bond debt will be treated in marshalling assets as a mere simple contract creditor." Story Eq. Jur., § 499 (d), and cases quoted. In Bank v. Adger, 2 Hill Eq. 266, Judge O'Neill says: "It was an entire debt due by all or either

of the obligors; payment of it by one of the co-sureties entitled him to contribution as for so much money paid, laid out, and expended, and the debt thus due to him by his co-surety is a mere simple contract. This was ruled by Lord Chancellor Eldon in *Copps v. Middleton*, 1 Turn. & R., 224."

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*Mr. Trenholm could not recover upon the bond against Mr. Welsman's estate, for he had paid the bond, and in the language of Lord Eldon, "it is gone and cannot be set up." Nor can the mortgage avail him, for it has been declared by the highest authority to be inoperative and unenforceable. He must rank, therefore, as a simple contract creditor, and his assigns can have no higher right than he himself had. The contention of the endorsed bondholders that they are bona fide holders of negotiable securities for value without notice cannot be sustained. The endorsement was placed upon the bonds after maturity, and the holders took them subject to all the equities between the parties. The very terms of the endorsement showed that the bond had been paid by Mr. Trenholm and had been re-issued as his individual liability. How, therefore, could such a bond be entitled to priority of payment out of the estate of the original guarantor over other bonds of equal date and rank which had not been paid? This court is administering the assets of Mr. Welsman's estate among his creditors. I cannot see how the specialty creditors, holders of the original issue of B bonds, guaranteed by Mr. Welsman, can be postponed in such administration to the holders of certain others of the same bonds through and by means of any act of such guarantor subsequent to the original guarantee.

Even if the endorsement was intended to have the effect of an equitable mortgage, as has been contended, it could not avail as against the bondholders. The endorsement of a negotiable security after it is due and dishonored, is a new and independent contract between the immediate parties. The holders of these endorsed bonds stand here, by their own claim, as Mr. Trenholm's assigns, and they can urge no higher claim than could have been set up by Mr. Trenholm himself. I hold, therefore, that the bonds bearing the special endorsement are not entitled to any preference or priority over the other B bonds proved in this case. And I so report.

Upon exceptions to this report, his honor filed the following decree:

After careful consideration of the pleadings in this case, the report of the master, the exceptions thereto, and the exhaustive

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*arguments of counsel, I am constrained to adopt the conclusions of the master as enunciated in his very able report.

I do not agree altogether with him in the view which he has taken of the nature and

effect of the special endorsements made by James T. Welsman upon the bonds held and produced by the intervenors. These endorsements seem to me to be more in the nature of a memorandum for future and convenient use by Mr. George A. Trenholm, after he should have consummated the gigantic and impracticable scheme upon which he had entered, of paying off the indebtedness of \$710,000, which he was able only partly to accomplish. But without elaborating my views upon this point, which would in the end consist with the master's conclusions in the main issue, I deem it sufficient and altogether consistent with my own convictions, to affirm his report and to make the same the judgment of this court. And it is so ordered and adjudged.

From this decree the First National Bank of Charleston and the South Carolina Loan and Trust Company appealed upon the following exceptions:

1. Because it is error of the presiding judge to confirm the report of the master, and make it the judgment of the court; and this because of matters outside of the case made in the pleadings; and which are not legally admissible in the case of a contract, expressed in terms clear and without ambiguity; and those terms being the highest evidence of the intention of James T. Welsman in the contract so made, as also of the proper interpretation of it.

2. Because the master in his report erred, and the presiding judge, in confirming that report, also erred, in holding that this case was decided by the Supreme Court of the United States in the case of *Hampton, Adm'r, et al. v. Phipps*, when the decision in that case in no manner related to the special contract, made in the endorsement of James T. Welsman on the bonds now before the court; nor was the same referred to in the record or in the judgment of the Supreme Court of the United States.

3. Because the terms in that endorsement were clear, positive, and freed from all ambiguity; and with the acknowledgment by James T. Welsman of his indebtedness to George A. Trenholm, and his plainly expressed intention to secure the payment of

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that *indebtedness, when he designated the security he then gave to make certain the payment of that indebtedness; and in such terms that he and the holder of the bond plainly understood what was that security.

4. Because by the conditions, subject to which only, according to the decision of the Supreme Court of the United States, the mortgages between George A. Trenholm and James T. Welsman could be enforced by the creditors of either against the other, under the principle of subrogation; and the bankruptcy of George A. Trenholm and James T. Welsman, which made the performance of such conditions impossible; it then became competent for either of these parties, by any

other declaration, to subject the property of either to such other charges as the said George A. Trenholm or James T. Welsman chose to make. And this right was exercised by James T. Welsman in the endorsement he made on these particular bonds.

5. Because in the exercise of the power so belonging to the said James T. Welsman, he did give to the First National Bank of Charleston, and other holders of bonds with the like endorsement, in that endorsement a plain acknowledgment of indebtedness and to secure that indebtedness; and did for this purpose sufficiently and clearly designate the security so given.

6. Because the said James T. Welsman did not, during his lifetime in any manner, question or express a wish that the endorsement on these bonds should be construed otherwise and enforced than according to the plain intent and meaning of the terms used in such endorsement.

7. Because this endorsement on a bond, of which the holder is lawfully and for value in possession, carried with it to such holder all the security attached to or connected with the said bond; and intended and accepted as having added value given to the bond because of such security.

8. Because in this case the holders of bonds with such endorsement have all the rights, and are entitled to all the remedies, which in equity are applied in the cases of an equitable mortgage.

9. Because the presiding judge, in confirming the report of the master, has erred in his conclusion of law, that the holders of these bonds rank only as simple contract

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creditors; whereas the rule in this State is distinctly the reverse of that stated by the master, and erroneously accepted by the presiding judge as the law in this State.

10. Because the decree in this case should be, that the holders of the bonds, with the special endorsement thereon, are entitled to be paid out of the fund in court, the same being the proceeds of the sales of the real estate referred to in that endorsement as the security for the payment of these bonds.

The respondents submitted the following additional grounds in support of the Circuit decree:

1. That the said master should have found that Welsman was not bound to contribute anything to any sums that Trenholm might pay, until Trenholm had paid and overpaid the amount of four hundred thousand dollars, for which he (Mr. Trenholm) was liable.

2. That the said master should have found that the endorsement stating that Mr. Welsman was so liable, made by him on certain bonds which had been paid by Mr. Trenholm, was made under a clear mistake and misapprehension on the part of Mr. Welsman, against which equity will relieve the creditors of Welsman.

3. That the said master erred in holding

that there is no necessity to suppose, because of the use of the fraction 31-71, that any confusion existed in Welsman's mind between his two liabilities upon the two classes of bonds.

4. That the master erred in holding that the proportion applied practically to each bond as fully as it did to the whole sum, if the parties chose to so apply it, and that it was so applied.

5. That the master erred in holding that endorsement created any liability on the part of Mr. Welsman to Mr. Trenholm.

6. That the master erred in holding that the bonds paid by Mr. Trenholm had been reissued by him or as his individual liability.

Messrs. Buist & Buist and A. G. Magrath, for appellants.

Messrs. Simonton & Barker, De Saussure & Son, B. H. Rutledge, and E. McCrady, jr., contra.

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*October 11, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. For the purpose of settling with the creditors of John Fraser & Co. and Fraser, Trenholm & Co., two of the partners in those houses, to wit, W. L. Trenholm and Theodore D. Wagner, executed a number of bonds, aggregating in the whole the sum of seven hundred and ten thousand dollars, by which they bound themselves, jointly and severally, to pay to James Robb and Charles T. Lowndes, as trustees, or the survivor of them, their assigns or the assigns of the survivor, the amount named in each of said bonds, at the several dates named therein, the last of said dates being the first day of January, 1873. Upon these bonds George A. Trenholm and James T. Welsman, by their endorsement under their hands and seals, guaranteed the payment thereof. These bonds were known and designated as B bonds, and the following endorsement was placed thereon by the trustees above named, viz.: "The within bond being exchanged for bills and claims under the agreement herein referred to, is assigned, set over, and transferred, and payment directed to be made to the holder hereof." To make good an unexpected deficiency in the assets of Fraser, Trenholm & Co., another lot of bonds, designated as C bonds, were issued by George A. Trenholm and James T. Welsman, which, however, are not involved in this case.

On May 3, 1869, George A. Trenholm and James T. Welsman entered into a written agreement, a copy of which is set out in the record, by which it is declared that the said parties "did, between themselves, agree that the limit and extent of the amounts for which each of them would respectively be liable should be as follows, that is to say, of the said sum of seven hundred and ten thousand dollars (the B bonds), that the said

George A. Trenholm should be liable for the sum of four hundred thousand dollars, and the said James T. Welsman for the sum of three hundred and ten thousand dollars, and that in the obligation to be given under the second article of the said memorandum of final settlement of the sixteenth November, Anno Domini one thousand eight hundred and sixty-eight (the C bonds), the said George A. Trenholm should be liable for forty of seventy-one parts thereof, and the said James T. Welsman should be liable for

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thirty-one of seventy-one parts thereof, * * with the clear understanding and agreement that each would be respectively liable to the other for the full discharge of the said sum and the said proportion by them respectively undertaken, and that each would save and keep harmless and indemnified the other from all claim, demand, or damage for or by reason of the said guaranty and endorsement, and of such obligation, beyond the amount or proportion by each respectively assumed as hereinbefore stated."

It is further declared in the said agreement that the foregoing "does fully and truly recite and set forth the amounts and proportions for which each as to the other is respectively liable, because of the said guaranty and endorsement, and the said obligation by them made and undertaken, and that each is as to the other bound fully to discharge and satisfy such amount and such proportion as is hereinbefore recited and set forth as so undertaken by each as to the amount and proportion for which he is liable and that each will save and keep harmless and indemnified the other from all demand and damage for or by reason of the amount or proportion so undertaken by him." The agreement also provided that each should execute to the other a mortgage for his more perfect indemnity. In pursuance thereof the said parties did, on the same day, to wit, May 3, 1869, execute each to the other a mortgage to secure the performance of the covenants contained in said agreement.

In January, 1873, after the maturity of the B bonds, James T. Welsman signed the following endorsement, printed on certain of those bonds, to wit: "The proportion of the within bond for which the within bound James T. Welsman is liable, that is to say, thirty-one of seventy-one parts thereof, having been paid by George A. Trenholm, for that sum, with interest, James T. Welsman is indebted to George A. Trenholm, and the mortgage from James T. Welsman to George A. Trenholm, bearing date May 3d, A. D. 1869, and recorded in the mesne conveyance office, Charleston County, in book H., No. 15, page 571, is acknowledged by James T. Welsman to be security for the same to the said George A. Trenholm or his assigns."

George A. Trenholm died on November 17, 1876, without ever having paid his proportion

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of the B bonds, and it is conceded that his estate is insolvent and utterly unable to pay such proportion. James T. Welsman died July 17, 1877, without ever having paid his proportion of the B bonds, and it is likewise conceded that his estate is utterly insolvent and will never be able to pay his proportion of said bonds.

Sometime in 1878, certain holders of bonds guaranteed by Trenholm and Welsman, filed a creditors' bill in the Circuit Court of the United States, claiming the benefit of the mortgages of May 3, 1869, given by Trenholm and Welsman, each to the other. This claim was resisted by Hampton, a judgment creditor of both Trenholm and Welsman, whose judgment was junior in date to said mortgages, and by the executor of James Welsman, the father of James T. Welsman, who held a mortgage executed in 1871, upon some of the property embraced in the mortgage of Trenholm to Welsman, dated in May, 1869. The Circuit Court sustained the claim of the bondholders and ordered a sale of the property covered by the mortgages. This decree was, however, reversed by the Supreme Court (see *Hampton v. Phipps*, 108 U. S., 260 [2 Sup. Ct. 622, 27 L. Ed. 719]), and under that decision the Circuit Court of the United States ordered the balance of the funds in the hands of the referee, arising from the sales of the property of Welsman embraced in the mortgage to Trenholm, to be transferred to the State court, there to be applied in due course of administration. This balance, amounting to something over eleven thousand dollars, is now in the hands of the master, and constitutes the fund over which the present controversy has arisen.

The appellants, as holders of certain of the B bonds, bearing the endorsement placed upon them by Welsman, a copy of which is hereinbefore set out, claim that they have a prior lien upon the fund in controversy by reason of such endorsement, and this claim is resisted by the holders of B bonds upon which there is no such endorsement. The master, to whom the issues were referred, for the reasons stated in his report, which is set out in the record, disallowed the claim of the appellants and held that they could only claim as simple contract creditors of the estate of Welsman. The Circuit Judge, while not endorsing all the reasoning of the master, overruled the exceptions and con-

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firmed the report. From this judgment the holders of the bonds bearing the Welsman endorsement appeal upon the several grounds set out in the "Case," and the unendorsed bondholders, according to the proper practice, give notice that they will undertake to sustain the judgment confirming the master's report, upon grounds other than those upon which the master bases his conclusion.

We do not propose to consider these

grounds *seriatim*, but shall confine ourselves to the consideration of those questions which arise upon the record and are material to a proper decision of the case. We may say, however, in the outset, that we do not agree with the master in holding that the question is *res adjudicata* by the decision of the Supreme Court of the United States. That court simply held that under the case as presented to it, the right of subrogation set up by the bondholders could not arise, because by a proper construction of the terms of the mortgages of May 3, 1869, they were only intended to indemnify the said parties for any excess beyond the sum or proportion which each had assumed to pay, and as it was conceded that neither had paid nor could pay anything in excess of the sum or proportion he had assumed, no liability from one to the other had arisen or could arise, and hence there was nothing upon which either could base a claim for indemnity, and therefore nothing upon which either mortgage could be rendered operative. As was said by the court: "Unless one of them had been compelled to pay, and had in fact paid, an excess beyond his agreed share of the debt, there could have been no breach of the conditions of the mortgage, and consequently no right to a foreclosure and sale of the mortgaged premises. * * * The mortgages were not created for the security of the principal debt, but as a security for a debt possibly to arise from one surety to the other;" and as under the conceded facts of that case such possible debt had not then arisen and could not afterwards arise, inasmuch as neither party had paid or could pay anything in excess of his share, the conclusion necessarily followed that there was no debt and no liability from one to the other, and therefore nothing to support either mortgage. As the court in that case well said: "There is, therefore, no right to the

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subrogation insisted on, *because there is nothing to which it can apply." In this view we entirely concur, but in that case the question of the effect of the Welsman endorsement, upon which the appellants now rely, does not seem to have been raised, and no allusion seems to have been made to it in the opinion of the court.

Indeed, we do not see how it would have been pertinent to the question which the Supreme Court of the United States was called upon to determine. As we understand it, the controversy there was between the B bondholders as a class, and certain lien creditors, whose liens arose subsequent to the date of the mortgages of May 3, 1869, but prior to January, 1873, when the Welsman endorsement was placed upon certain of the B bonds, under which appellants now set up their claim. Hence, in that controversy, it was not necessary or important to determine the effect of the Welsman endorsement; for, even

giving it the full effect now claimed for it by the appellants, it certainly could not override the previous liens created by Hampton's judgment, which was recovered on June 19, 1869, or the mortgage to the elder Welsman, executed June 13, 1871. We do not think, therefore, that the question presented in this case can be regarded as *res adjudicata* by the decision of the Supreme Court of the United States in *Hampton v. Phipps*, *supra*. It certainly was not in terms decided or even alluded to in the opinion of the court, and according to our view it was not even pertinent to the question there raised.

A good deal has been said as to what were the intentions of Welsman when he signed the endorsement on the bonds in question, and as to whether he was not then under a mistake as to his liability to his co-guarantor or co-surety, Trenholm, for that was really the true relation in which these parties stood to each other; but according to the view which we take of the case it will not be important to determine these questions. Assuming, then, for the purposes of this inquiry, that Welsman when he signed the endorsement intended precisely what the words there used import, and that his purpose was to admit an indebtedness to Trenholm to an amount represented by a specified fractional part of the bond, and to acknowledge that such indebtedness was secured by the mortgage, we propose to consider what are

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the rights of the *parties. There can be no doubt that Trenholm and Welsman, practically as co-sureties on the bonds, were each liable to the lawful holders thereof for the full amount of the bonds; but, in the absence of any special agreement between themselves, they would each be liable, as between themselves, for only one-half of the full amount. Hence if either one of them paid the full amount of the bonds, he would have a valid claim against the other for one-half of the amount so paid.

But it is equally true that this relative liability, as between themselves, might be fixed by special agreement at a different proportion from one-half. It is an undoubted fact in this case that these parties did exercise this right, and did by special agreement in writing and under seal, fix their relative liability each to the other, and it is a circumstance not without significance, that in doing so they fixed their relative liability so far as the B bonds were concerned (the ones out of which this controversy arises), at specified sums of money, and not as in case of the C bonds at fractional parts of the whole debt. It seems to us that the true import and meaning of this agreement, a copy of which is set out in the record, is that, while, of course, Trenholm and Welsman were each liable to the bondholders for the full amount thereof, yet as between themselves they had divided the debt into two

portions—one of four hundred thousand dollars, for which Trenholm alone was responsible, and the other of three hundred and ten thousand dollars, for which Welsman alone was responsible. In other words, that as between these parties there were two debts—one of \$400,000, and the other of \$310,000, the former due by Trenholm and the latter by Welsman, and that until one paid some portion of the liability of the other, he could have no claim upon the other.

This seems to us the necessary construction of the words used by the parties in the agreement, for the liability of each to the other is expressly declared to be a liability for any amount "beyond the amount" which each had respectively assumed to pay. It is quite clear, therefore, that under the terms of this agreement, Trenholm could have no claim whatever against Welsman until he had paid something in excess of four hundred thousand dollars, and then only for

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such excess, and as it is conceded that *he never did pay as much as \$400,000, it is quite clear that Welsman never was under any legal, or even moral, obligation to pay Trenholm anything by reason of their co-suretyship on the B bonds under the express terms of the agreement defining their relations in reference to that matter.

This being so, even if the endorsement placed upon certain of these bonds by Welsman should be construed as an agreement to pay to Trenholm thirty-one of seventy-one parts of each bond upon which it was placed, it follows that there was no consideration whatever for such agreement; there was no antecedent liability which could constitute such consideration, and it is not pretended that any consideration passed at the time the endorsement was placed upon the bonds, and it not being under seal, it must be regarded as a mere nudum pactum. It cannot be said that Trenholm's right to call on his co-surety, Welsman, for contribution constituted a sufficient consideration for the agreement contained in the endorsement, because no such right did then or has ever existed.

In 3 Pomeroy Equity Jurisprudence, section 1418, this right of contribution between co-sureties is defined as follows: "Where there are two or more sureties for the same principal debtor, and for the same debt or obligation, whether on the same or on different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation (the Italics being ours), he is entitled to a contribution from each and all of his co-sureties in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. * * * The right, however, may be controlled or modified by express agreement among the co-sureties or debtors." Now, Trenholm, as we have seen,

not having paid "more than his proportionate share of the debt or obligation," as fixed by the special agreement of the parties, there is no excess over his share for which he could call on Welsman to reimburse him. The endorsement placed upon certain of the B bonds cannot, therefore, be regarded as anything more than an agreement by Welsman, without any consideration, to pay to Trenholm a certain proportion of each bond so endorsed, and an acknowledgment that the performance of such promise is to be secured by the mortgage of May 3, 1869.

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*The want of consideration, if nothing else, would be sufficient to prevent such an agreement from being set up as an equitable mortgage, in derogation of the rights of bona fide creditors. As is said in 3 Pom. Eq. Jur., § 1231: "The theory of equitable liens has its ultimate foundation, therefore, in contracts express or implied;" and as a consideration is necessary to the validity of a contract, it follows that an equitable mortgage based upon an agreement without consideration cannot be set up, certainly not to the prejudice of creditors. Indeed, the Court of Equity will not enforce a voluntary trust, however meritorious the objects of it may be, as long as it is merely "executory, incomplete, imperfect, or promissory." 2 Pom. Eq. Jur., § 997, and 1 Story Eq. Jur., §§ 433, 987. But more than this, Welsman, being in debt at the time, could not, even by a formal mortgage, without any consideration, fix a lien on his property which could take precedence of such debts.

But even if Trenholm had paid more than his proportion of the debt, and thereby acquired the right to call upon his co-surety, Welsman, for contribution, he could not enforce this right to the prejudice of the common creditor. The right of contribution, resting, as it does, upon principles of equity and not upon contract, will not be enforced by a Court of Equity to the injury of the prior and higher rights of the creditor to be paid his debt in full, for which he has a right to look to all the sureties. Hence a surety cannot enforce contribution from his co-surety until the common debt, for which they are both liable, has been fully paid or satisfied in some way. *Dering v. Earl of Winchelsea*, 1 Wh. & Tud. Lead. Cas. Eq., *100, and the notes to that case. It seems to us clear, therefore, that in no view of the case could Trenholm, by virtue of the endorsement placed upon certain of the B bonds or otherwise, successfully claim a right to priority of payment out of the proceeds of the sale of the property covered by the Welsman mortgage.

And we think it equally clear that the appellants, claiming, as they must do, through Trenholm, as his assignees, can have no higher rights than he had. The appellants certainly cannot claim to be purchasers of

negotiable securities; for even assuming that the bonds were made negotiable by the en-

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dorsement placed upon *them by the trustees (as to which, however, we do not feel called upon to express any opinion), they acquired possession of them after they became due, and after they had lost their negotiable character, if they ever had any. But, in fact, the appellants never became the purchasers of the bonds as such. When Trenholm paid these bonds, they lost their character as bonds, certainly their negotiability, and by what right he, or his representative after his death, could re-issue them as bonds, we are at a loss to conceive. They were in Trenholm's hand, after payment of them by him, nothing more than evidences of indebtedness to him by the principal obligors and by his co-surety, which, in the strongest view which can be taken for appellants, he could, by virtue of the equitable doctrine of subrogation, set up against them as specialty claims; but they certainly had none of the features of negotiable securities. When, therefore, these bonds were re-issued, as it is said, by Trenholm, or by his representative after his death, it amounted to nothing more than a transfer of such claims—not of the bonds as such—to the persons to whom they were delivered. Assuming, then, for the purposes of this case only, without considering the question that such claims could be and were properly assigned to the appellants, it is manifest that their position is that of assignees of unnegotiable claims, and their rights can be no higher or better than those of their assignor.

From the foregoing views it follows that the appellants, as holders of the papers originally issued as B bonds, which now bear the special endorsement placed upon them by Welsman, have no claim upon the fund in controversy; and as, by the judgment appealed from, they have been practically excluded from any participation therein by being placed in the rank of simple contract creditors, and as the respondents, while not appealing from the judgment below, have given notice that they would ask this court to sustain said judgment upon other grounds than those upon which it was based, one of which was that the special endorsement placed upon the bonds now sought to be set up by appellants, created no liability on the part of Welsman to Trenholm, we feel warranted in simply affirming the judgment. In doing so, however, we do not wish to be un-

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derstood as endorsing *the proposition that where one of two sureties pays a bond debt, in claiming contribution from the estate of his co-surety he can rank only as a simple contract creditor. Upon that question the authorities in this State, as well as elsewhere, are conflicting, and we prefer to re-

serve our opinion until a proper case for its decision arises.

The judgment of this court is, that the judgment of the Circuit Court, with the reservation above mentioned, be affirmed.

Mr. Justice McGOWAN concurred.

Mr. Chief Justice SIMPSON concurred in the result.

25 S. C. 379

WOLFE v. PORT ROYAL & AUGUSTA
RAILWAY COMPANY.

(April Term, 1886.)

[1. *Justices of the Peace* ⚭135.]

On a motion to stay a sale under levy until an appeal from the trial justice's judgment is heard, the Circuit Judge cannot adjudicate the sufficiency of the appeal.

[Ed. Note.—Cited in *Corley v. Evans*, 69 S. C. 522, 48 S. E. 459.

For other cases, see *Justices of the Peace*, Cent. Dig. §§ 426-447, 749; Dec. Dig. ⚭135.]

[2. *Justices of the Peace* ⚭160.]

The object of exceptions is to point out the particulars in which the alleged errors of law consist. On appeal from a judgment by default rendered by a trial justice, the Circuit Judge properly ruled that the notice of appeal was insufficient, the only ground being "that manifest injustice had been done the defendant by the said judgment, and that defendant's default in not being present at the trial was excusable."

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 588; Dec. Dig. ⚭160.]

[3. *Appeal and Error* ⚭1094.]

A judgment on the facts, rendered by the Circuit Judge on appeal from a trial justice, is not appealable to this court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4322; Dec. Dig. ⚭1094.]

Before Pressley, J., Barnwell, November, 1885.

The opinion fully states the case.

Messrs. Elliott & Howe, for appellant.

Mr. A. B. Comer, contra.

October 11, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The plaintiff obtained a judgment against the defendant corporation before trial justice W. M. Bostick, on September 5, 1885, of which notice was

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given to the company on September 11. On September 15, the defendant gave notice of appeal to the Court of Common Pleas, upon the ground "that manifest injustice had been done the defendant by the said judgment, and that defendant's fault in not being present at the trial was excusable." The plaintiff, disregarding the appeal, had one of the freight cars of the company levied on to satisfy the judgment, and thereupon the defendant applied to Judge Pressley at chambers to restrain the sale under the levy aforesaid;

and as it appeared that an appeal was pending, Judge Pressley ordered the levy released, "and that all proceedings under said judgment and execution be stayed until the appeal therefrom to the Court of Common Pleas shall be heard, the notice in said appeal having been served within the time prescribed by law in such case." From this order the plaintiff gave notice of appeal.

Afterwards at the regular term of the Court of Common Pleas, when the case was reached on the docket, the plaintiff, having previously given notice to that effect, moved to dismiss the appeal upon two grounds: first, that the notice was not served within the time prescribed by law; and second, that the exceptions and grounds of appeal are not sufficiently definite and specific. The judge granted the motion and dismissed the appeal, "because of insufficiency of the notice of appeal." From this order the defendant corporation appeals to this court upon the following grounds: "I. Because his honor erred in holding that the notice of appeal was insufficient. II. Because his honor erred in holding that the notice of appeal was not sufficiently definite. III. Because his honor erred in holding that the notice of appeal should have stated further grounds than 'that manifest injustice had been done defendant, and that defendant's neglect was excusable.' IV. Because his honor erred in holding that affidavits should have been served with said notice of appeal," &c.

There is nothing in the view urged that the matter of the sufficiency of the appeal was, or should have been, "adjudicated" in the application of the defendant to suspend the enforcement of the execution. That application was made at chambers, and the judge could do no more than he did—"stay all pro-

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ceedings upon *the judgment and execution, until the regular appeal to the Court of Common Pleas could be heard."

The very object of exceptions is to point out the particulars in which the errors of law complained of consist. When, in the case of a judgment rendered by default in a trial justice court, the defendant seeks a new trial upon the ground that his "default was excusable," the act itself which gives the right, expressly declares that, "If the defendant failed to appear before the trial justice, and it is shown by the affidavits served by the appellant or otherwise that manifest injustice has been done, and he satisfactorily excuses his default, the court may, in its discretion, set aside or suspend judgment and order a new trial." &c. Subdivision 1, section 368, of the Code. It was certainly not a compliance with this provision of the law for the appellant simply to state as a ground of appeal "that manifest injustice had been done, and that defendant's default in not being present at the

trial was excusable," without stating any of the circumstances which made it "excusable." Such exception gives no fact upon which the discretion of the judge may be exercised. It is really no more than the expression of the opinion of the defendant himself, which would very probably exist in the case of every judgment rendered by default. Besides, if the particular facts had been fully stated, and the Circuit Judge had exercised his discretion and rendered his judgment on the facts, such judgment would not have been appealable to this court, which only corrects errors of law, except in cases in chancery. See *LeConte v. Irwin*, 19 S. C., 556, and authorities.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 381

SPARKS v. DAVIS.

(April Term, 1886.)

[Execution \hookrightarrow 407.]

Every judgment creditor, who can make the requisite showing, is entitled to institute supplementary proceedings, and a creditor who obtains his judgment after a receiver of the debtor's property has been appointed in a former

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proceeding, is entitled to have an examination of the judgment debtor. But there cannot be more than one appointment of receiver.

[Ed. Note.—Cited in *In re Solomon's Estate*, 74 S. C. 191, 54 S. E. 207.

For other cases, see *Execution*, Cent. Dig. § 1171; Dec. Dig. \hookrightarrow 407.]

Before Wallace, J., Greenville, October, 1885.

The opinion fully states the case.

Mr. W. L. Wait, for appellant.

Mr. J. H. Heyward, contra.

October 11, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. The plaintiff recovered judgment against the defendant on April 1, 1885, and, upon the affidavit required in such cases, instituted supplementary proceedings against him on September 23, 1885, in which Judge Wallace ordered that the defendant, Thomas W. Davis, "should appear before S. J. Douthitt, Esq., master for Greenville County, at his office in the city of Greenville, on September 26, instant, to make discovery on oath concerning his property," &c. This order Davis resisted, and gave notice that he would apply to Judge Wallace for an order vacating the aforesaid order in supplementary proceedings, upon the ground that in another case, on the second day of January, 1884, David P. Verner, Esq., was appointed receiver of the property of the said debtor, under supplementary proceedings instituted in a suit by the "Dauntless Manufacturing Company"

against him, before the plaintiff, Sparks, had obtained his judgment.

Judge Wallace refused to vacate the order directing the debtor to be examined, holding that "all the conditions prescribed by the code, as precedent to supplementary proceedings, existed in the above entitled action at the time the order sought to be vacated was signed: that appearing, the plaintiff was entitled to the order. The fact that a similar order had been taken in another action by another plaintiff against the same defendant cannot affect the plaintiff's rights, because he was not a party to that action and had no power to intervene in it and examine the defendant or submit other testimony touching his estate and effects. The fact that a receiver having been appointed

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under *another action, is a bar to the appointment of another receiver in this action, does not destroy the right of the plaintiff here to his statutory method for the discovery of property applicable to his judgment, and which, if discovered, may be administered by the receiver already appointed," &c.

From this order Davis appeals on the following exceptions: "I. Because his honor erred in refusing to vacate the order for supplementary proceedings in this action, when it appeared that a receiver for all of the defendant's property, which could be applied to the payment of his debts, had already been appointed under supplementary proceedings in another action. II. Because when it appeared that supplementary proceedings had been instituted against the defendant in another action and a receiver appointed thereunder, no other order for supplementary proceedings against him should have been made, unless it had appeared in the affidavit therefor that he had acquired property since the date of the receiver's appointment in the former proceeding, which would be applicable to the judgments against him, and the order for the examination in this action should have been dismissed for that reason. III. Because in any event the examination should have been confined to the period of time subsequent to the date of the receiver's appointment in the former proceeding, and his honor erred in deciding that the plaintiff in this action was entitled to an unlimited examination into the defendant's affairs under this proceeding," &c.

Section 312 of the Code provides that "when an execution against property of the judgment debtor * * is returned unsatisfied, the judgment creditor, at any time after such return made, is entitled to an order from a judge of the Circuit Court, requiring such judgment debtor to appear and answer concerning his property before such judge at a time and place specified in the order, within the county to which the execution was issued." (The examination may

now be before a referee appointed for that purpose. Section 316.) Section 318 of the Code, after giving the judge power to appoint a receiver of the property of the judgment debtor, provides: "But before the appointment of such receiver, the judge shall ascertain, if practicable, by the oath of the party or otherwise, whether any other sup-

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plementary proceedings are pending against the judgment debtor; and if such proceedings are so pending, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to said receivership. No more than one receiver of the property of a judgment debtor shall be appointed," &c.

It thus appears that the right to institute supplementary proceedings is given to every judgment creditor who can make the required showing, without any limitation or qualification whatever. Each creditor is independent of the others, and entitled for himself to seek his legal remedies. In order, doubtless to secure the regular and orderly administration of the discovered assets or property of the debtor, the appointment of receiver is limited to one. We cannot, however, see that there is any inhibition against a judgment creditor instituting his own proceeding, at least down to the time of the appointment of a receiver, who, when appointed, is required to perform certain duties for all those claiming the remedy of the statute. In the case of *Kennesaw Mills Co. v. Walker*, 19 S. C., 104, cited by the counsel of the appellant, there were two independent proceedings by different creditors, and the debtor was examined in both cases; but as the time and place and referee were the same in both, they were allowed, as a matter of convenience, to be heard together.

Even after the appointment of a receiver in one case, we find no absolute prohibition against the institution of other supplementary proceedings by a different creditor, only that "notice should be given of all subsequent proceedings in relation to such receivership," &c. Besides, in this case the plaintiff, Sparks, had not obtained his judgment when Mr. Verner was appointed receiver in 1884; and therefore being in no sense a party to the proceeding in which he was appointed, he had no power to intervene in it and examine the defendant, or to submit other testimony touching his property and effects. We do not understand that the order authorizing the plaintiff, Sparks, to examine the defendant, contemplated the appointment of another receiver in his case, and as the Circuit Judge said: "The statute does not seem to provide that this remedy is to be enforced by one judgment creditor only, or that the remedy is exhausted by be-

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ing *enforced in one action, and that sub-

sequent judgment creditors have no right of discovery under it."

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 385

WARE v. HENDERSON.

(April Term, 1886.)

[1. *Appeal and Error*—§185.]

A question of jurisdiction may be first raised in this court, and is not waived by a failure to make the objection in the court below.

[Ed. Note.—Cited in *Martin v. Bowie*, 37 S. C. 114, 15 S. E. 736; *Riddle v. Reese*, 53 S. C. 199, 202, 31 S. E. 222; *State ex rel. Kirven v. Scarborough*, 70 S. C. 291, 49 S. E. 860; *State v. Adams*, 73 S. C. 437, 53 S. E. 538; *McGrath v. Piedmont Mut. Ins. Co.*, 74 S. C. 71, 54 S. E. 218; *Nixon & Danforth v. Piedmont Mut. Ins. Co.*, 74 S. C. 440, 441, 443, 54 S. E. 657; *Alexander Sprunt & Son v. Gordon*, 89 S. C. 430, 71 S. E. 1033.

For other cases, see *Appeal and Error*, Cent. Dig. § 1166; Dec. Dig. § 185.]

[2. *Venue*—§10.]

The Court of Common Pleas of Abbeville had no jurisdiction to render judgment against an administrator (resident in Greenville) of an intestate (also resident in Greenville) for an account of his administration of an estate of which he had been appointed receiver in Abbeville, where the estate was located.

[Ed. Note.—Cited in *Bell v. Fludd*, 28 S. C. 315, 5 S. E. 810; *Ex parte Ware Furniture Co.*, 49 S. C. 30, 27 S. E. 9; *Sileox & Co. v. Jones*, 80 S. C. 488, 61 S. E. 948.

For other cases, see *Venue*, Cent. Dig. § 19; Dec. Dig. § 10.]

3. Cause remanded, with leave to apply for a change of venue.

Before Pressley, J., Abbeville, April, 1885.
The opinion sufficiently states the case.

Messrs. Stokes & Irvine and Perrin & Cothran, for appellants.

Messrs. W. O. Bradley and W. H. Parker, contra.

October 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This action was commenced on August 24, 1883, in the County of Abbeville, against the defendant as administratrix, with the will annexed, of E. S. Irvine, deceased, and as his legatee and devisee, for an account of the estate of the plaintiffs which was in the hands of the said E. S. Irvine as receiver, in which judgment is demanded against the defendant, as well as such administratrix, as legatee and devisee, on account of assets descended, for any balance that may be found due upon such accounting. The said E. S. Irvine, though appointed receiver in the County of Abbeville, where the estate placed in his charge was located, and where he made his returns as receiver, was a resident of Greenville County, and so continued up to the time of his death, and all his real estate is located in the last

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mentioned county. The defendant was, at the time of the commencement of this action, and is yet, a resident of the County of Greenville, where she qualified as administratrix, made her returns as such and received her final discharge, upon her ex parte application for that purpose, though she undertook to make a final return and settlement of the accounts of her testator as receiver before the judge of probate for Abbeville County.

The case was heard by Judge Pressley while holding the Court of Common Pleas for Abbeville County, who rendered a judgment in favor of the plaintiffs, from which the defendant appeals upon several grounds affecting the merits, and also upon the ground that the court in Abbeville had no jurisdiction of the case against the defendant, who is a resident of the County of Greenville. This question of jurisdiction does not seem to have been raised in the Circuit Court, and therefore the Circuit Judge made no ruling upon it. But, as has been frequently held, a question of jurisdiction may, for the first time, be raised in this court, and therefore we must first determine that question before we can look into the merits; for if it shall be determined that the court which undertook to render judgment in this case had no jurisdiction of it, then the so-called judgment is a mere nullity, and there would be no necessity or propriety for us to inquire into the reasons upon which it was based.

The question is, could the court in Abbeville take jurisdiction of this case against the defendant, who is a resident of Greenville, unless the place of trial had been changed to the County of Abbeville by an order of the court under section 147, of which there is no pretence in this case? The code, after providing that certain specified actions, of which this is not one, must be tried in certain places, proceeds, in section 146, as follows: "In all other cases the action shall be tried in the county in which the defendant resides at the time of the commencement of the action: * * * subject, however, to the power of the court to change the place of trial in the cases as hereinafter provided." It will be observed that the language used in these sections of the code in regard to the place of trial is of an imperative character—"must be tried" in sections 144 and 145, and "shall be tried" in section 146—and we do not see by what authority a court can dis-

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*regard such an imperative mandate from the law-making power. This language clearly implies that a case cannot be tried elsewhere than in the place appointed for the purpose, unless the place of trial be changed under section 147 of the code; and therefore if tried in the wrong county, the trial and the judgment entered therein are nullities for want of jurisdiction.

This has been distinctly held in one case

(*Trapier v. Waldo*, 16 S. C., 276) and very plainly intimated in another (*Steele v. Exum*, 22 S. C., 276), where the exact point did not arise. For in *Trapier v. Waldo*, while the court held that the court in Charleston had acquired jurisdiction over the persons of those who had been made parties to a case for the foreclosure of a mortgage of real estate lying in Georgetown County, prior to the repeal of the first paragraph of section 149 of the old Code, yet, as to parties who were brought in by amendment, subsequent to such repeal, it could not take jurisdiction and the judgment as to them was therefore void. (Note.—In examining this case it will be necessary to bear in mind that the sections of the code are not now numbered as they were when the opinion in *Trapier v. Waldo*, was filed.) So in the case of *Steele v. Exum*, supra, the Chief Justice uses this language: "It may be true, no doubt it is, that so far as the trial of the cause upon its merits is concerned, that court had no jurisdiction, as under the code, supra, the defendants residing in other counties, the trial could not be had in Williamsburg: but did it not nevertheless have jurisdiction as to changing the place of trial?" and the case goes on to decide the only question then before the court, to wit: that the court did have jurisdiction of the motion to change the place of trial, and again uses this language: "But it is only because the court cannot have such complete jurisdiction that the power in question has been conferred." This language plainly and necessarily recognizes the idea that, while a court sitting for a county in which an action is improperly brought, may take jurisdiction of a motion to change the place of trial, yet it has not such complete jurisdiction of the case as would enable it to proceed with the trial of the cause on the merits. See also *Tate & Thompson v. Blakeley*, 3 Hill, 298.

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*The cases of *Lebeschultz v. Magrath* (9 S. C., 276), and *Parker v. Grimes* (*Ibid.*, 281), arose prior to the amendment of section 149 of the old Code, and therefore do not now apply. For that section as originally adopted, and as it read at the time those cases were decided, contained an express provision that if the action was not commenced in the proper county, the case might nevertheless be there tried, unless the defendant took the proper steps to have the place of trial changed; and hence while that was the law no jurisdictional question could arise, because jurisdiction to try the case in the wrong county was expressly conferred by the statute, unless the defendant saw fit to use the means provided for changing the place of trial to the proper county. But when that portion of section 149, containing this provision was repealed, as it has been by the act

of 1879 (17 Stat., 14), the power to try a case in the wrong county has been taken away, and therefore it must be tried in the proper county, and the court of another county cannot take jurisdiction of it.

Respondents contend that this objection came too late, and that defendant, by submitting to the trial in Abbeville County without objection, has waived her right to have the place of trial changed. But if, as we have seen, the objection is jurisdictional, then such an objection never comes too late, and it is well settled that consent cannot give jurisdiction. *Gallman v. Gallman*, 5 Strobl., 207. Under the code as it originally read, a defendant could waive this objection, because the statute then provided: "If the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein, unless the defendant, before the time for answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the court as is provided in this section." Hence if the defendant failed to take the proper steps, at the proper time, to have the place of trial changed, he waived the right to do so, and the statute expressly provided that the trial might be had in the wrong county.

But since the language just quoted has been stricken out of section 149 by the amendment of 1879, above referred to, and that section, now numbered 147, contains no

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such provision, *there is no authority for trying a case elsewhere than in the proper county, unless the place of trial is changed by the court under section 147, and no requirement that the defendant shall demand a change of the place of trial, failing in which will warrant a trial to be had in the wrong county. Nothing now remains but the imperative mandate that the action "shall be tried" in the county designated by the statute as the proper county for that purpose. The cases of *Green v. Bookhart* (19 S. C., 466), and *Union Bank v. Northrop* (*Ibid.*, 473), are cases in reference to proceedings supplementary to an execution, in which it was held that mere irregularities will not affect the validity of such proceedings, and therefore do not apply here.

We think it clear, therefore, that the Court of Common Pleas for Abbeville County had no jurisdiction of this case, in which the only defendant is and was at the commencement of the action a resident of the County of Greenville; and that upon this ground alone, without reference to the merits, which it would be premature to consider now, the judgment appealed from must be set aside.

The judgment of this court is, that the judgment appealed from be set aside, solely on the ground of want of jurisdiction in the court which rendered it, without prejudice as to the merits, and that the case be re-

¹ See, too, *Bacot v. Lowndes*, 24 S. C., 392.—
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manded to the Court of Common Pleas for Abbeville County, so that the parties may, if they so desire, take the proper orders to change the place of trial.

25 S. C. 389

SWANDALE v. SWANDALE.

(April Term, 1886.)

[1. *Homestead* ⇨32.]

Under the constitution as amended in 1882, a debtor, if the head of a family, is entitled to a homestead in any lands which he may possess, whether it is, or has been, his family residence or not.

[Ed. Note.—Cited in *Nance v. Hill*, 26 S. C. 227, 229, 1 S. E. 897.

For other cases, see *Homestead*, Cent. Dig. § 41; Dec. Dig. ⇨32.]

[2. *Homestead* ⇨78.]

Real property in which such debtor had an interest having been sold for partition, he is entitled to a homestead out of his share in the proceeds of the sale.

[Ed. Note.—Cited in *Gibbes v. Hunter*, 99 S. C. 403, 83 S. E. 608.

For other cases, see *Homestead*, Cent. Dig. § 110; Dec. Dig. ⇨78.]

[3. *Exemptions* ⇨33.]

A distributee is entitled to a personal property exemption out of his share (if any) of the intestate's personal estate.

[Ed. Note.—For other cases, see *Exemptions*, Cent. Dig. § 35; Dec. Dig. ⇨33.]

[4. *Executors and Administrators* ⇨76.]

While the Court of Common Pleas cannot

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admeasure and lay off home*stead, it has jurisdiction to determine the question of right to the exemption claimed, when necessary to the determination of an action properly pending in that court.

[Ed. Note.—Cited in *National Bank of Newberry v. Kinard*, 28 S. C. 115, 5 S. E. 464; *Ex parte Worley*, 49 S. C. 57, 26 S. E. 949.

For other cases, see *Executors and Administrators*, Cent. Dig. § 336; Dec. Dig. ⇨76.]

Before Cothran, J., Greenville, July, 1885.

The case is fully stated in the opinion of this court.

Mr. A. Blythe, for appellant.

Mr. M. F. Ansel, contra.

October 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. Simon Swandale died sometime in 1884, leaving a will, by which in the first clause he gave all his property, of every kind, to his wife and children (of whom G. Tupper Swandale is one) in equal shares. His property consisted mainly of a large hotel in the city of Greenville, known as the Mansion House, with the furniture therein, and his private residence and household and kitchen furniture. By the third clause of his will he directed his executors to sell the property known as the Mansion House, and by the fourth clause he

provides that the executors may sell all the remainder of his real estate, and after the whole has been sold he directs that the proceeds be distributed amongst his wife and children as provided in the first clause of the will. The plaintiff, who is the widow of the testator and his sole qualified executrix, sold the Mansion House for the sum of seventeen thousand dollars and the private residence for the sum of thirty-three hundred dollars, leaving the personal property unsold.

The testator was adjudged, several years before his death, to be a person of unsound mind, and the appellant, G. Tupper Swandale, was duly appointed and acted as his committee, and at the time this action was commenced had not rendered his final account as such committee. The appellant is the head of a family and was, at the time of the testator's death, as well as before, living with said testator in the dwelling house above spoken of, and continued to reside there until the same was sold. He has contracted debts to an amount exceeding his in-

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terest in his *father's estate, and some of his creditors, having reduced their claims to judgment, levied upon his undivided interest in the real estate before it was sold.

The plaintiff, finding herself embarrassed in the administration of the estate as to the interest of the appellant, brought this action against him, making all his creditors parties, asking, amongst other things, that the appellant be required to account as committee, and that his interest in the estate may be ascertained and determined. The appellant answered, setting up his claim of homestead, which is resisted by his creditors, and this is the only issue presented by this appeal. This claim was rejected by the Circuit Judge, but for what reason does not appear, as only extracts from his decree are given in the "Case." It does appear, however, that the Circuit Judge determined that the interest of the appellant in the real estate must still be regarded as realty, notwithstanding the sale by the executrix, which did not operate as an equitable conversion into personalty; and to this part of the decree no exception has been taken by any of the parties.

It is stated in the "Case" that all of the debts of appellant were contracted "since the first of January, 1880," and as the amendment to the homestead clause of the constitution of 1868 was not adopted until December 13, 1880, this statement would leave it uncertain whether the question in this case was to be determined under the provision of the constitution of 1868, or under the amendment of 1880. This uncertainty has, however, been removed by the written admission of counsel, herewith filed, to the effect that all the debts were contracted since the constitution was amended, and therefore the question is to be determined under the homestead clause as it now reads. That clause

is as follows: "The general assembly shall enact such laws as will exempt from attachment and sale, under any mesne or final process issued from any court, to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate, not to exceed in value one thousand dollars, with the yearly products thereof; and every head of a family, residing in this State, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars." In pursuance of this consti-

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tutional man*date the general assembly did, on December 24, 1880 (17 Stat., 513), enact a law declaring the exemption in the language just quoted from the constitution.

It is very obvious that this language differs very materially from that employed in the original constitutional provision. There the language used is: "The family homestead of the head of each family residing in this State, such homestead consisting of dwelling house, out-buildings, and lands appurtenant," &c. This language indicates that the property intended to be exempted has already acquired the character of "the family homestead," which is defined to be "the dwelling house, out-buildings, and lands appurtenant," while the language of the constitution as it now reads is altogether different. It does not indicate that the property intended to be exempted has already acquired the character of *the* family homestead, but on the contrary the words are, "a homestead in lands"—that is, a place for a homestead, which either may or may not be dwelling house, for it is not defined as such in the constitution now of force, as it was in the original constitutional provision.

There must have been some reason for this very marked change in the phraseology used in the provision intended to secure this exemption, and we can conceive of none other than to remove the restriction by which the exemption was confined to a specified part of the debtor's property, and leave it altogether undefined and unrestricted except by its value. Under this view of the constitution as it now reads, when a debtor sets up a claim of homestead, it is not at all important to inquire whether such debtor has, or ever had, a family residence or dwelling house. If he has lands, he is entitled, under the express terms of the constitution, to claim a homestead in such lands, whether he ever lived on them or not; for there is nothing now to restrict the exemption which he claims to "the family homestead" or to "the dwelling house," or any other particular part of his lands.

If, therefore, the interest of the appellant in the proceeds of the sale of the real estate of his father is still to be regarded as realty, notwithstanding the fact that the land has been sold by the executrix for partition merely, as was held by the Circuit

Judge without appeal, we see no reason why

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the appellant may *not claim his homestead exemption in such interest after it has been finally ascertained. It is a mistake to suppose that the appellant's claim of homestead is in the family residence—the family homestead—of the testator, as seems to be assumed in the argument of the counsel for respondent. The question here is whether the appellant is entitled to a homestead exemption *in his share* of his father's real estate, now represented by the proceeds of the sale thereof in the hands of the plaintiff as executrix. No question, therefore, can arise as to whether two homestead exemptions can be claimed *in the same property*. When the share of appellant under the will has been ascertained, it becomes his own exclusive property, and it is in that alone that the exemption can be claimed.

As to the personal property, we do not see how there can be a question. Indeed, the Circuit Judge seems to have disregarded that altogether, under the assumption, which is alleged to be a mistake, that it would be exhausted in the payment of the debts of the testator. If that be so, then, of course, the appellant would be entitled to no share in it, and there would therefore be nothing out of which he could claim the personal property exemption. But if the Circuit Judge was in error in supposing that the personal property would be consumed in the payment of the debts of the testator, then the appellant would be entitled to an interest therein, and out of such interest we see no reason why he could not claim the exemption. This exemption under the amended constitution is not now, as formerly, confined to specified kinds of personal property, but embraces all of that class.

The position taken by respondent that the Court of Common Pleas has no original jurisdiction of a proceeding to lay off a homestead or assign a personal property exemption, while correct and fully sustained by the authorities cited, is not applicable in this case. This is not such a proceeding, but it is an action brought by an executrix to obtain instructions of the court in administering the estate of her testator, and one of the difficulties presented is this claim of homestead. So that for the purpose of effecting the object of the action, it becomes necessary to adjudicate simply *the question of right to the exemption claimed*, leaving it to the proper

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authority to admeasure and lay off the *particular property to which under such right the claimant may be entitled. See *Munro v. Jeter*, 24 S. C., 29.

The judgment of this court is, that so much of the judgment of the Circuit Court as rejects the appellant's claim of homestead be reversed, and that the case be remanded

to that court for such further proceedings as may be necessary to carry out the views herein announced.

(1 S. E. 13)

25 S. C. 394

ASHLEY v. HOLMAN.

(April Term, 1886.)

1. In action by the committee of a lunatic against the executors of a former committee for an account of the value of services rendered by the lunatic, the Circuit Judge found that such services were rendered and fixed their value, and that these services were enforced for the committee's profit. On appeal, this court sustained the first finding because not wholly without evidence to support it, but reversed the other finding as without testimony and not a natural or necessary inference from the facts proved.

2. The questions adjudicated in the former appeal in this case, *Ashley v. Holman*, 15 S. C., 97, stated.

[3. *Insane Persons* ⇨74.]

If the committee of a lunatic exacts valuable labor from his ward, for his own profit and benefit, he is liable to account for the value of such labor; but if the service is enforced only for the proper discipline and healthful employment of the ward, the committee is not liable, notwithstanding incidental benefit to him therefrom.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 127; Dec. Dig. ⇨74.]

[This case is also cited in *Ex parte Chappell*, 34 S. C. 102, 12 S. E. 934, without specific application.]

Before Fraser, J., Barnwell, March, 1885.

This was an action by Joseph Ashley, committee of William Ashley, against W. A. Holman and W. A. Bailey, executors of William Ashley, sr., deceased. The Circuit decree omitting the statement of facts to be found in the opinion of this court, was as follows:

This being a case in which a trustee is called to account, and in which the claim is founded on the duties growing out of that relation and not upon a contract, and no attempt made to settle with the ward or his committee, until the payment of the two thousand dollars, not long before the com-

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mencement of this action, there is nothing on which to found a plea of the statute of limitations in this case. The ward was no party to the application to the Judge of probate, in reference to the making of annual returns, and is not bound by anything in it.

It is probably true that William Ashley, the elder, never dreamed that he was making himself liable to account for the services of his ward; but if he has made a mistake, it is not an unusual experience of trustees in their dealings with the matters committed to their care.

An examination of the record of the proceedings under which William Ashley, the elder, was appointed committee of his son,

William Ashley, jr., and in which the order of maintenance was also made, does not, as I understand them, show that the order of maintenance in any way had reference to the mode in which the ward had been managed by his father, or was in future to be managed by him as the committee. Their legal effect on this point does not differ from what it is, as the same proceedings and order are set out in the complaint. As they were described in the complaint, the Supreme Court holds that they are no bar to this action. *Ashley v. Holman*, 15 S. C., 97. The only questions before the court were as to the mental capacity of William Ashley, jr., his fitness to control himself and manage his estate, as to the value of his estate and the amount necessary for his support and maintenance. There was enough for this latter purpose, and the court allowed that and no more. The court did not inquire if he could labor and earn wages, and it did not then seem necessary to do so.

Only questions of fact now remain to be disposed of: 1. Was the ward capable of rendering valuable services as alleged? 2. Did he render such services to his committee? 3. Were they required merely as necessary or proper discipline? 4. What, if any, was their value?

It will be impossible to discuss the testimony in detail, and I am at the disadvantage of not having seen the witnesses, and not having the aid of the master by his own judgment as to the conclusions to be derived from the testimony. It may be said, however, that the testimony of the two distinguished physicians who have been examined by commission refers to a hypothetical case,

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*which is not exactly the case now before the court. They, however, only give their opinion. On the other side, it might be said with at least some plausibility that there are many cases of mere idiocy where human ingenuity could utilize mere physical force and power even where the mind was gone, and even extraordinary mental powers are sometimes strangely joined in a person who would be a proper subject to be made a ward of chancery. If such an unfortunate should be able and should in fact engage in profitable employments, he should labor for himself and not his committee.

The great preponderance of testimony is to the effect that the ward did render valuable service to his father and committee during the whole time the relation of ward and committee existed between them, and which services would have been rendered by some else, either slaves or hirelings, if not rendered by him. Even in the last sickness of the father, when the tenderest care was due from all around him, the ward seems to have been trusted to perform important duties around his bedside, and this must

have been with the knowledge of the family. I am not sure that the committee ought to be allowed to enjoy without account the services of his ward, even if such services were the best thing for his health and discipline, if these services had a money value over and above the cost of producing them. I am quite sure that the committee should account if the benefit to the ward was merely incidental, as I am inclined to think it was in this case.

The labor of the ward in this case was constant; and it was enforced under circumstances which, if not painful to himself, must have been so to those who took an interest in him. The chastisement which seems frequently to have been inflicted for mere neglect of duties required, was never, so far as appears from the testimony, inflicted after the day's work was over, to keep his ward from straggling away from his father's dwelling to places where he did not want him to go. The impression made on my mind by the testimony is not that there was any intentional unkindness towards the son, but that the father had become accustomed to his son's infirmities and gave way to his own, perhaps, ruling passion to economize and

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utilize all available labor about him. The testimony for the defence has been mainly of a negative character, and not sufficient to overcome the plaintiff's case.

When witnesses testify as to the value of services, they, to this extent, give their opinions, and it is the duty of the court to weigh their opinions in the light of the personal experience of the judge who tries the case. Two hundred dollars a year would have been, during all these years, a full compensation for the ablest of field hands and somewhat over the average for what was known as a full hand on a plantation. A full hand would not have been willing to do for less than any other work such as was required of the ward in this case. This, however, is not the test. What could this labor have been procured for? All the work done by him was such as was usually done by the inferior laborers on the plantations and who were scarcely half-hands—hands clothed and fed, not as a member of Mr. Ashley's family and at his table, but with such food and clothing as were usual on such plantations amongst the laborers, and at first cost. I think, therefore, that an average of one hundred dollars a year will be a fair allowance for the value of these services. Assuming, therefore, that the committee was chargeable with these services, at the rate of one hundred dollars a year, at the end of each year, and allowing on these sums simple and not annual interest, and deducting commissions, the plaintiffs are entitled to a judgment for that amount—the sum of five thousand one hundred and fifty dollars.

It is therefore ordered and adjudged, that

the defendants, as executors of William Ashley, the elder, deceased, do pay to the plaintiff, as committee, or guardian, of William Ashley, jr., of unsound mind, the sum of five thousand one hundred and fifty dollars and the costs of this action.

From this decree the defendants appealed upon the grounds substantially stated in the opinion.

[For subsequent opinion, see 44 S. C. 145, 21 S. E. 624.]

Messrs. Robert Aldrich and S. W. Melton, for appellants.

Messrs. John J. Maher and Isaac M. Hutson, contra.

November 22, 1886. The opinion of the court was delivered by

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*Mr. Chief Justice SIMPSON. In a former appeal in this case, involving the judgment of the Circuit Court, sustaining a demurrer to the complaint, this court, reversing the judgment below in that respect, decided that the order in chancery, dated in 1855, by which the testator of the defendants had been appointed the committee of William Ashley, the younger, and under which he was allowed the annual interest on the estate of the said William for his board and maintenance, did not in itself preclude a claim for compensation, on behalf of the said William, for services rendered said committee, after the relation of committee and ward had been established, if in fact the said William had rendered to his committee services of a character and under such circumstances as would entitle him in law to such compensation. The court further held in substance that while it was almost inconceivable that an incurable lunatic could earn wages by his labor, yet that this was a matter which would depend upon the facts of each case, and if any case wages had been justly earned by valuable services rendered by such lunatic, and exacted for the profit of the committee, that the doors of the court should not be shut against him because of his lunacy; and that in such case, where an action like the one below had been brought claiming an accounting from the estate of said committee, it could not be dismissed on the ground that the complaint did not state facts sufficient to constitute a cause of action. And the case was then remanded to the Circuit Court under the above rulings.

Upon the case going back it was heard and tried by his honor, Judge Fraser (upon a mass of testimony taken by the master, all of which appears in the "Case"), who found the following facts: First, "That said lunatic did render valuable services to his father (the committee) during the whole time the relation of ward and committee existed between them." Second, "That said services were such as were usually done by inferior laborers, scarcely half hands, and therefore worth

half wages, to wit: \$100." Third. "That it was probably true, that William Ashley, the elder, never dreamed that he was making himself liable to account for these services." And fourth. That said services were enforced by the committee, not so much for the discipline and health of the ward, as for the

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reason that the father (com*mittee) "had become accustomed to his son's infirmities and gave way to his own ruling passion, to economize and utilize all available labor about him." In other words, as we understand this last finding, that the services of the ward were enforced for the profit of the committee, benefit to the ward being merely incidental. Upon these facts, his honor held that the estate of the committee should account, saying that he was not so sure but that it should still account even if said services had been enforced as a matter of discipline, and healthful exercise only. Whereupon he ordered and adjudged, that the defendants, executors of William Ashley, the elder (former committee), do pay the plaintiff, present committee, the sum of \$5,050, and the costs of suit.

The appeal questions the correctness of his honor's findings of fact, denying upon the evidence the capacity of the lunatic to render service, that he rendered service of the value fixed by the judge, and also that said services were enforced for the profit of the committee, under the influence of a ruling passion to economize and utilize all available labor about him, instead of for the proper discipline of said lunatic—the appellants contending that the service rendered by the son was enforced by the father chiefly from a desire to promote the health and happiness of said son, said services having no real value to the father, because otherwise, what was done by him would have been done by his regularly employed servants and the "trash gang" without additional expense to the father, and that his honor should have so found.

The appeal also questions the principle of law which his honor applied to the facts as found, to wit: that although no contract, either express or implied, in the sense that both parties should assent thereto, could arise, one of the parties being non compos and therefore unable to assent, yet that a legal obligation independent of contract could and did exist here, arising out of the duty of the committee to charge himself with the value of the services received by him at the hands of his ward, upon which the action could be sustained—the appellant contending besides, that the service rendered here was rendered in the relation of parent and child, not for the benefit of the parent, and with no intention, expectation, or promise express or implied on the part of the parent to pay

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for them, and therefore they should *have

been held gratuitous, and not susceptible of raising a charge.

Now, can the findings of fact below be sustained? is the first matter before us. We have carefully gone over the testimony reported in the "Case," voluminous and extensive as it is, and, guided by the light of those numerous cases of ours, in which it has been held that the findings of fact by the Circuit Judge will be sustained unless there is either an entire absence of evidence to support them, or the manifest weight thereof is otherwise, we have reached the conclusion that the facts found as to services being rendered by the ward to his committee, and as to their value, are not entirely without testimony, and they, therefore, must be regarded as established. There was very strong testimony the other way, however, so much so, indeed, that in attempting to balance the evidence on both sides, with the view to ascertain the preponderance, it is difficult to see how the conclusions below were reached, except that more reliance was placed in the witnesses of the plaintiff as a whole than upon those of the defendants. In fact, the testimony offered by the defendants was so strong in opposition to the plaintiff's claim, that respondent's distinguished counsel frankly admitted in his argument here, "That if the testimony of these witnesses (alluding to certain witnesses of the defendants just named by him) is to be relied on implicitly, as a truthful representation of the facts, the case of the plaintiff has not been established." Saying further: "That the little that William did in the way of required and enforced service according to this testimony could have been of no value to the committee, and might well be considered only the necessary and healthful discipline to which he should have been subjected as contributing to his physical comfort and health." The contest, then, must have been very close, and might have turned either way, depending upon the estimate in which the testimony on either side was held by the Circuit Judge. Notwithstanding this, however, the findings of the Circuit Judge, mentioned above, having evidence to support them, must be sustained, under the rule in such cases.

But the other important finding, that these services were enforced by the committee up-

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on his unfortunate son, for his own *profit, under the promptings of a ruling passion to economize and utilize all available labor about him, rather than for the discipline, health, and happiness of said son, we do not sustain, because after a careful analysis of plaintiff's testimony, we fail to find any evidence supporting it. True, there is abundant testimony on the one side, that the son did do many things in and about the house, yard, and horse lot, such as making fires, cutting and hauling wood, shucking corn, feeding

and watering horses and other stock, seeing to the barn keys, and doing other small chores about the premises, and also that these to a great extent were required and enforced by the father, and that they were of some value to him; but we find no testimony as to the motive of the father in enforcing said service. The witnesses who speak of the fact, say nothing as to the motive, and there is certainly no direct or positive testimony on that subject from the plaintiff.

Nor do we think such finding is a reasonable or natural inference from the other facts of the case, in the face of the evidence that William Ashley, the elder, was a man of large fortune, owning, up to emancipation, over 150 slaves, with an abundance of personal property of all kind, and no doubt a large landed estate, and the father of the unfortunate lunatic, of whose estate and person he had very properly been appointed the committee. Can it be, that with these surroundings, and with no need for the labor of his son, he was so lost to all the promptings of parental affection, not to say of common humanity, as to be willing to make a degraded menial servant of him, and for no other reason than for profit to himself? We cannot think so. We cannot think that this is a legitimate inference from the facts that service was rendered, that it was enforced, and that to some extent it was valuable in the sense that others would have had to render it if the son had not—to which extent the testimony of the plaintiff goes, but no further.

It must be remembered that William Ashley, the elder, is in his grave. This action has been instituted since his death. In his life he never dreamed that he would be expected to account. And it does not appear that he ever gave any full explanation to any one as to the government of his son and the

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purpose he had in view in requiring him to be employed. But the fact that he was silent upon this subject to his overseers, his slaves, and hired laborers, adds nothing to the probability of the inference mentioned. But he was not entirely silent. The picture which Mrs. V. V. Hohman gives of the condition of his son and what the father said, when he attempted to keep him from the negro quarter, and prevent him from drawing water, cutting wood for the negroes, and nursing their children, is striking and significant, and furnishes to some extent a key to the conduct of the father. She said: "He tried the plan of making him stay in the house and to divert him there; but nothing he could do could interest or amuse him. He would sit with his head drooped, the picture of despair. * * * And her father said, that plan would not do—that he would pine away and die." There being no direct testimony upon this point, and the inference drawn not being a necessary or natural one from the

facts proved, we feel constrained, under the authority of the cases above referred to, to overrule said finding.

Now the question arises, whether under the facts before this court, the judgment below can be affirmed? This raises the legal question, when and under what circumstances can a lunatic earn wages, chargeable upon his committee?

Before proceeding, however, to this question, it would be well to determine the points settled on the previous appeal,¹ and therefore needing no further examination here. The precise point brought up in the exception in that appeal, and which this court adjudged definitely, was, whether the order in chancery of 1855, appointing William Ashley, the elder, committee of his son, precluded all claim for services rendered, if any, by said son. This court held that it did not, overruling the judgment below. That question is therefore res adjudicata here. This court also, in response to the argument of the appellant, in which an effort was made to sustain the judgment below, on the ground that the ward being non compos could not make a contract, and therefore on that account there could be no cause of action in his behalf, even though the order in chancery above did not preclude his claim, held that this was not sufficient, and that notwith-

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standing no contract could be made between the parties, in the sense that both should assent thereto, one of them being non compos, and therefore unable to assent, yet that the law might raise an obligation between such parties, independent of contract to pay for services rendered. The court, however, did not determine or specify the conditions upon which such obligation would arise, or the character of cases in which it would be enforced. It simply adjudged the question that it was not impossible for a non compos to earn wages; or rather the fact of one being non compos did not in itself shut the doors of the court against him. This last question, it is true, was not distinctly raised in the appellants' exceptions in the former appeal, but we think it was raised sufficiently in the argument to prevent our utterances thereon from being entirely obiter. At all events, upon further reflection, we see no reason to change or modify our opinion then expressed. These matters are therefore dismissed, and we will now proceed to the question, whether the facts before the court bring the case under any principle of law which can sustain the judgment below.

We have examined, as far as practicable, all text books and reported cases within our reach, and, singular to say, while we have found the law to be that a non compos may be held liable to others for services of a certain character, to wit, necessities furnished,

¹ Ashley v. Hohman, 15 S. C., 97.

medical attention, &c., on the ground of an implied contract, notwithstanding his admitted incapacity to make a contract, yet we have found no case where others were held liable to him for services rendered. Nor have the distinguished and zealous counsel in the cause referred us to any case where the precise question here has ever before been presented to the courts. Coming in this shape, then, before us, it has been exceedingly embarrassing, and its decision either way has been surrounded with difficulties, and especially so on account of the possible influence which the decision one way or the other may have upon the happiness of that unfortunate class of persons in behalf of one of whom in the person of William Ashley, the younger, this question for the first time in the history of our judiciary has been raised.

To lay down the rule that a committee can work his afflicted ward constantly, indiscrim-

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inately, and for his own pecuniary *profit, and yet pay him nothing, nor account in any way to his estate, because he cannot make a contract, would be a principle not only dangerous to this stricken class, but shocking to every sense of justice. And yet, on the other hand, to hold that a committee is to be held to a strict account and made to pay for every service rendered by his ward, as if no such relation as that of committee and ward existed, and without regard to the object had in view by the committee in requiring the service, and that, too, after the lapse of years, during all of which time the committee had never conceived that he was imposing upon himself such an obligation, as in this case, would be dangerous to the committee, and besides would in a great degree destroy the purposes of his guardianship, preventing the exercise of proper discretion in the discipline and control which should be administered, and the plan which he should adopt in the government of his ward.

In the absence of direct authority and with no case before us where the question here has been considered and discussed, we are left to general principles as applied in analogous cases, and we do not see why the principle enforced against a lunatic for necessary services rendered him, should not be applied in his favor, where he has rendered necessary service to another. Nor why his committee should not be responsible where the evidence is plain that he has enforced and accepted such service for his own benefit and profit. The laborer is worthy of his hire, and if one having control of a non compos, who is unable to contract, yet able to do valuable work, enforces that labor for his own benefit, he should not escape responsibility. If, however, the service has been enforced by the committee not for his profit, but for the proper discipline and healthful exercise and employment of the ward, as the best thing to be

done for his comfort and happiness, although with incidental benefit to the committee, we see no ground for accountability, and especially so in a case like the one at bar, where the committee was the father of the ward, was a man of large fortune, in no way in need of the service rendered, had no idea that he was annually creating a debt against himself, which was to be enforced against his estate after his death, when he would have no opportunity to meet the claim by explanation, counter-claim, or otherwise, and

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when, too, although *he bequeathed nothing directly to his said son, he yet charged his whole estate with his comfortable support and maintenance.

Our conclusion is, that while the Circuit Judge was not in error as to the principle of law which he applied to the facts as found by him, yet one of those facts being overruled, and that fact being the one which made the law enforced applicable, the judgment becomes erroneous.

It is therefore the judgment of this court that the judgment of the Circuit Court be reversed.

25 S. C. 405

BAGGOTT v. SAWYER.

(April Term, 1886.)

[1. *Infants* ⚭113; *Partition* ⚭107.]

Parties to a cause, properly in court in person or by guardian ad litem, are bound by a decree passed in open court setting aside a sale previously made in that cause and also by a decree at chambers ordering a re-sale; and they will not be permitted fifteen years afterwards to question such decrees.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 302; Dec. Dig. ⚭105; *Partition*, Cent. Dig. § 372; Dec. Dig. ⚭107.]

[2. *Judicial Sales* ⚭42; *Specific Performance* ⚭55.]

Parties to a cause knowing of a combination to chill the bidding at a judicial sale made therein cannot, after long acquiescence, have the sale set aside; but parties to the conspiracy cannot obtain the aid of the court in specifically enforcing their illegal agreement with their co-conspirators.

[Ed. Note.—Cited in *Lamar v. Wright*, 31 S. C. 74, 9 S. E. 736; *Milhous v. Sally*, 43 S. C. 324, 21 S. E. 268, 885, 49 Am. St. Rep. 834.

For other cases, see *Judicial Sales*, Cent. Dig. § 81; Dec. Dig. ⚭42; *Specific Performance*, Cent. Dig. § 173; Dec. Dig. ⚭55.]

[3. *Partition* ⚭111.]

The parties held bound by the decree vacating the first sale in the case and by the order of re-sale, are entitled to their proportionate interest in the securities taken at the resale.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. § 402; Dec. Dig. ⚭111.]

4. Petition for rehearing refused.

Before Hudson, J., Lexington, September, 1885.

The opinion sufficiently states the case.

Mr. D. S. Henderson, for plaintiffs and other heirs.

Messrs. Meetze & Muller, for George and John Sawyer.

Mr. A. B. Sawyer, for Catherine Sawyer and others.

Messrs. G. T. Graham and J. H. Rion, for the heirs of William Fort.

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*November 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In January, 1862, an order was obtained in the Court of Equity for Lexington District (now county), in partition proceedings for the sale of certain real estate of one George Sawyer, sr., deceased, his heirs at law all being parties thereto. At the sale of said real estate, his widow, Catherine Sawyer, one of the defendants here, became the purchaser, at and for the sum of \$10,285, to secure which sum she executed her bond with one John W. Sawyer and William Fort as sureties to Henry A. Meetze, commissioner in equity, and also a mortgage of the premises. Some time after this and before the proceedings in partition had ended, to wit: in July, 1869, Jane Fulmer and Jasper Sawyer, two of the parties to said proceedings, having died, an order was obtained from Judge Boozer to amend the bill in Sawyer v. Sawyer, making their heirs at law parties defendant, and also an order appointing guardians ad litem of certain minors. These orders were obtained on motion of the aforesaid Mr. Fort, who was a relative of the parties, and the attorney having in charge the partition proceedings.

In August, 1869, two petitions were filed, one purporting to have been signed by Mrs. Catharine Sawyer, and praying that she might be released from her purchase of the said real estate, and that her bond and mortgage be given up and cancelled and a re-sale of the land be had. This petition was based upon the great and unexpected change which had taken place in her condition on account of the results of the war. The other petition purported to have been signed by the other heirs at law, the minors signing through their guardians ad litem, and prayed same as the first one. These petitions were referred to a special referee by Judge Boozer, to inquire and report whether it was best for the infants that the bond and mortgage should be released, &c. Mr. Fort was the attorney for the petitioners. The reference was held, and, as it appears, without notice to any of the parties or their guardians ad litem. Upon a favorable report coming in, Judge Boozer, in open court, on December 11, 1869, decreed that the former sale be rescinded, the bond

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and mortgage *cancelled, and that it be referred to the referee to report upon what terms a re-sale should be ordered.

In accordance therewith a report was af-

terwards made, not signed, however, by the referee, Griffith, C. C. P., but by his deputy clerk, Mr. Harman, recommending a sale of the premises in two parcels, &c., upon which report Judge Boozer, at chambers, on December 29, 1869, decreed a sale, which was made by the sheriff of Lexington on February 7, 1870, at public outcry, George Sawyer being the purchaser of both tracts at \$1,175—said to have been a very inadequate price. This bid of George Sawyer was on same day transferred to Mr. Fort, to whom the sheriff executed titles, upon his giving bond and mortgage to secure the credit portion of the purchase, the cash portion having been credited on the costs of sale and the fee of Mr. Fort as complainants' solicitor. No part of the bond and mortgage has been paid except \$195, which was paid by Mr. Fort to Mrs. Catharine Sawyer as her dower in the purchase money. This sale was afterwards confirmed by an order of Judge Melton.

It appears as a further fact found in the case by the Circuit Judge, Judge Hudson, that before the sale mentioned above, to wit: February 7, 1870, Mr. Fort, the attorney in the cause of Sawyer v. Sawyer, and a creditor of the estate of George Sawyer, sr., and George Sawyer, jr., also a creditor and heir and administrator of George Sawyer, sr., and John W. Sawyer, also a creditor and heir of George Sawyer, sr., agreed together that William Fort should not bid at the sale of the land against the said George and John W. Sawyer, provided that if they or either of them should become the purchaser, he or they would transfer their bid to the said Fort; George and John, however, to take possession and when they paid said Fort what was due him by the estate, he would make title to them.

William Fort died in 1875. Under the above state of facts the action below was commenced in 1884, by the plaintiffs, grandchildren and heirs at law of George Sawyer, sr., against Catharine Sawyer, the widow and an heir at law of the said George, and also the other heirs at law of the said George, and also against the administrator and heirs at law of William Fort, deceased, demanding judgment, that the tract of land in question

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*be sold, and the proceeds be applied to the payment of the bond and mortgage of Catharine Sawyer, given at her purchase of the land, March 11, 1862, in the partition proceeding before mentioned, and that judgment be entered up for any deficiency against the said Catharine and her sureties, John W. Sawyer, and the estate of William Fort; and to this end that the sale made to William Fort, February 7, 1870, be set aside, &c., and if this be refused, that the re-sale of the land under the orders above be set aside and a new sale be had.

The heirs of George Sawyer, sr., who were made defendants, answered, admitting the

allegations of the complaint and joining in the prayer for relief, except the defendants, George Sawyer, jr., and John W. Sawyer, who claimed that they were entitled to the land under the agreement made by them with Mr. Fort at the sale of February 7, 1870, and they demanded a dismissal of the complaint and a specific performance of the contract with Mr. Fort as against the heirs of the said Fort, their co-defendants. The other defendants, heirs at law of Fort, denied the alleged combination at the sale, and claimed that all questions as to the bond and mortgage had been adjudicated by the proceedings under the petitions; that all facts connected with the sale were known or by due diligence could have been known, and they submitted that all relief against said sale, if at any time the heirs of George Sawyer were entitled thereto was barred by laches and the statute of limitations.

His honor, Judge Hudson, heard the case, and upon the facts stated (which, upon examination of the "Case," will be found to be the material facts) he held "as matter of law, that the plea of former adjudication as to the bond and mortgage set up as a defence by the Fort heirs to the demand for foreclosure by the Sawyer heirs was not binding and effectual against the plaintiffs, Eliza C. Derrick, George A. Fulmer, John W. Fulmer, Mary L. Fulmer, Amanda M. Boozer, Mary E. Crim, and Maria J. Leaphart, for the reason that they were not parties to or bound by the proceedings following up the petitions aforesaid. * * * That all the other heirs at law of George Sawyer, sr., are bound by said proceedings up to and including the order of December 14, 1869. This decree released Mrs. Catharine Sawyer from

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her bond and mortgage, and was made in open court." And he decreed a foreclosure of the Catharine Sawyer bond and mortgage to the extent of the interests of said plaintiffs, adjudging that the heirs of Jane Fulmer were entitled to one-sixteenth of two thirds of said bond, with interest from November 11, 1885, and the heirs of Jasper Sawyer to the same amount; that all the other parties to the suit, whether as heirs or creditors of George Sawyer, sr., were precluded from setting up any claims, as they were barred by estoppel, laches, and lapse of time. He found further as matter of law, that the order of Judge Boozer passed December 29, 1869, at chambers, ordering a re-sale of the land, was and is assailable and invalid for the want of jurisdiction, and that the sale had thereunder on February 7, 1870, was also impeachable, because the order was granted at chambers, and that it was also voidable because of the agreement between Mr. Fort and George and John W. Sawyer, but that the heirs of George Sawyer, sr., who attack said sale and who signed the petition, and who were not minors, either knew the

facts or had the means of knowing them, and because of their negligence and laches in not applying sooner, they cannot complain of the defects of said sale, and are barred of any relief.

As to the claim of affirmative relief set up by George and John W. Sawyer, he held that said claim, arising upon a contract which was illegal and against public policy, could not be entertained, they being left where the court found them, with the legal title of the land abiding in William Fort, deceased, as against all the parties to the action contesting it, except those to whom relief was especially granted. He finally ordered, on failure of Catharine Sawyer, John W. Sawyer, and the estate of William Fort paying or causing to be paid to the plaintiffs the sums allowed them by a day fixed, that the land be sold under the bond and mortgage of the said Catharine, &c., with leave to said parties to have judgment and execution for such deficiency, if any, that might occur, but upon compliance with the terms of the decree, that the heirs of Fort have full possession of the tract of land as against all parties to this action who dispute in any manner the title of William Fort, deceased.

The plaintiffs, Deborah Baggott, Martha

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Fallow, Ella Williamson, Ansel Sawyer, and Howell Sawyer, excepted and appeal upon several grounds:

1st. Because his honor erred in holding that said plaintiffs were bound by the decree of Judge Boozer of December 14, 1861 (1869), as a bar to the foreclosure sought, whereas he should have found that Howell Sawyer was not a party to said proceeding, and that the other plaintiffs had no knowledge of said decree, or the references upon which it was based, the same having been procured by William Fort in his own interest, and against the interest of his clients.

2d. That his honor having found that the decree of Judge Boozer was made "at chambers," and therefore the court was without jurisdiction, and the sale tainted by a combination to chill the bidding, he should have found said sale absolutely void, and have ordered a re-sale.

3d and 4th. That his honor erred in finding that these parties were barred by negligence, laches, &c., whereas he should have held as matter of law that laches should not have been presumed against them, because of the relations which existed between them and their attorney, Mr. Fort, and because of the minority of some of the parties.

5th. That he erred in not admitting the testimony of George and John W. Sawyer.

6th. That he erred in decreeing full possession to the heirs of Fort, the same never having been asked in the pleadings.

The other defendants, heirs at law of George Sawyer (except George Sawyer and John W. Sawyer), appealed upon the same

grounds as above; the widow, Catherine, adding an exception as follows: That his honor erred in finding that the reception by her from William Fort of one-sixth of his bid at the re-sale, estopped her from questioning the same.

George Sawyer and John W. Sawyer appealed upon the following exceptions:

1st. Because his honor erred in not admitting and considering the testimony of George and John W. Sawyer, where they testified to transactions with Fort, said testimony being competent under section 2025 of the General Statutes.

2d. In decreeing that full possession of the

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land in question should be given up to the estate of Fort, because the same was never asked for by said estate, and such relief is contrary to all the pleadings in the case.

3d. In not excluding as incompetent the agreement between George Sawyer and H. Arthur Fort, the same having been altered and erased in several important particulars.

4th. That his honor having admitted the special agreement, he erred in not admitting and considering the testimony of George Sawyer as to payments made to Colonel Fort, same being competent under section 400 of the Code. This testimony should have been admitted in favor of John W. Sawyer.

5th. That his honor having found the sale of February 7, 1870, and the title of Colonel Fort thereunder valid, he erred in not finding that George and John W. Sawyer entered into possession of the land under the agreement with Colonel Fort, that he would make them titles when they paid him what was due him by the estate of George Sawyer, sr. That he erred further in not finding that they had paid said money, and in not decreeing specific performance in their behalf.

It will be observed that there is no appeal from the plaintiffs in whose behalf relief has been granted, nor have the heirs of Fort appealed. Nor do the exceptions of those who have appealed question the rulings made in favor of the successful plaintiffs. So much of the decree, therefore, as has adjudged the successful plaintiffs entitled to have the original mortgage of Catherine Sawyer reinstated and foreclosed for their benefit, on the ground that they were never parties to the proceedings by which she was released from her purchase, and her bond and mortgage cancelled, under the order of December 14, 1869, must be regarded as established and submitted to by all parties, and the judgment based upon that ruling must be enforced in behalf of said plaintiffs, whatever may be the consequences to the other parties.

The unsuccessful heirs of George Sawyer, sr. (except George, jr., and John W. Sawyer), however, claim that they, too, were entitled to the benefit of the foreclosure ordered upon several grounds. First, they say, that as

to the defendant, Howell, he was in no way a party to the proceedings which led up to

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the decree of Judge Boozer of December 14, 1869, releasing Catherine Sawyer from her bond and mortgage, and that the other complaining parties had no knowledge of said decree or the references upon which it was made. Contra to this, it must be remembered that there is a wide difference between the position of the excluded heirs and the successful plaintiffs as to the original bill of Sawyer v. Sawyer; a difference too, which affects very differently the rights respectively of these classes under the proceedings in that case. All of the excluded heirs, including Howell Sawyer and Mrs. Cook, for whom an especial appeal is urged, were parties to Sawyer v. Sawyer from the beginning to the end, while at no time were the successful plaintiffs parties to any portion of said proceedings—so held by the Circuit Judge without appeal.

The petitions which led up to the order of Judge Boozer of December 14, 1869, releasing Mrs. Catherine Sawyer, were proceedings, it seems, in the case of Sawyer v. Sawyer, to which the excluded heirs were all parties. The order of December 14, 1869, was passed in open court, after the report of a referee upon the propriety of such an order, and although we can see no reason why a second guardian ad litem was appointed for Howell Sawyer, yet there seems to be no doubt that he was properly in court up to that time, and being so, he, with the others who were also in court, having submitted to the decree made without appeal, cannot now at this late date avail themselves of the defence that they had no knowledge of said decree or of the references upon which it was based. There must be an end to litigation, and if parties to actions fail to attend to their own interest while the action is in progress, or lose their right of appeal by negligence and inattention, they must take the consequences. Whatever may have been the justice or propriety of the order of December 14, 1869, there can be no doubt that all who were parties to the proceeding which resulted in that order are bound, the same having been passed in open court, and submitted to for years and without appeal.

But, it is urged in behalf of the appellants, admitting that they are bound by the decree of December 14, 1869, yet they are not bound by the order of sale subsequently pass-

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ed by Judge Boozer, said order having been passed at chambers, and that his honor having held the court without jurisdiction, on that account it was error on his part not to vacate and set aside the sale made thereunder, and thereupon to order a re-sale. This would be sound doctrine if these appellants had not been parties to that proceeding, or being parties had resisted said order and had

appealed therefrom. But having been parties thereto, and not only parties, but at the same time active in promoting said order and in bringing about the sale, it is too late now, after the lapse of years, fifteen or more, to complain. They are estopped from raising the question of jurisdiction. Under all the circumstances, that question was beyond the reach of the Circuit Court, so far as the appellants were concerned.

It is urged, again, that the sale should have been set aside on account of the combination between Mr. Fort and George and John W. Sawyer not to bid against each other, which the Circuit Judge found as matter of fact existed at said sale. But here also the Circuit Judge found as matter of fact that these appellants knew of this conspiracy, or of facts and circumstances connected therewith sufficient to put them on an inquiry which would have developed it, and he ruled that said appellants having submitted to said sale, without protest or objection up to this action, they could not now complain, and were barred by their own laches of all relief. We think this ruling of the Circuit Judge is sustained by authority. See *Kerr Frauds*, 303-305; *Badger v. Badger*, 2 Wall. 87 [17 L. Ed. 836].

Nor do we think that the ruling of his honor as to the claim of George and John W. Sawyer for affirmative relief was erroneous. They were parties to the conspiracy as to the bidding at the sale, which was illegal and against public policy, and they had no rights, therefore, either legal or equitable which the court could enforce, and it was right that the court should leave them where it found them.

We do not see the pertinency of the exception made by all of the appellants, in which it is complained that his honor refused to admit and consider the testimony of George and John W. Sawyer as to transactions with Mr. Fort, deceased; nor that of George and John W. Sawyer that his honor, having ad-

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mitted *the special agreement, he erred in not admitting and considering the testimony of George Sawyer as to payments made to Colonel Fort. We do not find in the argument reference to the folios where the admission of this testimony was insisted upon and refused, and exception taken. All that we find in the decree of his honor on this subject is that he found as matter of fact: "That before the sale of February 7, 1870, William Fort, who was attorney in the cause of Sawyer v. Sawyer, and a creditor of the estate of George Sawyer, sr., and George Sawyer, jr., who was a creditor and an administrator and heir of said estate, and John W. Sawyer, who was a creditor and heir of said estate, agreed together that William Fort would not bid against said George and John at said sale, provided, &c. * * * This finding," he said, "is obtained irrespec-

and upon the testimony of Ansel Sawyer, where it was not objected to, and the statements of Colonel Fort in the answer in the Murphy dower case, and the statement of his heirs in the complaint in the ejectment case. In fact, the senior counsel for the Fort heirs, Mr. Rion, in his argument admitted that such agreement existed, but denied its legal effect." This branch of the case, in the mind of the Circuit Judge, turned upon the existence of this illegal agreement, of which there appeared abundant testimony, independent of any effect which the appellants might have hoped to accomplish by the admission of the testimony of George and John W. Sawyer.

This brings us to the last exception taken by all the appellants, wherein error is alleged, that his honor decreed that full possession of the land in question should be given up to the estate of Fort. We do not find anything in the pleadings which authorizes this portion of the decree. The action was instituted by a portion of the heirs of George Sawyer, sr., praying judgment that a bond and mortgage given by Catherine Sawyer in the purchase of certain real estate of the said George Sawyer, deceased, under partition proceedings, be enforced by foreclosure of the mortgage, with an alternative prayer that if this could not be done, that a certain subsequent sale of said real estate be set aside, and a re-sale ordered and the proceeds distributed. The relief first above mentioned has been decreed to some of these

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*heirs, but denied to the others, the latter being held bound by the sale sought to be vacated—the result being that the successful plaintiffs, heirs, are entitled to share in the proceeds of the sale to Mrs. Catherine Sawyer, and the others in the proceeds of the sale to the Fort heirs. Provision is made in the decree for the successful heirs, but none for the appellants.

We think the appellants, styled herein as the unsuccessful heirs, should receive their shares respectively of the sale made to Fort. They have been held to that sale, and they are entitled to have it enforced against the estate of Fort and his heirs, all of whom are before the court. To this end the decree below should be modified and amended so that unless the Fort heirs shall pay to said unsuccessful heirs their shares respectively in the purchase by William Fort of said real estate by a time to be fixed, that then the land be sold in satisfaction of his bond and mortgage given at said purchase; or should a sale be made under so much of the decree below as gives relief to the successful heirs in the foreclosure of the mortgage of Catherine Sawyer, that this sale shall also be in foreclosure of the mortgage of William Fort; the proceeds of said sale, if made, to be distributed between the successful heirs, their shares therein being as decreed below, and the balance between the appellants, their

shares being ascertained according to the purchase price of William Fort; and should there be a deficiency in either, that the successful heirs have judgment and execution against Catherine Sawyer and her sureties, and the appellants judgment and execution against the estate of William Fort, if any, for the same.

It is the judgment of this court that so much of the decree as adjudges possession of the lands to the Fort heirs be reversed, and so much as affords relief to the successful heirs, plaintiffs, be affirmed; and that the case be remanded, so that such modification as is herein above decreed in favor of the appellants may be made, the shares of said appellants in the proceeds of the Fort mortgage to be ascertained upon reference or otherwise as the Circuit Court may determine.

In this case, a petition for rehearing was tiled by the Fort heirs, upon the ground that

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William Fort had fully paid the bond and mortgage given by him for his purchase at the re-sale; and that the statement to the contrary found in the Circuit decree was a manifest mistake of fact.

January 18, 1887. The following order was passed:

PER CURIAM. The petition is based upon a statement that the finding of his honor, Judge Hudson, "that no part of the Fort bond and mortgage had been paid except \$195, the widow's dower," was founded upon a mistake of fact, and as this finding constituted in part the basis of our judgment, a rehearing is asked. In the absence of an admission from all the parties that there was such a mistake, we cannot alter the record, and must assume that the findings below were correct, there having been no appeal from said finding. The petition is therefore dismissed.

(1 S. E. 111)

25 S. C. 416

LOWRY v. THOMPSON.

(April Term, 1886.)

[1. *States* ⇐ 191.]

Plaintiff contracted to sell his land to the State Land Commissioner, received a small portion of the purchase money, and executed his deed, which was never delivered, but was surreptitiously taken possession of and retained by that officer, and no further payments were made. This office was abolished and all its assets directed to be turned over to the secretary of State, to be held subject to the control of the Sinking Fund Commission, which was composed of certain State officials, and this title deed thus came into the possession of the secretary of State. Upon the refusal by the commission to return this deed, plaintiff brought action against the Sinking Fund Commission for its recovery. *Held*, that the action was really against the

State, and therefore was not maintainable in any of the courts of the State. Cases reviewed.

[*Ed. Note*.—Cited in *Butler v. Ellerbe*, 44 S. C. 276, 22 S. E. 425; *Pool in Evans*, 57 S. C. 86, 35 S. E. 436; *Hopkins v. Clemson Agricultural College*, 77 S. C. 34, 35, 36, 38, 57 S. E. 551; *State of South Carolina ex rel. J. Fraser Lyon, Atty. Gen., v. State Dispensary Commission*, 79 S. C. 326, 60 S. E. 928; *State v. Lazarus*, 83 S. C. 217, 65 S. E. 270.

For other cases, see *States*, Cent. Dig. § 181; Dec. Dig. ⇐ 191.]

[2. *Courts* ⇐ 37.]

[Cited in *Columbia W. P. Co. v. Columbia Electric, etc., Co.*, 43 S. C. 167, 20 S. E. 1002; *Adkins v. Moore*, 43 S. C. 174, 20 S. E. 985; *Green v. Niver*, 43 S. C. 369, 21 S. E. 263; *Butler v. Ellerbe*, 44 S. C. 260, 263, 22 S. E. 425; *Riddle v. Reese*, 53 S. C. 202, 31 S. E. 222; *Whetstone v. Livingston*, 54 S. C. 545, 32 S. E. 561—to the effect, when a state is a party to a suit which for that reason is not maintainable, the jurisdictional defect may be objected to at any time.]

[*Ed. Note*.—For other cases, see *Courts*, Cent. Dig. §§ 147–149, 151, 156; Dec. Dig. ⇐ 37.]

Mr. Chief Justice Simpson dissenting.

Before Cothran, J., Richland, July, 1884.

This was an action by James M. Lowry against Hugh S. Thompson, governor, W. E. Stoner, comptroller general, and others, as Commissioners of the Sinking Fund, for the recovery of a title deed. Upon the point decided by the court, the opinion fully states the case.

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*Mr. Miles, attorney general, for appellant. Mr. J. D. Pope, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. This action was brought by the plaintiff against the Commissioners of the Sinking Fund of the State of South Carolina to recover the possession of two papers in the form of deeds, purporting to be conveyances of certain tracts of land in the County of York, by the plaintiff to C. P. Leslie, as land commissioner of the said State, the consideration mentioned therein aggregating the sum of seventeen thousand five hundred and ninety-nine dollars. The case as made for the plaintiff was, in substance, this:

Sometime in the year 1870, the plaintiff agreed to sell to the said Leslie, as land commissioner, the said tracts of land at the price named as the consideration in the said papers, to be paid in cash. Accordingly the papers were drawn up, signed and sealed, but not delivered, and were placed by the plaintiff in the hands of one Gulick to be delivered to the said land commissioner when the balance of the purchase money should be paid, the plaintiff having previously received twenty-four hundred dollars on account thereof. While the papers were thus in the possession of Gulick, the said Leslie applied to him for them so that they might

be submitted to the attorney general for examination and approval, alleging that this was necessary in order to enable him to pay the balance of the purchase money. Gulick delivered the papers to the agent of Leslie for the purpose of examination, with the understanding that they were to be returned to him after they had been examined. They never were returned, but the said Leslie upon various pretexts neglected to do so, although repeated demands were made upon him for their return both by plaintiff and the said Gulick, and on the contrary, the same were surreptitiously put upon record in the proper office in York County.

By the act of February 15, 1872, the office of land commissioner was abolished, and in

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the second section of that act it was *provided: "That all books and papers pertaining to the office of the land commissioner be turned over to the secretary of State on and after the passage of this act. And the secretary of State shall execute the duties heretofore devolving upon the land commissioner." By the act of 1878, now section 60 of the General Statutes, it was provided: "The secretary of State shall take charge of all property of the State, the care and custody of which is not otherwise provided for by law. He shall hold the same subject to the directions and instructions of the commissioners of the sinking fund." Section 61: "Hereafter no grants of vacant lands shall be issued, except to actual purchasers of the said lands for value; and all vacant lands purchased by the late land commissioners of the State shall be likewise subject to the directions and instructions of the commissioners of the sinking fund." And then by section 62, which is but a re-enactment of the act of 1870, the several public officers mentioned in the title of this action are constituted the commissioners of the sinking fund, "to receive and manage the incomes and revenues set apart and applied to the sinking fund of the State." And by section 63, it is made the duty of the said commissioners "to sell and convey, for and on behalf of the State, all such real and personal property, assets, and effects belonging to the State, as is not in public use," with certain exceptions which need not be mentioned here, and apply the proceeds as therein directed.

It seems that the papers in question, together with the other books and papers pertaining to the office of land commissioner, were, when that office was abolished, turned over to the secretary of State, and the same are now in the possession of that officer. On October 18, 1883, the plaintiff made a formal demand upon the commissioners of the sinking fund for the papers in controversy, which not being complied with, this action was commenced for their recovery. As the secretary of State has not been made a party, the action seems to be based upon the

theory that though the papers in question are in the actual possession of the secretary of State, yet they are only held by that officer as the mere hand of the commissioners of the sinking fund, and being subject entirely to their control, the action is brought against them alone, as they alone can direct the disposition of them.

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*The Circuit Judge held that the land commissioner originally obtained possession of these papers by fraud, and the subsequent fraudulent holding of them by that officer "followed the papers into the hands of the present defendants, his successors, who still hold, but should not be allowed to retain, possession of the same," and that the value of the papers to the plaintiff should be measured by his liability under the covenants of warranty therein, to wit: the sum of seventeen thousand five hundred and ninety-nine dollars. He therefore rendered judgment that the plaintiff do recover from the defendants the papers in question, and in case the specific property cannot be delivered up, that he recover the value thereof, to wit: the sum of fifteen thousand, one hundred and ninety-nine dollars. From this judgment defendants appeal upon the several grounds set out in the record, which need not be mentioned here. Upon the argument of that appeal the court suggested a question of jurisdiction not raised by the parties, to wit: whether the action was not, in fact, though not in form, an action against the State, and as such not maintainable in any of the courts of the State, and ordered a re-argument upon that question, which has been had.

It will be necessary, first, to dispose of the question of jurisdiction: for if it shall be determined that the court has no jurisdiction, then it would be not only unnecessary but improper to undertake to decide any of the other questions in the case.

That a State cannot be sued in any of its courts, without its express consent, which can only be given by the legislative authority, is a proposition so universally conceded as to render any argument or authority to support it wholly unnecessary. If, however, authority should be asked for, it will be found in almost every case which will be hereinafter cited, where it will be found that the proposition has either been distinctly decided or expressly recognized, and we are not aware of any authority to the contrary. As it is not pretended that any such consent was given in this case, the first inquiry is, whether this is really an action against the State. The fact that the State is not named as a party to the record is not conclusive of this inquiry, though at one time it seems to have been so held in the case of *Osborn v. United States Bank*, 9 Wheat., 738 [6 L. Ed. 204], followed by

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Davis v. Gray, 16 Wall., 203 [21 L. Ed. 447]; but these cases, so far as this particular point is concerned, are entirely inconsistent with the more recent decisions of the Supreme Court of the United States, where the rule seems to be now well settled that an action though in form against an officer of a State, if it is in fact a suit against the State itself, cannot be maintained even though the State is not made a party on the record. *Louisiana v. Jumel*, 107 U. S., 711 [2 Sup. Ct. 128, 27 L. Ed. 448]; *Cunningham v. Macon & Brunswick R. R. Co.*, 109 U. S. 446 [3 Sup. Ct. 292, 609, 27 L. Ed. 992]; *Hagood v. Southern*, 117 U. S., 52 [6 Sup. Ct. 608, 29 L. Ed. 805].

Indeed, it being universally conceded that a State cannot be sued without its consent, except in the limited class of cases in which a State may be sued in the original jurisdiction expressly granted to the Supreme Court by the constitution of the United States, it is only in cases where the State is not named as a party defendant in the record, that any real question of jurisdiction can arise: for if the State is named as a party defendant in the record, that precludes further inquiry, and the court, it is universally conceded, cannot take jurisdiction. In *Cunningham v. Macon & Brunswick R. R. Co.*, supra, Mr. Justice Miller reviews this whole subject and admits that it is not an easy matter to reconcile the various decisions of the Supreme Court of the United States upon the subject; and while disavowing any attempt to do so, he proceeds to deduce from them certain general principles. After laying down the general principle that a State cannot be sued without its consent, except in the limited class of cases above alluded to, he says: "This principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction;" and after adding that the courts have, "in some instances gone a long way in holding the State not to be a necessary party, though some interest of hers may be more or less affected by the decision," he proceeds to classify the cases in which this has been done, as follows:

"1. It has been held in a class of cases where property of the State, or property in which the State has an interest, comes before the court and under its control in the regular course of judicial administration,

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without being forcibly taken from the *possession of the government, the court will proceed to discharge its duty in regard to that property. And the State, if it chooses to come in as plaintiff, as in prize cases, or to intervene in other cases when she may have a lien or other claim on the property,

will be permitted to do so, but subject to the rule that her rights will receive the same consideration as any other party interested in the matter, and be subjected in like manner to the judgment of the court. Of this class are the cases of *The Siren*, 7 Wall., 152, 157 [19 L. Ed. 129]; *The Davis*, 10 Wall., 15, 20 [19 L. Ed. 875]; and *Clark v. Barnard*, 108 U. S., 436 [2 Sup. Ct. 878, 27 L. Ed. 780]." It will be observed that in the case of *The Davis*, supra, while the lien for salvage on the personal property of the United States was fully recognized, yet it was held that such lien could not be enforced by a suit against the United States, or by a proceeding in rem where the possession of the property can only be had by taking it out of the actual possession of the officers or agents of the government charged therewith, but that as it appeared in that case that the property was not taken out of the possession of any officer or agent of the government, but from the common carrier to whom it had been delivered for transportation from one port to another, when the government came in and asserted its claim to the property, it would be required to discharge the lien before the property would be delivered to it.

"2. Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the orders of the government. In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." The somewhat famous case of *United States v. Lee*, 106 U. S., 196 [1 Sup. Ct. 240, 27 L. Ed. 174], is cited as belonging to this class, and to it we may add the subsequent case of *Poindexter v. Greenhow*, 114 U. S., 270 [5 Sup. Ct. 903, 962, 29 L. Ed. 185].

"3. A third class, which has given rise to more controversy, is where the law has imposed upon an officer of the government a well defined duty in regard to a specific matter, not affecting the general powers or functions of the government, but in the performance of which one or more individuals have

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a distinct *interest capable of enforcement by judicial process." Amongst the cases mentioned as illustrations of this class are, *Davis v. Gray*, 16 Wall., 203 [21 L. Ed. 447]; which, however, is questioned as going to an extreme limit, if not beyond it; *Board of Liquidation v. McComb*, 92 U. S., 531 [23 L. Ed. 623]; and *Osborn v. Bank of the United States*, 9 Wheat., 738 [6 L. Ed. 204], which last mentioned case is declared to go no further than to decide: "That where a plain official duty, requiring no exercise of discretion, is to be performed, and perform-

ance is refused, any person who will sustain a personal injury by such refusal may have a mandamus to compel performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." As a further illustration of this class we may add the recent case of *Allen v. Baltimore & Ohio Railroad Company*, 114 U. S., 311 [5 Sup. Ct. 925, 962, 29 L. Ed. 200].

We have felt warranted in making these liberal quotations from the case of *Cunningham v. Macon & Brunswick R. R. Co.*, because it is manifestly a well considered case, in which the whole subject is reviewed and ably treated, and the case has been distinctly recognized and followed in one of the most recent decisions of the Supreme Court of the United States—*Hagood v. Southern*, supra.

It may be well to mention here that the title of the case (*United States v. Lee*) much relied on to support the jurisdiction in this case, as it is designated in the reports and usually cited, is well calculated to mislead, by conveying the impression that the United States was a party to the action in that case. The fact, however, is otherwise. The action was brought against Kaufman and others, as individuals, in the State court and removed to the Circuit Court of the United States. Thereupon the attorney general filed a suggestion, setting forth certain facts upon which he claimed that the court could not take jurisdiction of the case, and moved to set aside all the proceedings for want of jurisdiction, saying expressly that he appeared only for the purpose of such motion. The plaintiff having recovered judgment in the Circuit Court, two writs of error were sued out—one in the name of the United States, and the other in the name of Kaufman and

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others, *the defendants against whom judgment was rendered. That the United States was not a party, is apparent from the following language used in the opinion of the court: "As the United States was not a party to the suit below, and while defending the action by its proper law officers, expressly declined to submit itself as a defendant to the jurisdiction of the court, there may exist some doubt whether it has a right to prosecute the writ of error in its own name; but as the judgment against Kaufman and Strong is here on their writ of error, under which all the questions are raised which could be raised under the other, their writ being prosecuted in the interest of the United States, and argued here by the solicitor general, the point is immaterial, and the question has not been mooted." The whole decision shows clearly that the case turned entirely upon the question whether an individual who, when sued for a trespass, under-

takes to justify under the title of the United States, can maintain such defence without establishing the validity of such title. It is clear, therefore, that this case was properly placed by Mr. Justice Miller in the second class, when, in *Cunningham v. Macon & Brunswick R. R. Co.*, he was classifying the various cases in which the court could take jurisdiction.

Now let us examine the case presented for our determination in the light of these decisions of the Supreme Court of the United States, to which we have resorted in the absence of any cases in our own state upon the point involved. It certainly cannot be pretended that the case falls within either the first or third of the classes in which Mr. Justice Miller arranged the cases in the case of *Cunningham v. Macon & Brunswick R. R. Co.*, and we think it equally clear that it does not fall within the second class. The action is not brought against the defendants as individuals for a tort, from which they are seeking to defend themselves by some act or order of the State government; but the action is brought against them as commissioners of the sinking fund to recover property alleged to be in their possession officially. Indeed, the person or officer, the secretary of State, who, it is conceded, has the actual possession of the property, has not been made a party to the action, and the claim against the defendants as officers or agents of the State

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government is rested solely upon *the ground that the secretary of State, who has the actual possession of the property, holds it "subject to the directions and instructions of the commissioners of the sinking fund," who are therefore sued as the only parties having the right to control the disposition of the property in question.

Now, unless the property is held and claimed as the property of the State, it is very manifest that the defendants, as commissioners of the sinking fund, have nothing whatever to do with it, and never having had it in their actual possession, they would not, on that ground, be amenable to an action for its delivery. For the act (section 60 of the General Statutes) only requires the secretary of State to take charge of "the property of the State" and hold "the same subject to the directions and instructions of the commissioners of the sinking fund," and hence if the property in question is not held and claimed as the property of the State, then it is clear that the commissioners of the sinking fund have nothing more to do with it, and are under no more responsibility for it than for any other property of a third person which may happen either wrongfully or accidentally to be in the actual possession of the person who holds the office of secretary of State. If, then, the property is to be regarded as in the official possession of the secretary of State, held and claimed as the property of the

State, and as such subject to the control of the commissioners of the sinking fund, it would seem to be clear that the action is, in fact, though not in form, an action against the State itself; for in such case, as the State can only hold possession of personal property by or through an officer or agent, the possession of the officer or agent is the possession of the State, and the State is an indispensable party to any contest for the right of possession.

Even if the possession of the State was originally acquired by some wrongful act of some one of its officers or agents (though it is difficult to see how this could be judicially determined until the question of jurisdiction is first disposed of), still no action could be maintained by the rightful owner to recover possession against an officer of the State government holding and claiming the property as the property of the State when sued as such; because in such case, the State being

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the real party in interest, *would be an indispensable party to the action, and as she could not be made a party without her consent, the action could not be maintained in any court, and the claimant would be remitted to his remedy by petition to the legislature, just as in the case of all other claims against the State, where, if his claim be well founded, it is not permissible to doubt he would receive ample justice. If, however, the action should be brought against the person in possession as an individual, and he, in his defence, seeks to justify his possession by alleging title to, or right of possession in, the State, then, as in the case of *United States v. Lee*, supra, he must establish such title or right of possession, and if he fails to do so, judgment goes against him as an individual.

The reason for the distinction is obvious. In the former case the party in possession being sued as an officer, judgment can only go against him as such, and not against him as an individual, for he is not sued as such; and as the only property which he holds as an officer is the property of the State, it is clear that the State is the real party in interest, as it is out of her property alone that the judgment sought to be recovered can be satisfied. But in the latter case, where the party in possession is sued as an individual, the judgment can only be enforced against the individual property of the defendant, and the State is not necessarily interested and is not therefore the real party in interest. Take this very case as an illustration. Suppose it should become necessary to enforce the alternative money decree, against whose property could it be enforced? Certainly not against the individual property of the persons named as defendants, for no claim against them as individuals has been established. If it is proposed to enforce such judgment against

the property held by them as commissioners of the sinking fund, the answer would be that all of the property so held is the property of the State, which, of course, even if the State enjoyed no more exemption from suit than a private citizen, could not be reached under such judgment, as she was not a party to the action in which the judgment was recovered, according to the only theory upon which the action could be maintained. True, it may be said that it is not likely that it will be necessary to enforce

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the alternative money decree; *but that cannot affect the legal question involved. If the judgment is a valid one at all, it is just as valid in the one alternative as in the other; for if the court had jurisdiction of the case, the judgment as rendered was not only authorized, but required by the conclusions as to the facts and the law reached by the Circuit Judge. It seems to us, therefore, that the fact that the judgment rendered in this case cannot, in one of its alternatives, be enforced, because it goes against the property of the State, shows conclusively that the action was in fact, though not in form, an action against the State, of which neither this court nor the court below has any jurisdiction.

The cases of *The State v. The President and Directors of the Bank of the State of South Carolina*, 1 S. C., 63; *Dabney, Morgan & Co. v. The Bank of the State*, 3 Id., 124; *Bank of the United States v. The Planters Bank*, 9 Wheat., 904 [6 L. Ed. 244]; *Bank of Kentucky v. Wister*, 2 Peters, 318 [7 L. Ed. 437]; *Briscoe v. Bank of Kentucky*, 11 Pet., 257 [9 L. Ed. 709]; *Darrington v. State Bank of Alabama*, 13 How., 12 [14 L. Ed. 30]; and *Curran v. State of Arkansas*, 15 How., 304 [14 L. Ed. 705], relied on by the counsel for the plaintiff, have all been carefully examined, and do not appear to us to be applicable to the present inquiry. These cases, so far as we are at present concerned with them, only decide that the fact that a State owns a part or the whole of the stock of a banking corporation, does not exempt such corporation from suit under the rule that a State cannot be sued without its consent. Aside from the fact, which of itself would be conclusive of the inapplicability of these cases, that in most, and probably all of them, the charters of the corporations contained express provisions that they could sue and be sued, it is well settled that, in the eye of the law, a corporation and the individuals who compose it are totally distinct and different persons. Hence an action against a corporation can never be regarded or treated as an action against the individuals who hold its stock. Without some special provision in the charter to that effect, or some general law of the State, the individuals who compose the corporation are not only not to be regarded as

parties to an action brought against it, but their individual property could not be reached under a judgment against the corporation. From this it follows naturally and logically that when an artificial person

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*called a corporation is brought into existence, it, like all other persons, natural as well as artificial, may be subjected to the process of the courts, and the fact that its stock is owned in part or in whole by the State, confers upon it no exemption from suit, as the corporation and the persons who compose it are totally distinct and different persons.

It is argued, however, that when the State established the office of land commissioner, who was charged with certain specific duties, to wit: the buying of lands and selling them in small parcels to actual settlers, and set apart a fund, the proceeds of the sale of bonds issued for that purpose, to be used in paying for the lands so purchased, that fund was as much separated from the other funds of the State and placed under the control of the land commissioner, as the capital provided for the Bank of the State was separated from the other funds of the State and placed under the control of the president and directors of that institution, and that as the latter was subject to suit in the courts of the State upon any contract made by them, so could the former, as the State, in such case, could not be regarded as a necessary party to the action, and hence no exemption from suit on that account could be claimed. It will be observed, however, that the land commissioner, neither singly nor in conjunction with the advisory board, was ever constituted a corporation while the bank was, and therefore the analogy would not hold good.

But even assuming, for the purposes of this inquiry, that the land commissioner could, in his own name, sue or be sued upon any contract made by him in the performance of his official duties, it must be remembered that that office has long since been abolished, and all the funds and property pertaining thereto have been placed in the hands of the secretary of State, along with all the other property of the State, the custody of which is not otherwise provided for by law, and hence such funds and property are no longer separated from the other assets of the State, but along with such assets are directed to be applied to the payment of the debt of the State. There is, therefore, now no longer any separate agency entrusted with a specific fund, in regard to which such agency can contract and be contracted with, as was formerly the case in reference to the

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land commissioner and the Bank of the State. So that, besides the fact that the land commissioner was never made a corporation as the Bank of the State was, there is this ad-

ditional objection to the view contended for by the plaintiff. The State has resumed the possession and control of all the assets heretofore entrusted to the land commissioner for a specific purpose, and has appropriated these assets, along with others, to the general purpose of the payment of the public debt.

If, however, in resuming the possession and control of the books and papers heretofore entrusted to the land commissioner the State has acquired the possession of any property belonging to the plaintiff, upon which the State has no rightful claim, this court cannot permit itself to doubt, that upon a showing to that effect made in the proper way for a claim against the State to be presented, that restitution will be made upon such terms as are just; but no action against the State or any officer thereof entrusted with the custody of such property, can be maintained in the courts of this State for want of jurisdiction.

Having reached the conclusion that neither this court nor the court below has any jurisdiction of this case, because it is in fact though not in form an action against the State, we have no authority to consider any other question arising in the case, and anything which we might say would be an extrajudicial utterance, in which this court has no disposition to indulge.

The judgment of this court is that the judgment of the Circuit Court be reversed, and that the complaint be dismissed for want of jurisdiction, without prejudice as to the merits of the claim.

Mr. Justice McGOWAN concurred.

Mr. Chief Justice SIMPSON, dissenting. The action below was brought to recover certain personal property claimed by the plaintiff, and alleged by him to be in the wrongful possession of the defendants, as commissioners of the sinking fund, upon whom a demand had been made and refused. The defendants admitted in substance that they, as said commissioners, had control of the property sued for, and they claimed that the title to said property was in the State; that they held as trustees for the State, and were not authorized to deliver it to the plaintiff until the rights and equities of the

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State in the premises should be judicially determined, setting up a counter-claim against the plaintiff for some \$3,000. Judgment below was for the plaintiff on the merits. On appeal to this court by the defendants, for the first time a question of jurisdiction was raised to determine which a re-argument was ordered on the single point, to wit: Whether or not the action below, though not in form, was yet in substance, and fact an action against the State. Upon this re-argument my brethren having determined that the action is against the State,

have adjudged that the complaint be dismissed for the want of jurisdiction. In this opinion I have not been able to concur for the reasons following:

I do not deny the legal proposition that the State cannot be sued in the courts of this State, except by its own consent. This doctrine is too well settled and too firmly established to intimate even a doubt in reference thereto. And I fully concur in its correctness. But I take issue with the majority on the proposition that the State has been sued, or is in any way a party to the action below, and I therefore fail to see the applicability to the case of the principle that the State cannot be sued, upon which the complaint has been ordered to be dismissed.

The question, then, is, was the action below against the State in such sense as on that account it should be dismissed, the State not having consented to be sued? It is nowhere contended that the State is named as a party on the record, nor has there been any attempt to summon her by the service of any process, nor has she voluntarily appeared as one of the defendants. It is said, however, that the State may still be regarded as a party to the issue involved, to wit: the title to the property in question is really between the plaintiff and her, notwithstanding she is not named in the record, and no effort has been made by the plaintiff to make her a party. The only cases where this question has been raised are certain cases heard and decided in the Supreme Court of the United States, and I concur with the statement in the majority opinion that these cases are not entirely consistent with each other.

In *Osborn v. The U. S. Bank*, 9 Wheat., 739 [6 L. Ed. 204], the bank instituted proceedings against Osborn, auditor of the State of Ohio, to restrain him from enforcing an

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act of the State of Ohio against the *bank in reference to collecting certain taxes imposed by the act. One of the positions taken in the case was: "That in fact the bill was against the State, and as such the Circuit Court had no jurisdiction." This point (which is the exact point here) seems to have been fully considered by the Supreme Court on appeal. It was conceded on all sides that the defendants on the record had no personal interest whatever in the suit, and that their connection therewith was simply official as agents of the State of Ohio, and that the State alone was really interested in the result. With this fact admitted, Chief Justice Marshall, in delivering the opinion of the court, after fully discussing the question whether the jurisdiction of the court as to the parties depended upon the character of those whose interest is litigated, or of those who are parties to the record, concludes the discussion of that branch of the case, with the following emphatic

declaration: "But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named on the record." And further: "The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants, whether they are to be considered as having a real interest, or as being only nominal parties." This case was decided by the Supreme Court of the United States in 1824, the precise question involved here being involved there. The court held that the State of Ohio not being named as a party on the record was no party to the suit, although her rights and interests were alone involved, and being no such party, the jurisdiction of the court was not ousted. Therefore the case proceeded to judgment against Osborn, the auditor.

In *Davis v. Gray*, 16 Wall., 203 [21 L. Ed. 447], decided in 1872, the doctrine of *Osborn v. The Bank of the United States* was distinctly affirmed and the principles redeclared in terms as follows, to wit: "That where the State is concerned the State should be made a party if it can be done. That it can-

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not be done is a sufficient reason *for the omission to do it, and the case may proceed to decree against her officers in all respects as if she were a party to the record;" that in deciding who are parties to the suit, the court will not look beyond the record: that making a State officer a party does not make the State a party, although her law prompt his action, and she may stand behind him as the real party in interest; that a State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." And Mr. Justice Swayne, in delivering the opinion, refers to *Dodge v. Woolsey*, 18 How., 331 [15 L. Ed. 401]; *The State Bank of Ohio v. Knoop*, 16 How., 369 [14 L. Ed. 977]; *The Jefferson Branch Bank v. Skelly*, 1 Black, 436 [17 L. Ed. 173]; *Ohio Life & Trust Co. v. Debolt*, 16 How., 432 [14 L. Ed. 997]; and *The Mechanics & Traders Bank v. Debolt*, 18 How., 380 [15 L. Ed. 458], as proceeding upon the same principles and controlled by the authority of *Osborn v. U. S. Bank*, supra, with respect to the jurisdictional question arising in each of those cases as to the defendants.

It is said, however, in the majority opinion, that these cases are inconsistent with the recent cases from the Supreme Court of the United States, and especially with the cases of *Louisiana v. Jumel*, 107 U. S., 711 [2 Sup. Ct. 128, 27 L. Ed. 448]; *Cunningham v. Macon*

& Brunswick R. R. Co., 109 U. S., 446 [3 Sup. Ct. 292, 609, 27 L. Ed. 992]; and Hagood v. Southern, 117 U. S., 52 [6 Sup. Ct. 608, 29 L. Ed. 805]. It may be that these latter cases, especially Louisiana v. Jumel, and Cunningham v. Macon & Brunswick R. R. Co., cannot be fully harmonized with the cases referred to above, but those older cases were not overruled by these latter ones. On the contrary, in the opinion of the court in each of these latter cases the former ones, especially Osborn v. Bank and Davis v. Gray, the two leading cases on that line, were recognized and the principle which governed therein distinguished from said latter cases, leaving both classes standing and of force. In Hagood v. Southern, supra, Mr. Justice Matthews, after discussing the principle applied in a class of cases to which Osborn v. The Bank belonged, as compared with the case then before the court, said: "A broad line of demarcation separates from such cases as the present (Hagood v. Southern) in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in

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its political capacity—those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiff under color of authority, unconstitutional and void," &c.

With the cases from the Supreme Court of the United States then standing in this way, I do not think it can be successfully claimed that that court has established the principle even for its own government, that where the issue involved is one between a State alone and the plaintiff, the defendants being only agents and officers of the State and asserting the rights of the State, that the State in every such case must be regarded as a party, thereby ousting the jurisdiction of the court, although she is not named on the record as a party. On the contrary, I think that each case as to this question must depend upon its own facts, the fact of the State being held a party or not, depending upon the further fact, whether the suit is intended, on the one hand, to enforce by affirmative official action on the part of the defendants the performance of an obligation which belongs to the State in its political capacity, or, on the other, is to redress or restrain the violation of some personal or property right, inflicted or threatened under the color of official authority. If the case belongs to the first class, then under the principle of Louisiana v. Jumel, Cunningham v. Macon & Brunswick R. R. Co., and Hagood v. Southern, supra, the Supreme Court of the United States no doubt would hold, that the State, though not named as a party, would still be held to be a party sufficiently so to oust the jurisdiction. But if it belonged to the second class, under

the authority of Osborn v. The United States Bank, and Davis v. Gray, supra, it would allow the action to proceed, at least to the point of determining whether the defendants were rightfully acting under and by the authority of the State; or, rather, whether the right asserted by them for the State rested upon a sound foundation.

In my opinion, the case below belonged to this latter class. It was an action to redress an alleged wrong inflicted upon the property rights of the plaintiff under the color of official authority, and the State not being nam-

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ed as a party, nor any process *prayed, or attempted against her, she is no party—certainly not in such sense as to demand a dismissal of the complaint for the want of jurisdiction.

The majority opinion, however, is based more especially upon the case of Cunningham v. The Macon & Brunswick R. R. Co., supra, in which Mr. Justice Miller in delivering the opinion of the court, after laying down the doctrine: "That wherever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse the jurisdiction," which he says is a conceded principle in all the cases; and after adding, "that the courts have gone a long way in some instances, in holding the State not to be a necessary party, though her interest may be more or less affected," proceeds to classify the cases in which this has been done, dividing the cases into the three classes mentioned in the majority opinion. My brethren adopt this classification, and they undertake to show that the case at bar does not belong to either of these classes. This, it appears to me, is changing the question before the court. The question before us is not whether the court can proceed to judgment without the State being a party, but it is whether the State is a party. The question whether we can pronounce judgment against the defendants in the absence of the State, appears to me to be a very different question from whether the State is a party. In the latter case, which is the question that has been discussed before us, if the State is held a party, then the jurisdiction is gone at once without further argument or investigation; but in the former case, the merits are somewhat involved, and must be examined before a judgment can be reached.

In this view of the matter it does not seem to me, so far as the question before us is concerned, to be very material, whether or not the case at bar belongs to either of the classes mentioned by Mr. Justice Miller. But suppose that it does not belong to either one of these classes. Does it follow necessarily, that the court could not proceed to judgment, the State being absent? I do not understand that Mr. Justice Miller excludes every other case except those belonging to one or other

of the classes mentioned by him. He simply classifies the cases in which the court has

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*heretofore acted, and declares that in those cases the jurisdiction of the court has been maintained; but he does not hold, that these are the only cases in which that jurisdiction could attach.

But is it clear that the case at bar is outside of the classification as it stands? Is it not embraced in the principle of the second class? To the second class belongs *United States v. Lee* (106 U. S., 196 [1 Sup. Ct. 240, 27 L. Ed. 171]), and cases of that character, where officers and agents of the government are sued for property which they hold not in their own individual right, but as officers and agents, and their defence is title and possession in the government, and not in themselves personally. That was the case of the *United States v. Lee*, where the defendants were holding "Arlington" as the agents and officers of the United States, and had been thus holding for ten years or more, as public property—a national cemetery. They were sued for possession by Lee. The United States interposed by its attorney, claiming that the United States was a party, or rather was an indispensable party, and the United States could not be sued; that the court therefore had no jurisdiction and could not proceed. The court held otherwise, and the case went to judgment, in favor of Lee.

Now, the facts in that case are almost identical in their character with the facts here. Here the plaintiff sues for personal property, the title of which is evidently in him. The defendants admit possession, they do not deny that that possession reached them through an illegal act of the former land commissioner, as charged in the complaint, but they claim that they are holding not in their own right, but for the State, who has a claim against the plaintiff, which they demand should be settled before they are required to deliver to him his property. These are the facts. How do they differ in character from those in *United States v. Lee*? I can see no difference.

But it is said there is a difference in the character of the actions in the two cases; that in *Lee* and *United States*, the action was against the defendants as individuals, and not as officers and agents, and that in the case below the action was against the defendants as officers and agents, and not as individuals. That is true. There is that difference between the cases, but does that demand the application of different principles

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to facts which are nearly the same? In *Lee* and *United States*, the court held, that the defendants could not oust the jurisdiction of the court by interposing the defense that they were officers, and holding entirely for the government, which was a known and admitted fact. This being so, how can that ju-

risdiction be affected, when they are sued as such officers? What difference can it make, whether the character of the holding appears from the plaintiff in his complaint, or from the defence set up in the answer of the defendants? The principle set up in *Lee* and *United States* was, that holding for the State did not in itself, and proprio vigore, oust the jurisdiction of the court, preventing all further investigations; but that, in such case, the action should proceed until it was determined that the holding was rightful and legal.

I cannot see why that principle should not still apply in a case like that before the court, where the plaintiff alleges that the defendants are in possession of his property, as State officials, claiming for the State, but that they are wrongfully so, because his title is better than that of the State, and where the defendants admit that they are holding for the State, claiming title in the State. There can be no doubt that the same principle is involved in each of the cases, to wit: whether the defendants' claim is founded on legal grounds, which can only be determined by assuming jurisdiction and by investigating the question. It is admitted that this can be done where the matter of the right of the State is set up as a defence by the defendants, when sued as individuals, but it is denied, where the character of the holding is alleged in the complaint (because such are the facts of the case), and the defendants are sued as officials. It appears to me that this would be technical to an extreme degree, and subversive of right and justice.

I do not think that the State is a party to the action. Nor do I think that it is indispensable that she should be a party, so as to enable the court to render a judgment—the court having jurisdiction of the defendants, against whom a judgment may be made, the State still having the right to assert her claim, if any. I therefore cannot concur in the majority opinion.

Judgment reversed.

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*BAILEY v. COLTON.

(April Term, 1886.)

[1. *Trusts* ⚭357.]

Where a creditor receives trust funds from his debtor, in payment on the debt, not knowing of the trust, he is not implicated in his debtor's breach of trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 539; Dec. Dig. ⚭357.]

[2. *Appeal and Error* ⚭994.]

This court will rarely, if ever, disturb the findings of fact of the Circuit Judge, where they depend upon the credibility of witnesses examined openly before him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3901–3906; Dec. Dig. ⚭994.]

[3. *Trusts* ⇐357.]

Mrs. C. borrowed money from N. on a bond and mortgage, and then lent it to her husband on his note. Afterwards C. made a payment to N. on this bond and credited the amount on the note. This payment was made by C. with trust funds, but neither N. nor Mrs. C. knew this. A year later, after threat of suit by the cestui que trust, Mrs. C. gave a second mortgage to N. in part, to indemnify him, if required to refund this payment. *Held*, that Mrs. C. could not be required to refund this money, and that the indemnity given by her to N. did not ratify her husband's misconduct nor enure to the benefit of the cestui que trust.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 539; Dec. Dig. ⇐357.]

[4. *Appeal and Error* ⇐169.]

Points not raised nor considered on Circuit are not properly before this court for review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1018-1034; Dec. Dig. ⇐169.]

Before Wallace, J., Union, June, 1885.

The appeal in this case was from the following Circuit decree:

It is not necessary that authorities should be cited in support of the proposition that the payment of trust funds upon the debt of the trustee or of his wife is a breach of trust. Upon the consummation of such an act the sureties upon the bond of the trustee become immediately liable. The person to whom the payment is made is also immediately liable for the amount so received, if he was aware that the sum so paid him was paid in trust funds. If, however, the payee received in good faith, without notice, and the money itself cannot be identified, no right of action exists against him. 1 *Perry Trusts*, § 346; *Hudnal v. Wilder*, 4 *McCord*, 300 [17 *Am. Dec.* 744]. Now, as matter of fact, did Nicholson know or have reasonable grounds of belief that the money paid him by Colton was trust funds? It will be remembered that it was in January, 1884, that Nicholson went with Thomas Bailey to Colton. There is nothing to show that any of the subsequent steps in the matter of the appointment of the guardian was

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known to Nicholson, or *that he knew when Colton received his ward's money. Colton was in active business as a merchant, supposed to be handling more or less money every day, and it was past the middle of April, three months after the interview between Bailey, Colton, and Nicholson, before Colton paid Nicholson the eight hundred dollars. Although Colton was all the time insolvent, there is no sufficient proof to show in opposition to Nicholson's testimony that Nicholson knew of his, Colton's, insolvency. Colton testifies that he did not tell Nicholson that the money he paid him was trust funds, and Nicholson testifies that Colton did not tell him, and he did not know it. I therefore find that Nicholson did not know that seven hundred dollars of the sum paid by Colton was trust funds, and that he,

therefore, is not a party to the breach of trust and not liable in this action.

There can be no doubt that seven hundred dollars of the money paid to Nicholson was funds of Mary R. Bailey. The facts show it and Colton admits it. Mrs. Colton was also made aware of it, and agrees to save Nicholson harmless from any liability in consequence of it. She thus, after being aware of the facts, accepts the benefit of the payment of trust funds by her husband upon her debt, and by indemnifying Nicholson assumes the burden of defending the transaction. John E. Colton paid the money on his wife's debt. The payment of the debt was an obligation upon her. To the extent of the payment he discharged her obligation; he, therefore, did act and assumed to act for her. When the matter is afterwards brought to her attention by Nicholson, she accepts the advantage of the payment and claims to hold it. A manifested intention, with knowledge of the circumstances to accept and retain the benefits of an act by any one for whom the act was done, is a ratification of the act, whether previously authorized or not, and makes the actor agent of the person who ratifies. *Story Agency*, §§ 252, 253, et seq.

It is obvious, therefore, that the execution of the second mortgage to Nicholson by Mrs. Colton and the stipulation entered upon it in regard to the repayment by Mrs. Colton of the money paid to Nicholson by John E. Colton was a ratification of the payment, which had the effect to make John E. Colton the agent of Mrs. Colton in the transaction.

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Such a ratification not only *created the agency, but had the same effect as an original authority to bind the principal in regard to third persons. "An act done by an agent which would, if authorized, give an action for damages to a third person against the principal, will, if subsequently ratified by the principal, give the same right to damages against him, as much so as if the action was founded on a ratified contract of the agent.

In short, it is treated throughout as if the act was originally authorized; for the ratification relates back to the time of the inception of the transaction and has a complete retroactive efficacy. * * * Hence it is that if the agent has made a contract without authority from his principal or beyond his authority, and it is afterwards ratified, the principal may generally sue and be sued thereon, in the same manner and with the same effect as if he had originally given the authority." *Story Agency*, § 244, et seq.

It thus appears from the law and the facts that John E. Colton was in effect acting by the direction and authority of his wife, Mrs. R. W. Colton, when he paid the money to Nicholson for her. The legal effect of the transactions taken together is, that John E. Colton committed a breach of trust by the

direction of his principal, Mrs. R. W. Colton, of which Mrs. Colton received the benefit. This state of facts makes Mrs. Colton liable for the repayment of the money. At page 472 of Story's Agency, the following language occurs: "If the principal should direct his agent to commit a trespass, or to make a conversion of the property of a third person, or he should subsequently ratify or adopt the act, when done for his own use or benefit, he would be liable as an original trespasser or wrongdoer."

It is therefore ordered and adjudged, that John E. Colton do account for his actings and doings as guardian of Mary R. Bailey, and for any sums received by him and not properly paid out as such guardian, and for all sums properly chargeable against him as such guardian, the plaintiff is entitled to judgment against John E. Colton and his sureties, A. D. Spears and Joshua C. Spears.

It is further ordered and adjudged, that for the sums for which the plaintiff is entitled to judgment, as above adjudged, John E. Colton is primarily liable as between him

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and his sureties, and *that the plaintiff do have judgment against Rosalie W. Colton for the sum of seven hundred dollars and interest thereon from April 18, 1885, and that for this sum Mrs. Colton is primarily liable, as between her and the sureties upon the guardianship bond of John E. Colton, and for the payment of this sum so much of the bond and mortgage executed by Mrs. Colton to W. A. Nicholson on 5th February, 1885, shall stand as security, and the plaintiff here shall have all such rights in regard to said security necessary to enforce her right under it.

It is further ordered and adjudged, that as to W. A. Nicholson the complaint be dismissed.

Mr. William Munro, for plaintiff.

Mr. J. H. Rion, for Mrs. Colton and Nicholson.

July 19, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The defendant, Mrs. Rosalie W. Colton, being indebted to her co-defendant, Nicholson, for money borrowed by her and loaned to her husband, John E. Colton, another defendant, on his own note, to assist him in carrying on his mercantile business, on May 1, 1883, executed her bond to Nicholson in the sum of nineteen hundred and thirty-five dollars, and to secure the payment thereof gave him a mortgage on her house and lot, which was her separate property. On January 15, 1884, John E. Colton was appointed guardian of the plaintiff, and on that day executed his bond, with the other two defendants, A. D. Spears and J. C. Spears, as his sureties, for the faithful performance of his duties as such guardian. On April 15, 1884, John E.

Colton received about two thousand dollars, proceeds of a policy of insurance on the life of plaintiff's deceased father, to which the plaintiff and her mother were entitled in equal portions, and on the same day deposited the whole amount received in the bank at Union to his individual credit, which after the application by the bank of about three hundred dollars to previous overdrafts of John E. Colton, left about seventeen hundred dollars to his credit. On April 18, 1884, John E. Colton drew from the bank on a check payable to himself or bearer, seven

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hundred dollars in *currency, which, after adding thereto one hundred dollars taken out of his store, he paid to Nicholson on the bond of his wife hereinbefore referred to, and at the same time took credit on his note to his wife for the amount, to wit: the sum of eight hundred dollars.

On February 5, 1885, Nicholson having heard a rumor that an effort would be made to require him to refund the amount thus paid to him on the bond of Mrs. Colton by her husband, upon the ground that he had used his ward's funds in making such payment, and John E. Colton in the meantime, to wit: on January 29, 1885, having failed and made an assignment for the benefit of his creditors, he (Nicholson) obtained from Mrs. Colton a new bond for the balance due upon the old bond, and also covering three hundred dollars which Nicholson had loaned to Colton in December, 1884, with the additional sum of eight hundred and ninety-five dollars, being the sum, with interest, paid by Colton to Nicholson on the original bond of his wife, which last mentioned bond was secured by a mortgage of the same property. Thereupon the first bond and mortgage seem to have been marked satisfied. At the time the last bond was given it was understood between Mrs. Colton and Nicholson that this sum of eight hundred and ninety-five dollars was to be paid by Mrs. Colton only upon the contingency that Nicholson should be required to refund the money paid him by Colton with his ward's funds, and this understanding was evidenced by an endorsement on said bond to that effect.

On April 15, 1885, this action was commenced, wherein judgment was demanded that an account be taken of Colton's guardianship; that plaintiff have judgment against defendants for the balance found due her upon such accounting; and that the mortgages hereinbefore mentioned be set up and declared securities for plaintiff's benefit.

The case was heard by Judge Wallace, who found that there was a breach of trust upon the part of the guardian in applying seven hundred dollars of his ward's funds in the payment made by him on the bond; that Nicholson, however, was not privy to such breach of trust, as there was no sufficient

proof that he knew of Colton's insolvency at

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the time, or that he knew the money *paid him constituted any part of the ward's estate: that Colton in making the payment was acting as the agent of his wife, and although she may not have known at the time of the payment that the ward's funds were used for the purpose, yet this fact being known to her agent, whose act she subsequently ratified and accepted the benefit of, made her a participant in the original breach of trust by her husband and agent. He therefore rendered judgment that John E. Colton do account as guardian, and that the plaintiff have judgment against him and the defendants who are his sureties for the balance found due to the plaintiff upon such accounting: that as between him and his sureties, John E. Colton is primarily liable; "and that the plaintiff do have judgment against Rosalie W. Colton for the sum of seven hundred dollars and interest thereon from April 18, 1884, and that for this sum Mrs. Colton is primarily liable, as between her and the sureties upon the guardianship bond of John E. Colton, and for the payment of this sum so much of the bond and mortgage executed by Mrs. Colton to W. A. Nicholson on February 5, 1885, shall stand as security, and the plaintiff here shall have all such rights in regard to said security necessary to enforce her rights under it." He further adjudged that as to W. A. Nicholson the complaint be dismissed.

From this judgment the plaintiff and the defendant, J. C. Spears, who makes common cause with her (the defendant, A. D. Spears, who seems to have been insolvent, having died pending the trial), appeal upon the ground of error in dismissing the complaint as against the defendant, Nicholson; and Mrs. Rosalie W. Colton appeals upon the ground of error in fixing any liability upon her. The several grounds of appeal are set out in the record, but need not be repeated here, as we do not propose to consider them seriatim, but rather to determine the several questions which we understand these several grounds to raise.

The appeal on the part of the plaintiff and the defendant, Spears, raises a question of fact only: for unless some notice is brought home to Nicholson that Colton was using trust funds in making the payment to him, it is quite clear that Nicholson cannot be implicated in Colton's breach of trust. According to the well settled rule the finding of the Circuit Judge cannot be disturbed,

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*unless it is without any evidence to sustain it, or is manifestly against the weight of the evidence. So far from this being the case, we think the conclusion reached by the Circuit Judge may well be supported by the testimony. It is true that there is some testimony tending to show that Nicholson knew

that Colton was using the funds of his ward in making the payment, but it seems to us that the preponderance of the evidence is the other way. The testimony tending to show knowledge on the part of Nicholson is not very clear and distinct, while, on the other hand, the testimony of Nicholson and John E. Colton, if credited, conclusively shows a want of knowledge on the part of Nicholson, and, as we have said in several cases, where there is a conflict of testimony, and the result depends upon the credibility of the witnesses, this court will very rarely, if ever, disturb the conclusion reached by a Circuit Judge.

The appeal on the part of Mrs. Colton raises the following questions: 1st. Did the Circuit Judge err in holding that the facts in evidence showed that John E. Colton, when he made the payment to Nicholson, was acting as the agent of his wife, and that her subsequent ratification of this act of her agent, and adoption of the benefit of it, constitute her a participant in the breach of trust which he then committed, and as such responsible for it? 2nd. Can a married woman be made responsible out of her separate estate for a breach of trust committed by her husband? 3rd. Can a married woman, since the amendment to the married women's act, adopted in 1882, execute a valid mortgage to secure the repayment of money borrowed for her husband's use?

It seems to us that the Circuit Judge, in reaching his conclusion as to the liability of Mrs. Colton, overlooked the important fact that these parties stood towards each other not only in the relation of husband and wife, but also in that of debtor and creditor. The fact that she was the wife of John E. Colton does not by any means authorize the inference that she was acquainted with his financial affairs; for all experience shows that the wife is oftentimes woefully ignorant of her husband's pecuniary condition, and knows nothing of his business affairs. And as there is not a particle of evidence in this case that

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Mrs. Colton knew that her *husband had received any money for his ward, or even knew that he had been appointed guardian, or had any knowledge whatever of the payment to Nicholson until long after it had been made, we think, in considering this question, she should be looked at, not as the wife of Colton, but as his creditor.

Looking at her then in this light solely, what was, practically, the transaction here brought in question? Was it, in effect, anything, more or less, than the payment on a debt due by Colton to his wife through Nicholson? And if, as was properly held by the Circuit Judge, the payment made by Colton to Nicholson, even though made with trust funds, would not implicate Nicholson in the breach of trust, without proof that Nicholson knew at the time that the money used in

making the payment to him constituted a part of the trust funds, we are unable to see why, upon the same principle, Mrs. Colton should not be relieved from any imputation of participating in the breach of trust, when, as we have seen, she was entirely innocent of any knowledge, at the time of the payment, of the character of the funds used in making the payment, or of the source from whence they were derived by Colton.

True, she knew it afterwards, and so did Nicholson; but this knowledge, acquired nearly a year after Colton had committed the breach of trust, by using his ward's funds in making the payment, certainly cannot have the effect of implicating either Nicholson or Mrs. Colton in such breach of trust. Suppose that John E. Colton, instead of making the payment directly to Nicholson on his wife's bond, had first paid the money to her on the note which he had previously given to her for borrowed money, and she had then sent the money to Nicholson by her husband, or by any third person, to be applied to her bond to Nicholson, could it be pretended, in such a case, that Mrs. Colton could be implicated in the breach of trust committed by her husband, in the absence of any evidence that she knew, at the time, the trust character of the funds she was receiving? Surely not. As soon as the money was thus paid to her it became absolutely hers, to do with as she pleased; and money having no earmarks by which it could be followed, the cestui que trust would lose all right to it, and must look for reimbursement to the person alone

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*to whose guardianship it was committed, and the sureties on his bond. This, it seems to us, was, practically, the real character of the transaction; and the fact that the husband, instead of some indifferent third person, was used as the means of conveying the money to Nicholson, cannot alter the true character of the transaction.

Nor do we see how the subsequent conduct of Mrs. Colton can be regarded as either an adoption or ratification of the previous breach of trust committed by her husband. When, in February, 1885, nearly a year after Colton had committed the breach of trust, his wife for the first time heard, or, so far as the evidence shows, even had reason to suspect, that her husband had thus misapplied the trust funds, what does she do? She does not enter into any agreement or contract to indemnify and save harmless her husband's ward against any loss by reason of the misconduct of her husband, but she simply agrees to indemnify a third person, Nicholson, against any loss which he might sustain by reason of her husband's misconduct. Under the circumstances, this was quite natural, and perhaps commendable, on the part of Mrs. Colton, for it seems that Nicholson had been in the habit of befriending her husband, and that she had previously undertaken to

guarantee him against any loss which he might sustain by reason of such friendly acts, by mortgaging her separate property to Nicholson. When, therefore, it was apprehended that Nicholson might become a loser by the improper act of Colton, what more natural than that Mrs. Colton should do as she had done before, step forward and shield the friend of her husband from such apprehended loss? But how this can be regarded as an adoption or ratification of her husband's previous breach of trust, we are unable to perceive. It was simply a contract on the part of Mrs. Colton to indemnify her friend, Nicholson, and how it can be converted into an agreement to indemnify a wholly different person, the plaintiff in this case, with whom there was no privity, we are unable to understand.

The Circuit Judge, in speaking of this branch of the case, and of the conduct of Mrs. Colton in giving the second bond and mortgage to Nicholson, falls into an error, which we regard as fundamental, in using this lan-

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guage: "She thus, after being *aware of the facts, accepts the benefit of the payment of trust funds by her husband upon her debt, and by indemnifying Nicholson assumes the burden of defending the transaction." It is a mistake to say that she accepted the benefit of the payment, "after being aware of the facts." On the contrary, she had not only accepted, but had enjoyed, the benefit of the payment for nearly a year before she had the slightest knowledge of the facts. If she had so chosen, she could, when informed of her husband's breach of trust, have stood out and declined to come to the aid of any of the parties, and in the absence of any evidence whatever of notice to her of the trust character of the funds, she would have been entitled to the full benefit of the payment, as an executed transaction—not executory—which required some act or acquiescence on her part to complete it, and which could not be undone as to her without proof of such notice. On the other hand, if she had so desired, she might have agreed to indemnify the plaintiff against any loss which she might sustain by reason of the misapplication of her funds; or she might have undertaken to indemnify Nicholson against any loss which he might sustain by reason of the improper receipt by him from her husband of trust funds (if such should prove to be the case). She chose to do the latter and did not choose to do the former; and we do not see how she can be held liable to the plaintiff, whom she did not agree to indemnify, because she saw fit to indemnify another person, who owes no duty to, and stands in no privity with, the plaintiff.

Under this view of the case, the other questions raised by Mrs. Colton cannot properly arise, and need not, therefore, be considered. Indeed, so far as appears from

the "Case," the points raised by those questions do not seem to have been presented to or passed upon by the Circuit Judge, and are, therefore, not properly before us.

The judgment of this court is that the judgment of the Circuit Court, in so far as it adjudges any liability against Mrs. Rosalie W. Colton, be reversed, and that in all other respects it be affirmed.

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*COLEMAN v. WILMINGTON, COLUMBIA & AUGUSTA RAILROAD COMPANY.

(April Term, 1886.)

[1. *Master and Servant* ⚭190.]

The conductor of a material train, even in the matter of readjusting a switch, is not a fellow-servant with a laborer on his train, but is a representative of the master.

[Ed. Note.—Cited in *Rhodes v. Southern Ry.*, 68 S. C. 506, 47 S. E. 689; *Richey v. Southern Ry.*, 69 S. C. 387, 391, 393, 394, 48 S. E. 285.

For other cases, see *Master and Servant*, Cent. Dig. § 450; Dec. Dig. ⚭190.]

[2. *Master and Servant* ⚭286.]

A railroad company is not liable to one of its servants for the consequences of an isolated act of a third person over whom the company has no control; but where the company had ground for believing that a switch had been previously opened with a false key, and a train thrown off its proper track, the Circuit Judge properly submitted to the jury whether the company had been guilty of negligence in failing to take proper precautions to prevent a repetition of this act.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1021; Dec. Dig. ⚭286.]

[3. *Master and Servant* ⚭293.]

In action for injury to an employee resulting from a misplaced switch, the judge did not err in charging the jury that the railroad company was guilty of negligence if it failed to supply and maintain safe and suitable machinery and appliances, for keeping a switch properly connected is maintaining the track as a proper appliance.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1151; Dec. Dig. ⚭293.]

Before Aldrich, J., Sumter, October, 1885. The opinion fully states the case.

Mr. J. H. Rion, for appellant.

Messrs. Bowman & Harby, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Paul Coleman, a laborer in the service of the defendant company, brought this action against said company for damages on account of personal injuries received by him in the discharge of his duty, on April 23, 1885, at Eastover, in Richland County. It appeared that Coleman was a laborer on a material train, of which J. W. Griffin was the conductor; that after their day's work on the day stated, the train was run to the station at Eastover, and ar-

riving there a little after sundown, the conductor, Griffin, had the switch turned so as to connect with a side track at that place, and ran the train on said track in order to spend the night. The laborers remained in the shanty of the material train, and about

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two hours after the *regular passenger train, in passing, ran on the side track and into collision with the material train, by which one man was killed, and Coleman, the plaintiff, had his left foot and leg crushed. The negligence alleged was in allowing the switch to remain in connection with the turn-out instead of the main line.

The defendant company denied negligence, and for a second defence, stated specifically, that at Eastover they had a side track connected with the main line by a railroad switch, and that said switch was in good order and condition; that on the day mentioned they moved a train of cars upon the side track and caused it to stop thereon; that they disconnected the said side track from the main line and carefully locked the switch, and that thereafter said switch was unfastened by some evil disposed person to them unknown, and the main line was thereby broken, and a train running on the main line was turned into the side track and unavoidably collided with the material train standing thereon, without any fault or negligence on their part, &c.

The conductor, Griffin, testified positively that after going in upon the side track he turned the switch and restored the connection with main line and locked it. There was proof, however, tending to show that a collision on the same side track, very much in the same way, had occurred in August of the preceding year; and that the result of an investigation, ordered on that occasion, was to acquit the officials and to restore them to their places, there being grounds to believe that the lock of the switch, found unbroken, must have been tampered with, picked, or unlocked with a false key, in the possession of some malicious person, unknown to and beyond the control of the officers of the company; that notwithstanding this incident, the company had never changed the lock, but continued to use the same until after the last collision, in which the plaintiff was injured. The change of one lock would have made it necessary to change all on the road of the same pattern.

Upon the close of the plaintiff's testimony the counsel of the defendant company moved for a non-suit on two grounds: first, that the testimony for the plaintiff disclosed the fact that the injury to him resulted from an accident, caused either by the malicious act of some third person, over whom the defend-

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ant had *no control; or second, from the negligence of a fellow-servant of the plaintiff.

The motion was refused and the trial proceeded. Both parties made requests to charge. Some were charged as presented and others modified and some refused. The matters complained of appear in the exceptions. Upon the charge of the judge the jury found a verdict of \$1,500 for the plaintiff, and the defendant appeals upon the following exceptions:

1. "For that his honor allowed the plaintiff's first request to charge: 'If from the evidence the jury believe that the defendant failed to supply the plaintiff with safe and suitable machinery and appliances with which to discharge his duties, or that, having originally supplied the same, afterwards failed to maintain and keep in good repair such machinery and appliances, and that, by reason of its failure so to do, the plaintiff was injured as alleged, then the defendant is guilty of negligence, and the plaintiff is entitled to a verdict.' Such request, even if sound as an abstract proposition of law, not being pertinent to the facts proved in this case.

2. "For that his honor refused the defendant's second request to charge: 'If the jury believe that the defendant's side tracks and machinery were properly constructed and in good repair, and that the defendants exercised due care in the employment of competent, skilled, and prudent servants in the conduct of their business, and that the injury to the plaintiff was caused by the negligence of a fellow-servant, in neglecting to disconnect the side track from the main line of the railroad, then the defendants are not liable in this action,' on the ground that it was not involved in the decision in this case.

3. "For that his honor refused the defendant's third request to charge: 'That under the facts as proved in this case, the servant who was charged with the duty of attending to the switch, in disconnecting said side track from the main line, was a fellow-servant of the plaintiff,' on the ground that it is a question of fact for the jury.

4. "For that his honor refused the defendant's fourth request to charge: 'That the plaintiff cannot recover damages in this case for any injury that may have resulted

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to him from the negligence of a fellow-servant,' on the ground that such request cannot be allowed if negligence be proved.

5. "For that his honor refused the defendant's fifth request to charge: 'That the omission of the defendants to change the locks and keys on all the switches on their line of railroad, because there had been a suspicion that some one possessed a key to one of the switches, does not amount in law to negligence,' on the ground that that is a question for the jury to pass upon.

6. "For that his honor modified the defendant's sixth request to charge: 'If the jury believe that the switch at Eastover was

in good condition at the time of the accident, and that the accident did not result from the negligence of the defendants, they cannot be held liable for the acts of third persons over whom they had no control,' saying, 'allowed, unless you believe there was negligence in not changing the key.'

7. "For that his honor charged the jury as follows: 'The simple question for you is, was the defendant railroad guilty of negligence in not supplying new locks on the switches of the line, or placing guard at that particular switch, because the accident had happened there before?'

8. "For that his honor instructed the jury as follows: 'As to damages I have already instructed you. You have no proof of the extent of the injury except the personal inspection you have made from your box. Is it a permanent injury, or are you satisfied that the leg was not broken?'

9. "For that his honor refused the defendant's motion for a non-suit, made on the ground that the testimony for the plaintiff disclosed the fact that the injury to him resulted from an accident caused either by the malicious act of some third person over whom the defendant had no control, or from the negligence of a fellow-servant of the plaintiff."

As to the last exception (9), complaining of error in refusing the nonsuit. It is very clear that at 8 o'clock, two hours after the material train had passed out upon the side track, the switch connected with the side track and caused the collision. That connection was established to let in the material train, and must either have remained open or, if then closed, must in some way have been changed in the meantime. In the view

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that Griffin, *the conductor, may have left the switch open after using it, the argument was made that, although clear negligence on his part, it was the negligence of a fellow-servant, for which the company is not responsible to the plaintiff; that in reference to the special duty of the conductor to restore the switch to its place in connection with the main line, he was not a "middleman," representing the company, but a mere "switchman," doing the duty of "a mere operative."

We do not clearly see the distinction suggested. Taking the rule to be as stated by Mr. Wood, in his work on Master and Servant, section 438, it seems to us that the adjustment of the switches was an important duty resting on the company, no matter to whom the performance of that duty was delegated. Mr. Wood says: "To formulate a rule from these cases, it would be as follows: whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in person, or which rests upon him as an absolute duty, he is liable

for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman, he stands in the place of the master, but as to all other matters he is a mere co-servant."

In the late case of *Calvo v. Railroad Company* (23 S. C., 528 [55 Am. Rep. 28]), this court held that a locomotive engineer and a section master of track-workers are not fellow-servants in the sense that the railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other. In delivering the judgment of the court, Mr. Justice McIver said: "Now, it is well settled that it is the duty of the master, not only to provide his servants in the first instance with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair; and any negligence in the performance of such duty, whether done by the master in person or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence. * * * The question is as to the nature of the duty, not as to the rank or grade of

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the person employed to perform it. Is it a duty which the master owes to his servants? Under the well settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotives engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company." &c.

If it is the duty of the company to provide a suitable and safe track, of which there is no doubt whatever, it is most assuredly no less its duty to keep in order and rightly placed the switches, which are certainly important parts of the track, and, probably needing more strict attention than any other. We do not think that the conductor, Griffin, in respect to the special duty of readjusting the switch, was a fellow-servant of the plaintiff in the sense of the rule relied on. See *Couch v. C. C. & A. R. R. Company*, 22 S. C., 557.¹

But as the conductor, Griffin, testified positively that after passing out upon the side track, he readjusted and locked the switch, it seems to us that the main question in the case, was whether the company was or was not negligent in failing to change the lock at the Eastover switch, after it had been developed that there was at least good grounds for believing that it had been tampered with—picked or opened with a false key. We

have no doubt that, as an abstract proposition, a railroad company is not liable to one of its servants for the consequences of a single isolated act of a third person, over whom the company has no control. But, as we understand, there may be circumstances connected with it which would make a difference. If, for instance, the same act at the same place had occurred before, and it was of such a character as could be prevented by timely precautions, it is easy to see that, upon a repetition of the act, a new question might arise, involving the inquiry whether the failure to take these precautions was or was not negligence to charge the company.

As we understand it, the proper control over these railroad switches is a very important matter for the safety of passengers as

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*well as servants. We cannot doubt that it would be negligence in a railroad company to leave its switches entirely without locks to secure them, thereby putting it in the power of any reckless or malicious stranger to change them at will. And in respect to certainty and security there may not be any great difference between a lock capable of being opened and no lock at all. The question was one of fact, and the Circuit Judge, ruling in effect that there was a *prima facie* case—that negligence on the part of the company might be "reasonably and legitimately inferred" from the circumstances of the case—refused to grant the non-suit and referred the question to the jury; and in this we cannot say that he committed error of law. "The defendant is entitled to a non-suit when there is a total failure of evidence to maintain the plaintiff's case—that is, to show a *prima facie* case; but if there is any competent and pertinent proof, the force and effect of which must be determined, the case must go to the jury." *Carter v. C. & G. R. R. Company*, 19 S. C., 20 [45 Am. Rep. 751]; *Couch v. C. C. & A. R. R. Company*, 22 S. C., 558.

As to the first exception. The law announced is undoubtedly sound, but it is said that it was not applicable to the case proved. In the sense that keeping the switch properly connected was "maintaining the track as a proper appliance," we do not see that the charge was so general or impertinent to the facts as to furnish a good ground for reversing the judgment.

Exceptions 2, 3, and 4 relate to the view of the appellant that the conductor, Griffin, as to the special duty of replacing the switch after his train had passed on to the side track, was a fellow-servant of the plaintiff, Coleman, and therefore that the company was not responsible to him for an injury inflicted by the negligence of said Griffin. We disposed of this subject in considering the refusal of the motion for a non-suit, and we need not repeat what was there said.

Exceptions 5, 6, and 7 insist, in different

¹See, too, *Boatwright v. Railroad Company*, ante 128.—REPORTER.

forms, that the failure of the company to change the key of the switch at Eastover, after the first collision at that place, was not negligence, and that the judge should so have instructed the jury. In considering the question as to non-suit, we also determined this point, holding that it was not error of law to refer that question to the jury.

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*The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 453

RHETT v. JENKINS,

(April Term, 1886.)

[1. *Ejectment* ¶110.]

II, a slave was in possession of a lot from 1840 to 1870, when he died, devising this property by metes and bounds to his widow and son, who remained in possession of the portions devised. Under a judgment obtained against II in 1868, and another against his executor after his death, this lot was sold by the sheriff and purchased by the plaintiffs, who brought this action against the said devisees for its recovery. *Held*, that the judge erred in refusing to charge the jury that, "If they believe from the evidence that the defendants are in possession under II, either as devisees or heirs at law, then they must find for the plaintiffs, unless the defendants have shown an independent title in themselves by connecting themselves with a grant, or proving that which presumes a grant."

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 319-326; Dec. Dig. ¶110.]

[2. *Execution* ¶280.]

Proof of the judgment, execution, and sheriff's deed is conclusive evidence of title in the purchaser as against the judgment debtor until the defendant shows a better title.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 813; Dec. Dig. ¶280.]

[3. *Ejectment* ¶15.]

And this rule also applies to parties claiming as devisees under the judgment debtor, upon the principle that in actions for the recovery of real property it is not necessary to prove title beyond a common source—particularly so, where the sale is under a judgment having lien before the devise took effect.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 59; Dec. Dig. ¶15.]

[4. *Adverse Possession* ¶62.]

Having entered under the will of II the defendants could not afterwards disclaim title by devise and assert an independent title in themselves by adverse possession against the creditors of II.

[Ed. Note.—Cited in *Brock v. Kirkpatrick*, 69 S. C. 237, 48 S. E. 72.

For other cases, see *Adverse Possession*, Cent. Dig. § 325; Dec. Dig. ¶62.]

Before Hudson, J., Richland, October, 1885.

This was an action by J. T. Rhett and W. A. Clark against Bella Jenkins et al., and is a sequel to *Lyons v. Holmes*, 19 S. C. 406. The opinion fully states the case. After passing upon the requests to charge stated in the exceptions considered and others, the judge thus charged the jury as reported by himself:

I instructed them that the plaintiffs must recover upon the strength of their title, and

not upon the weakness of the title of their adversaries. To make out a prima facie title

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in themselves, *the plaintiffs must, first, connect their title with a grant from the State by successive deeds of conveyance; or, second, if no grant can be produced, they must show that from which a grant will be presumed, viz., that at some time in the past the citizens of this State held actual possession of this land adversely in an open and notorious manner for the period of twenty years or more consecutively, and connect themselves with a title thus matured; or, third, they must trace their title to a source common to the defendants and thus relieve themselves of the necessity of tracing title beyond a common source. The plaintiffs gave in evidence no grant from the State, and hence failed to establish the first and most satisfactory kind of title.

To raise the presumption of a grant, it was in evidence that one Richard Holmes, a slave, was in possession from about A. D. 1840 until he was emancipated in 1865, and thence onward until his death in 1870, leaving his widow Bella—since intermarried with Jenkins—and his son William surviving him; and to them he conveyed this lot of land by will: one part to his widow, Bella, and the other to his trustee and executor, James D. Tradewell, in trust for William. I instructed the jury that the possession of Richard Holmes for twenty-five years, whilst he was a slave, gave him no title; since, under the law of the land, he could acquire no title to land. His continued possession for five years as a freeman gave him no title. The plaintiffs by purchase at sheriff's sale, under judgment and execution against Richard Holmes, acquired no more than his title, viz., a naked possession of five years, which gave no estate in law.

But the plaintiffs contend that the defendants claim to hold and can only hold under Richard Holmes, and therefore cannot dispute his title. But I told the jury that the defendants claim by possession, and that if they saw fit to repudiate the will of Richard, they could do so, and rest upon this naked possession; most especially could they set up the defence that Richard had no title or estate which could be cast upon them by descent or which he could convey by will. It was competent for the defendants to show that neither the plaintiffs nor themselves did or could acquire title from Richard.

I charged the jury that if they found the

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fact to be that *Richard Holmes had no title to this land except the five years possession, from 1865 to 1870, then the plaintiffs acquired nothing by the sheriff's deed, and had no right to recover against the defendants. A naked trespass can neither be cast by descent nor derived by will, nor acquired by levy and sale under judgment against the

trespassers. *Ex nihilo nihil fit*. As this was really the point upon which the case hinged, and my rulings upon the points raised touching the two judgments can scarcely be misunderstood, I have not deemed it necessary to refer to them. The finding of every fact in the case was left to the jury.

I have given the substance of my charge without attempting to repeat the language.

Messrs. John T. Rhett and W. A. Clark, for appellants.

Messrs. Allen J. Green and Mark Reynolds, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Justice MCGOWAN. This was an action for the recovery of a lot in the city of Columbia, described in the complaint. As well as can be collected from the brief the following outline of facts appeared: That Richard Holmes, a man of color, died in March, 1870, in possession of the said lot, where he had lived for many years. He left of force his last will and testament, by which he devised one moiety of said premises to his wife, Bella, and the other moiety in trust for his son William and his children. After his death, Bella and William remained in possession of their respective portions under the will. William died in 1878, and his wife, Amanda, and her children continued to occupy their moiety. In 1868 James D. Tradewell recovered a judgment against Richard Holmes. In 1878 one Thoroughgood Thornton recovered a judgment against James D. Tradewell, as executor of the will of Richard Holmes, and under executions issued upon these judgments the premises in question were sold by the sheriff in 1885, and bid off by the plaintiffs, who received sheriff's titles and brought this action to recover the lot. The defendants answered denying

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that Richard Holmes was ever *seized and possessed of the premises, as he was a slave until emancipation in 1865; also denying that the will was of any force and effect as far as the devise to them of the premises was concerned, or that they possessed themselves of the premises under the aforesaid will of Holmes. And in addition, Bella Holmes interposed the statute of limitations. The plaintiffs did not undertake to prove title in Richard Holmes, but showed his continuous adverse possession of the premises for upwards of forty years, of which time the last five years prior to his death he was a freeman.

The cause came on for trial before Judge Hudson and a jury. Under the charge the jury found for the defendants. There were requests to charge on both sides, some of which were charged as presented, some in modified form, and some refused, as fully appears in the exceptions printed in the brief; but it will not be necessary to consider more

than the 1st, 5th, 7th, and 8th, which are as follows:

1. "Because his honor, the presiding judge, erred in charging the jury: 'If the jury believe from the evidence that Richard Holmes is the common source, and that the said Richard Holmes was a slave, and that he died on March 11, 1870, plaintiffs cannot recover unless they (the plaintiffs) have shown that the said Holmes acquired title since 1865.'"

5. "Because his honor, the presiding judge, erred in refusing to charge the jury, as requested by the plaintiffs, 'that if the jury believe from the evidence that the defendants are in possession under Richard Holmes, either as devisees or heirs at law, then the jury must find for the plaintiffs, unless the defendants have shown an independent title in themselves by connecting themselves with a grant or proving that which presumes a grant.'"

7. "That 'if the jury find the fact to be that Richard Holmes had no title to this land except the five years' possession from 1865 to 1870, then the plaintiffs acquired nothing by the sheriff's deed, and had no right to recover against the defendants.'"

8. "That 'a naked trespass can neither be cast by descent, nor devised by will, nor acquired by levy and sale under judgment against the trespassers.'"

It will be seen that the leading idea

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of the charge was, that *the plaintiffs could not recover unless they proved that Richard Holmes, the defendant in execution, had good legal title. This may be necessary in actions brought by purchasers at sheriff's sale against perfect strangers to the judgment debtor, and who do not claim in any way through or under him. But the rule is certainly different where the action is brought against the judgment debtor or himself. In such case it is well settled that "proof of the judgment, execution, and sheriff's deed shall be received as conclusive evidence of title until the defendant shows a better." The question here is what is the rule when the action is brought against the devisees of the judgment debtor in possession in accordance with and under his will. The subject as applied to this case is not entirely free from obscurity, but it strikes us that the view of the judge overlooked the consequences of both parties claiming from the same source, and also the force and effect of a sale under judgment as to the parties to that judgment and their privies.

There is no doubt as to the general rule that in an action for land the plaintiff must recover upon the strength of his own title and not the weakness of his adversary's. But there are exceptions, cases in which the plaintiff is not required to trace his title back to a grant. One class of these is where both parties claim from the same source of title; in which, as we understand it, the fact

that the plaintiff has traced his title back to a source from which the defendant also claims stands in the place of further proof or title, at least prima facie. We do not know that the rule is anywhere better stated than by Judge Withers in the case of *Pyles v. Reese*, 4 Rich., 558: "But the obligation is not without exception. Where the parties litigant derive title from the same source, no end of justice is to be attained by tracing beyond. Hence as between lessor and lessee the rule is universal; the latter having gained possession by his acknowledgment is estopped from his denial of the title under which he entered. How stands the case when one enters as a purchaser under the title of another, and a contest subsequently arises between the vendor and vendee? * * *

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Under the authority of adjudged cases we are of opinion a plaintiff is never compelled to go further back than the source whence the parties before the court derive title, if the source is the same. * * * That 'moral policy of the law,' of which Chief Justice Marshall spoke, is well vindicated in such a case by holding that prima facie he who enters upon land as a purchaser, thereby admits the title under which he enters to be good. I would refer to the cases of *Blight v. Rochester*, 7 Wheat., 535 [5 L. Ed. 516]; *Thomas & Ashby v. Jeter and Abney*, 1 Hill, 380; and *Hill v. Robertson*, 1 Strobl., 1. The opinion now pronounced is but the reiteration of principles held and affirmed in these cases," &c. And we might add several other cases in our own reports. *Martin v. Randlett*, 5 Rich., 541 [57 Am. Dec. 770]; *Geiger v. Kaigler*, 15 S. C., 269, &c.

According to this clear judgment, if we consider the defendants as purchasers for value from Richard Holmes, they could not put the plaintiffs to proof of the title of the said Richard; and, surely, they have no higher rights, as mere volunteers, devisees, who have no estate until the debts of the ancestor are paid, and as privies are bound by his sale either made by himself or through the sheriff. We do not understand that this conclusion rests upon the technical doctrine of estoppel, for the defendants are allowed, if they can, to prove an independent title in themselves; but it is simply the logical result of the defendants' claiming under the same title with that of the plaintiffs, considered in the light of the principle that one is held to admit the title under which he enters. If in such case the plaintiffs were still required to prove title in the common source, we are unable to see why the rule was ever adopted. It would certainly be without force or purpose. As it strikes us, the very object of the rule was to dispense with proof of title in the common source, or further proof, substituting therefor the admission of the defendant involved in his entering under that title. As was said by the chief justice in the late case of *Smythe v. Tolbert*, 22 S. C., 137:

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"If the parties do not claim through a common source, then the plaintiff must recover upon the strength of his own title, &c. If they do, then plaintiff may stop in the first instance at the title of the common grantor," &c.

Besides it happens that in this case there is another principle, growing out of the force and effect of a sale under execution, which fortifies this view. These plaintiffs purchas-

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ed the lot in question under a judgment against Richard Holmes obtained in his life time, and received therefor a conveyance of the sheriff. In *Thomas & Ashby v. Jeter & Abney*, supra, Chancellor Harper states the principle thus: "The rule is, that when a purchaser of lands at sheriff sale brings suit against the defendant to recover possession, he need show nothing but the judgment and the sheriff's conveyance. The same rule applies when the suit is against one in possession, claiming under the defendant, whether as tenant or under a conveyance (or devise), otherwise the rule would be nugatory. Here the conveyance was not subsequent to the judgment, but it is established to have been void from fraud. The defendant then stands in the situation of one put into possession by the original defendant, Thomas (Holmes), without any title at all. * * * If the defendants claim by any other title, they might have shown it in their defence," &c. It seems to us that this is conclusive of the case. The sale and conveyance of the sheriff transferred to the plaintiffs as purchasers all the interest of Holmes, of whatsoever nature and kind it might be. There was nothing left in him which could pass by devise or descent, and these defendants holding as devisees under him could not raise their voice to impeach that title which had passed to the plaintiffs. Like Thomas, in the case of *Thomas v. Jeter*, they were "without any title at all"—as Chancellor Harper expressed it.

But it is insisted that the defendants had the right to show that Holmes had no title—that being nominally a slave down to emancipation in 1865, he could not by possession or otherwise acquire legal title to the lot, although he had lived upon it, using it as his own for over forty years, and that his possession after he became a freeman, five years before his death, could not alone give title by adverse possession; and therefore being a mere trespasser he had no interest that could be levied and sold under judgment against him, and that it is absurd to say that something could come out of nothing—*ex nihilo nihil fit*. This at first view seems plausible, but we have already endeavored to show that as against the defendants the plaintiffs' case as to title in the common source must be assumed, at least prima facie; that is to say, as to Holmes' title it was not incumbent

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on the plaintiffs to show it; and that the

only way in which the defendants could defeat this prima facie case was either to show better title from Holmes or an independent title in themselves, which right was accorded to them, although mere volunteers, precisely as if they had been purchasers for value.

But even if the title of Holmes were a matter open for opposition on the part of the defendants, we cannot agree that it was shown that he was a mere trespasser and that nothing passed under the execution sale to the plaintiffs. Holmes, the defendant in execution, had all the presumptions arising out of an undisturbed possession for more than forty years. If a trespasser, it did not appear upon whom he trespassed. During five years of the time of his possession he was a free man and capable of acquiring property in any of the ways allowed by law; and of the parties before the court, who had the right to say that during that time he did not acquire title to the lot? As we have seen, the defendants, having entered under his title, had not such right.

It is, however, finally contended that the defendants had the right to repudiate the devise and hold on their own independent possession—relying upon the maxim *melior est conditio possidentis*—until perfect legal title was shown. Richard Holmes was a freeman when he made his will, which was legal and binding. The mother and son, named as devisees, manifestly accepted it, for they divided and occupied the different portions of the lot precisely as the will directed. It seems to us that having accepted the will and entered into possession under it, they cannot now, in order to evade paying the debts of the testator, disconnect themselves entirely from him, and, while enjoying his patrimony, disclaim that they received and held it under his will. Such a license would certainly unsettle the rights of parties and tend to defeat the object of the rule as to tracing title to a common source. We think it was error in the judge below to refuse to charge as requested: "That if the jury believe from the evidence that defendants are in possession under Richard Holmes, either as devisees or heirs at law, then the jury must find for the plaintiffs, unless the defendants have shown an independent title in themselves by connecting themselves with a grant or proving that which presumes a grant."

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*The judgment of this court is, that the judgment of the Circuit Court be reversed and the case remanded for a new trial.

25 S. C. 461

KERCHNER & CALDER BROS. v. McCORMAC.

(April Term, 1886.)

[1. *Attachment* ⚭227.]

An attachment may be set aside upon two grounds: 1. Where it has been irregularly is-

sued, the facts alleged being insufficient; 2. Where it has been improvidently issued, the facts alleged being untrue.

[Ed. Note.—Cited in *Lipscomb v. Rice*, 47 S. C. 16, 24 S. E. 925.]

For other cases, see *Attachment*, Cent. Dig. §§ 782, 802; Dec. Dig. ⚭227.]

[2. *Attachment* ⚭45, 97, 111.]

To entitle plaintiff to the severe remedy of attachment upon the ground of fraud, the charge must be made directly and fully in the terms of the statute, and the facts must be supported by such testimony as would prima facie sustain the charge in an action at law. The affidavit is not sufficient if rested merely upon hearsay, information, and belief.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. §§ 115, 249, 302; Dec. Dig. ⚭45, 97, 111.]

[3. *Appeal and Error* ⚭1010.]

The order of the Circuit Judge dismissing the attachment because improvidently issued, sustained—this finding of fact not being without testimony to support it, nor opposed to the overwhelming weight of testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. ⚭1010.]

Before Kershaw, J., Marion, March, 1885.

This was a motion to dissolve an attachment, which was issued upon the following affidavit:

Personally appears Francis W. Kerchner, one of the plaintiffs above named, who, on oath, says:

1. That a cause of action exists in favor of the above named plaintiffs against the above named defendants on the joint and several note of E. C. McCormac and E. A. McCormac for sixteen hundred and thirty-four 23-100 dollars to the order of E. L. McCormac, dated 25th January, 1883, due 1st January, 1884, which was endorsed over to said plaintiffs prior to its maturity by E. L. McCormac; which note bears interest after its maturity at the rate of 8 per cent. per annum, payable annually, and that no part of said note has been paid, and the plaintiffs are instituting an action of even date herewith against all of said defendants for the whole of said note and interest.

2. That the said E. L. McCormac is not a resident of this State, but a resident of the State of North Carolina; that the said E. L. McCormac has, as deponent is informed and believes, conveyed his interest in val-

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able real estate in this county to his *wife; that such conveyance was evidently for the purpose and with the intent to prevent the creditors of the said E. L. McCormac from reaching said property.

3. That said E. A. McCormac, being approached by plaintiffs recently as to his paying said note, coolly informed one of the plaintiffs that if plaintiffs would not sue said note, he, E. A. McCormac, would pay it; but that if they, plaintiffs, would sue it, that he, E. A. McCormac, would throw them into the costs, i. e., throw the costs upon

them, and that he would defeat them in getting anything on said note; that said threat could have but one interpretation, and that is, that said E. A. McCormac, who has a store and stock, or is a merchant, and who has other valuable property, and is unmarried, is about to dispose of his property with the intent of preventing plaintiffs and other creditors from collecting their claims.

4. That this deponent is informed by the agent of Messrs. Aaron & Rheinsein, of Wilmington, N. C., that E. A. McCormac has assigned to them a mortgage against E. C. McCormac for about eight thousand dollars, as a collateral to secure a debt for less than one-fourth that sum, which E. A. McCormac owes that firm, and that said E. A. McCormac has requested said firm not to let it be known that they hold such large collateral for their claim against him.

5. That deponent is further informed and believes that said E. A. McCormac is about to convey his stock of goods to a younger brother for the purpose of avoiding the payment of said note and perhaps other debts.

The Circuit decree was as follows:

A motion is made before me to set aside an attachment levied on the property of the defendant, E. A. McCormac. The motion is made, first, on the insufficiency of the affidavit upon which the warrant was obtained; and failing in that, upon affidavits controverting the facts charged in the original affidavit. The sufficiency of the affidavit must be determined in the first instance by inspection. If considered sufficient to sustain the attachment *prima facie*, the affidavits read at the hearing for the motion and those in behalf of the plaintiffs in reply must be considered, and if the allegations as stated in the original affidavit be not sustained, the motion must be granted; otherwise it must be refused.

The first paragraph of the original affidavit is a sufficient statement of the cause of

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action. The allegation contained in the second paragraph that E. L. McCormac, one of the defendants, is a non-resident of this State, is sufficient to sustain the attachment as to him, and this is not controverted. The other allegations contained in that paragraph are made on information and belief alone, without stating the source of the information or the grounds of belief. This is not sufficient. *Ivy v. Caston*, 21 S. C., 583. The allegations of the third paragraph of the affidavit are sufficient. They contain a statement of facts which, unexplained, would amount to fraud. The allegations of the fourth and fifth paragraphs of the affidavit are insufficient in that the former charges no fraudulent intent, and the facts stated do not make a case of fraud *per se*, and the latter sets forth allegations upon information and belief merely, which, as already said, is not sufficient.

The sufficiency of the affidavit being sustained in part, the case presented by the affidavits read at the hearing of the motion must be considered. The affidavit of E. A. McCormac denies the facts stated in the third paragraph of the original affidavit. The burden of proof of the fraud therein alleged is on the plaintiffs, and in a conflict of testimony the preponderance must be on their side. Nothing appears here but an affirmation on one side and a denial on the other, and no reason is furnished me for deciding the facts controverted in favor of one party rather than the other. Under these circumstances the facts alleged by the plaintiffs in this paragraph fail to be sustained by the preponderance of the testimony and must be decided against them. This leaves the attachment no ground to stand upon except as to E. L. McCormac, the non-resident, and that is not controverted.

The motion must prevail on another ground. The proof is abundant that the defendant, E. A. McCormac, was, at the time the warrant issued, making efforts to secure the means of paying the debt due to the plaintiffs. This negatives the inference of fraud sought to be drawn from the facts alleged. Upon this ground also the motion must prevail.

It is therefore ordered and adjudged, that the warrant of attachment herein, and all proceedings thereunder, in so far as they affect all the defendants except E. L. McCormac, who appears to be a non-resident of

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this State, be and are hereby vacated and dissolved. That the moving papers and all affidavits herein be filed, and that the plaintiffs pay the defendants the costs of this motion, ten dollars.

Messrs. Johnson & Johnson, for appellants,
Mr. C. A. Woods, contra.

August 3, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. In this case, a warrant of attachment issued by the clerk for Marion County and levied upon the property of E. A. McCormac, was set aside by his honor, J. B. Kershaw. The appeal involves the correctness of this action on the part of the Circuit Judge.

An attachment may be vacated or set aside upon one of two grounds, dependent upon the facts: 1st. Where it has been irregularly issued; and 2d. Where it has been improvidently issued. An attachment is irregularly issued where the facts or allegations contained in the affidavit upon which it is founded, are insufficient; in other words, where, even admitting them to be true, they do not constitute a legal ground for the warrant. It is improvidently issued where the allegations, if true, would be sufficient, yet it satisfactorily appears that they are not true. The first ground may be de-

terminated upon an inspection of the affidavit; the second upon motion, ordinarily, supported and resisted by affidavits pro and con. The attachment here was assailed upon both of these grounds.

His honor, the Circuit Judge, upon inspection of the affidavit of the plaintiff, Kerchner, upon which the clerk had issued the warrant, held that it was sufficient to sustain the attachment *prima facie*, at least to such extent as to authorize and require him to consider the affidavits submitted by the defendant against the truth of the allegations in the original affidavit, and those of the plaintiff in reply. Upon this hearing he determined that the allegations of the original affidavit had not been sustained by the preponderance of the evidence. He therefore ordered and adjudged that the attachment and all proceedings thereunder, in so far as they affected all the defendants except E. L. McCormac, who appeared to be a non-resident, be vacated, &c.

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*In our recent reports we have several cases which not only bear upon the question raised here, but we think are conclusive of this appeal, and against the appellant. These cases are, *Smith & Melton v. Walker*, 6 S. C., 169; *Brown v. Morris*, 10 Id., 469; *Clausen v. Fultz*, 13 Id., 478; and *Ivy v. Caston*, 21 Id., 583; In *Smith & Melton v. Walker*, it was held, "that where the application for an attachment is based on the ground that the debtor has absconded, or concealed himself, or has assigned, disposed of, or secreted his property, or is about to do so with intent to defraud his creditors, the affidavit must state the facts upon which the application is founded." In *Brown v. Morris*, *supra*, it was held, "that it was not sufficient to allege simply upon information and belief the allegations relied on for the attachment, but that the affidavits in such cases must contain a statement of the particular facts upon which the allegations rest, and the source from which the information is derived, and that the evidence thus presented must be of a character as would in an action at law *prima facie* establish the facts alleged. In no other than in such sense and by such means can the requisite facts be made to appear to the judge or other officer before whom the motion is made," says the court.

In *Clausen v. Fultz*, *supra*, the affidavit contained a general charge of fraud, stated upon information and belief, that the defendant was disposing of his property and effects with intent to defraud his creditors. Yet the court said this general charge, even if made upon positive knowledge, would not have been sufficient ground for issuing the attachment, unless supported by the statement of the facts and circumstances warranting such allegation. In *Ivy v. Caston*, *supra*, the court held, that where the affidavit upon which the clerk issued the attachment contained a

statement of belief, resting "upon hearsay, inferences, and conjecture," that there was intent to defraud, but made no positive averment founded on sufficient facts as to the intent, &c., the attachment should be dissolved on motion for irregularity.

Now, does the affidavit of Kerchner meet the requirements of these cases? We think not. Under the language of the attachment law, it is necessary that it should appear by affidavit that the defendant is disposing of

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his property, or intends to do so *(if that be the ground upon which the attachment is moved), with intent to defraud his creditors. Under the decisions above referred to, the fact of disposition of property, or purpose thereto, with intent to defraud creditors, must appear in such shape and upon such testimony as would at least raise a *prima facie* case in an action at law, and not upon the mere information and belief of the affiant. We think the affidavit of Kerchner fails in several respects to meet the requirements of the act and of the decisions construing it. In the first place, there is no direct charge that the defendant, E. A. McCormac, is attempting to defraud his creditors in the acts alleged. It is stated, it is true, that he is about to dispose of his property "with the intent of preventing plaintiffs and other creditors from collecting their claims." This may have been intended as a charge of fraud, but still it is not made in the direct and pointed way prescribed in the act, nor are the facts given upon which the court could determine whether or not this fraudulent intent was present. An attachment is a severe and harsh proceeding, it is summary and prompt, and parties desiring to avail themselves of it should conform to the requirements of the law, not inferentially and by indirection, but directly and fully.

By an examination of Kerchner's affidavit, it will be seen that the allegation that defendant, E. A. McCormac, is about to dispose of his stock of goods to his younger brother, is stated simply upon information and belief. That he had assigned a certain mortgage to Aaron & Rheinstein, of Wilmington, N. C., was made upon information from the agent of these parties—hearsay and incompetent in a trial at law. The allegation in the third paragraph, that the defendant was about to dispose of his property, is made as an inference from certain expressions used by the defendant, when called upon by the plaintiffs for payment of the note sued on, when defendant said if plaintiff "would not sue, he would pay the note. * * but if they did sue, he, McCormac, would throw them into the costs, and would defeat them in getting anything on the note." We hardly think that these expressions would be enough in themselves to sustain the allegation that McCormac intended to dispose of his property with intent

to defraud his creditors. Upon the whole,

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we are of opinion that *the order of the Circuit Judge setting aside the attachment could be sustained upon the ground that said attachment was irregularly issued, the affidavit upon which it was founded being insufficient, as appears from an inspection thereof.

As to the other ground, to wit: that the attachment was improvidently issued. The Circuit Judge, after a careful consideration of the affidavits submitted by the defendant contesting the truth of the allegations in the original affidavit, and the reply of the plaintiffs, came to the conclusion that said allegations were not sustained by the preponderance of the evidence, and therefore that there was no ground upon which the attachment could stand. This is a finding of fact by the Circuit Judge, which we are not authorized to disturb, unless under the well established rule (which rule applies here, see *Claussen & Co. v. Easterling*, 19 S. C., 515), it is without testimony, or the overwhelming weight thereof is the other way. We do not think that either of these conditions is present.

We do not understand that the judgment appealed from affects in any way the attachment as to E. L. McCormac, either as to any property of his levied upon or garnished in the hands of others, and so understanding and construing it.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

25 S. C. 467

BRUCE & CO. v. FOOT.

(April Term, 1886.)

[1. *Assignments for Benefit of Creditors* ⚡ 334.]

A valid assignment for the benefit of creditors has precedence over an attachment subsequently issued.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 965-971; Dec. Dig. ⚡334.]

[2. *Assignments for Benefit of Creditors* ⚡28.]

The law encourages an assignment by an insolvent debtor for the equal benefit of all his creditors; and such an assignment does not violate the law if it provides for an equal distribution among all the assignor's creditors "except debts already secured by mortgages, judgments, or other liens or encumbrances that the law shall require to be first paid."

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 106; Dec. Dig. ⚡28.]

[3. *Assignments for Benefit of Creditors* ⚡276.]

The assignee under an assignment for the benefit of creditors, cannot move to have subsequent attachments set aside on the ground that the property so attached belongs to him, until his right has been established under issue join-

ed on his return to the attachment under sections 255 and 256 of the Code.

[Ed. Note.—For other cases, see *Attachment*, Cent. Dig. § 821; *Assignments for Benefit of Creditors*, Dec. Dig. ⚡276.]

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[4. *Assignments for Benefit of Creditors* ⚡118, 124.]

*Provisions for proper fees for preparing the assignment and for rents enforceable by distress are not preferences within the provision of the attachment laws.

[Ed. Note.—Cited in *Haynes v. Hoffman*, 46 S. C. 168, 24 S. E. 103.]

For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. §§ 397, 398; Dec. Dig. ⚡118, 124.]

5. Petition for rehearing refused—no material fact or principle involved having been overlooked.

Before Wallace, J. Newberry, July, 1885. The opinion sufficiently states the case.

Messrs. Jones & Jones, Suber & Caldwell, Geo. S. Mower, James Y. Culbreath, and J. N. Nathans, for appellants.

Messrs. Moorman & Simkins, contra.

September 15, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On February 19, 1885, Michael Foot, the defendant, executed an assignment of all his property, consisting of lands, goods and merchandise, fixtures, bills, bonds, notes, &c., for the benefit of his creditors. He named as his assignee his son, Mordecai Foot, who was directed to sell the property, and, after paying the proper fees, costs, and commissions, and all rents, taxes, and assessments due thereon, to apply the proceeds to the extinguishment of all his just debts, "and if such remainder shall be insufficient to pay said debts in full, then to apply the same so far as sufficient to the payment, first, to any debts that may be already secured by pledges, mortgages, judgments, or any other lien or encumbrance upon said property, or any part thereof, that the law shall require to be first paid, and then to the payment of all other debts pro rata, which the law does not require to be first paid," &c. The assignment was delivered and also the assignee put into possession of the property.

On the same day (February 19), but some hours after, the plaintiffs, William Bryce & Co., and three other creditors of Michael Foot, severally issued writs of attachment and levied the property assigned as still belonging to the debtor, Michael Foot; on February 20, two other creditors also issued attachments; February 21, seven others;

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February 23, five others; February *24, one other; February 25, four others; February 27, two others; and on March 20, one other, making in all, twenty-six. The names of the different attaching creditors, and the amounts and nature of the claims, are all in

the "Brief." The affidavits on which the attachments issued are very much the same, charging that the assignment was fraudulent and void, and stating, upon information and belief, certain grounds and sources of information, and especially that Michael Foot had some time previous to the execution of the assignment made fraudulent mortgages to Oberdorfer, Samuels, and Klettner, amounting in the aggregate to some \$17,500; and that the said Foot was about to secrete a large sum of money from his creditors, &c. In a number of the cases the attachment bonds were payable to the clerk of the court, and in others to Michael Foot, the debtor.

The debtor, Michael Foot, his assignee, Mordecai Foot, and M. A. Carlisle, who had been elected agent of the creditors, made a motion before Judge Wallace to vacate and discharge the liens of all the attachments upon several grounds, which, for the purposes of this case, may be condensed into two: first, that when the attachments issued against Michael Foot, he had no interest in the property, the title to which had passed to the assignee, and he and the agent for creditors had the possession and rightful control of the same under the assignment, which conveyed all the interest of the debtor, much or little, and was regular and valid under the law; and second, that the said writs of attachment were issued upon insufficient affidavits, and were in other respects irregular; but if not, the facts stated were disproved and the writs were therefore improvidently issued, and were therefore void. Numerous affidavits upon these points, pro and con, were submitted, but the Circuit Judge did not consider it necessary to determine anything but the first point, as in his view that was conclusive. Upon that subject the judge held as follows: "There is no doubt in my mind that the assignment upon its face is a good and sufficient instrument as a deed of assignment, and that it operated to transfer the right of property to the assignee. It is in proof that the assignee was in possession when the liens were made. Upon this state of things it is clear that the assignee has the right to make the

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motion to vacate the liens. Section 263 of the Code is express upon the subject. The act of the general assembly (18 Stat., 491) amends section 255 and leaves section 263 unaffected, which, among other things, enacts that 'any person who establishes a right to the property attached, may move to discharge the attachment, as in case of other provisional remedies.' It is therefore adjudged, that the liens of attachments upon the property assigned by M. Foot be vacated and set aside," &c.

From this order the plaintiffs, the attaching creditors, appeal to this court upon the following exceptions:

"1. Because his honor erred in deciding and ordering that the liens of attachments upon the property assigned by M. Foot be vacated and set aside.

"2. Because his honor erred in deciding that the deed of assignment alleged to have been made by Michael Foot to Mordecai Foot was a good and sufficient instrument on its face as a deed of assignment.

"3. Because his honor erred in deciding that said alleged deed of assignment operated to transfer the right of property to the assignee.

"4. Because his honor erred in deciding that upon the execution of said alleged deed of assignment all leviable interest in the property immediately passed from M. Foot.

"5. Because his honor erred in deciding that the said alleged deed of assignment contained no preference whatsoever among the creditors of M. Foot, except as the law allows.

"6. Because his honor erred in holding that Mordecai Foot, as assignee under said alleged assignment, could make the motion to vacate the lien of the attachments.

"7. Because his honor erred in not deciding that Mordecai Foot, as assignee, and Milton A. Carlisle, as agent of creditors under the assignment, could not make the motion to vacate said attachments.

"8. Because his honor erred in not deciding that said alleged deed of assignment was void for fraud.

"9. Because his honor erred in not deciding that the liens of said attachments on the property embraced in said alleged deed of assignment should be sustained.

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"*10. Because his honor erred in deciding that said alleged deed of assignment embraced all of Michael Foot's property of all kinds."

As we understand it, the writ of attachment is a proceeding at law, and goes to secure a lien, in advance of the judgment to be recovered, on the property of the debtor. It is its very object to secure a preference as it gives priority according to date. It is a great privilege and is allowed only when certain acts of the debtor are made to appear, one of which is that he "has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his property with intent to defraud creditors," &c. When this condition of things is shown by affidavit with that certainty and particularity required by the law, the process issues, which is not limited to the identical property, in reference to which the alleged offence has been or is about to be committed, viz., the property "assigned, disposed of, secreted," &c., but reaches to any and all of the property of the debtor. So that in every attachment two questions may arise, which must be kept separate and distinct: first, whether the property attached belongs to the debtor;

and if so, second, whether the facts exist which authorize the writ to issue. If the debtor has no interest in the property, there is nothing to support the attachment. "If there is nothing on which it can operate, the attachment is at an end." *Chambers & Sadler v. McKee*, 1 Hill, 230. There is no doubt that a valid assignment for the benefit of creditors has precedence over an attachment subsequently issued. *West v. Tipper & Kimball*, 1 Bail., 198.

In this case the Circuit Judge considered only the effect of the assignment upon the title of the property, and connected therewith the right of the assignee to make that question by motion; and, of course, that is the only question which is before this court in such manner as to be decided here. In the view of the Circuit Judge that he had a right to hear the motion and decide it on affidavits, we cannot say that he committed error in holding that the assignment is regular on its face, and contains no provision which is inhibited by the act of the legislature (Gen. Stat., § 2014) or makes it void. The law allows, indeed, in cases of insolvency encour-

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ages, such assignments for the benefit *of all the creditors of the debtor. The terms of this assignment were sufficient to carry all the property of the debtor of every nature and kind whatever, and the proceeds (after deducting the expenses of administration) were to be equally distributed "among all his creditors, except debts already secured by mortgages, judgments, or other liens or encumbrances that the law shall require to be first paid." We do not think, *prima facie*, it can be truly affirmed of a voluntary assignment of all a debtor's property for the benefit of all his creditors (legal liens taking precedence), that it is one of those "assignments" contemplated by the law as good ground for a writ of attachment, *viz.*, "has assigned, disposed of, &c., or intends to assign his property with intent to defraud his creditors," &c. The assignee undoubtedly had *prima facie* title to the property for the benefit of all the creditors.

But the attaching creditors assail the assignment as void for fraud not apparent on the face of it; that the debtor refuses to deliver all his property, and that some of the property is covered by mortgages executed previously, which are without consideration, fraudulent, and void, the effect being to make the assignment itself void. It may be a question whether a voluntary assignment, fair and regular upon its face and in terms disposing of all the debtor's property for all his creditors, is necessarily made void by the fact (assuming it proved) that some of the property assigned is found to be covered by fraudulent mortgages previously executed. The assignment in its terms covers and transfers all the interest of the debtor in his property. If the previous mortgages are

good and valid, the assignee takes subject to them; if they are void, he takes the whole interest, and whether he takes one or the other, would not seem to affect the validity of the assignment itself, but rather to concern the administration of the assigned estate, and the manner of its distribution among the creditors. We could not say that a debtor, who had given a fraudulent mortgage on part of his property, should forever after be incapable of making a valid assignment for the benefit of all his creditors. We suppose that the locus penitentiae would still remain. It strikes us that it is possible for a voluntary assignment for the benefit of all

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creditors to be valid, and at the same *time mortgages covering parts of the property so assigned be set aside as fraudulent, and the debtor required to produce and deliver all his property covered by the assignment. It was stated at the bar that there is an action pending to set aside not only the assignment, but the mortgages as well. The attaching creditors have an interest to set aside both the assignment and the mortgages; there may be, however, other creditors who, concurring as to the mortgages, have an interest to sustain the assignment. But as the facts of the case are complicated and it will have to go back to the Circuit, we make no ruling as to whether the previous execution of the mortgages and the conduct of the debtor, Foot, in withholding the assigned property as alleged, should or should not make the assignment itself null and void.

The most difficult question still remains. The Circuit Judge held that the assignment, being good and sufficient on its face, was valid to transfer the title of the property to the assignee, and therefore, although he was not a party in the attachments, the assignee had the right to make the motion to vacate the liens under section 263 of the Code, which, among other things, provides that "any person who establishes a right to the property attached, may move to discharge the attachment as in case of other provisional remedy," &c. Was this error? Was the mere *prima facie* right to the property shown by the assignment, that "established right" referred to in the aforesaid section of the code, as giving to the assignee the right to move, upon affidavits merely, to discharge the attachments? The attaching creditors deny it, and say that was assuming the very point in contention, *viz.*, the validity of the assignment, which they deny.

It was held by this court, in the cases of *Copeland v. P. & A. Life Insurance Company*, 17 S. C., 116, and *Metts v. Saue*, *Ibid.*, 120, that "the assignee under a deed of assignment cannot by motion before judgment vacate an assignment levied upon the assigned property, he being no party to the action." This was not on the ground that the assignee may not show by proper proceedings that the title of

the property is in him for the benefit of creditors, but because the judge, upon mere affidavits, could not determine such an issue, involving the title to land, &c. In the case of *Metts*, supra, the Chief Justice said: "The

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attachment can operate only on the interest of the debtor. It cannot divest any lien encumbrance or title of a third party or affect his interest in any way. If the debtor has no interest, the proceeding is futile and it will be fruitless. The creditor levies on the property of persons other than the debtor at his peril. * * * If the rights of Blakey (assignee) have been interfered with, he has his remedy, and the courts will afford him full protection through some proceeding more appropriate than the one he has adopted. His motion involves the title to real property, which ordinarily should be determined by a jury," &c. When these cases were decided (1881) section 263 of the Code, cited by the judge, was on the statute book, but it was not then considered to give to the judge the right to hear and determine the question of the validity of the assignment upon mere affidavits.

In order possibly to supply this seeming *cassus omissus* in the law, sections 255 and 256 of the Code were amended in 1883, so as to read as follows: "If the person in whose possession such property shall be attached shall appear at the return of the writ and file his answer thereto, and deny the possession or control of any property belonging to the defendant, or claim the money, lands, goods and chattels, &c., as creditor in possession, or in his own right, or in the right of some third person, or if any part of the said property be claimed by any other person than such defendant, then, if the plaintiff be satisfied therewith, the party in possession shall be dismissed and the plaintiff pay the cost of his action. But if the plaintiff shall contest the said return or the claim of said third person, an issue shall be made up under the direction of the judge to try the question, and the party that shall prevail in said issue shall recover the costs," &c. It seems to us, that under our decided cases, the assignee could only be heard to set up his title to the property assigned for the benefit of all the creditors, under and by virtue of this amendment to the code. If we construe it as directing the manner in which the title to the assigned property shall be determined, and section 263 of the Code as giving to one who has already "established" his right to the property, permission to "move to discharge the attachment," we will give effect to the manifest intention of the legislature, and at the same time reconcile both provisions, and

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*maintain the consistency of the decisions of this court. We think the Circuit Judge ought to have ordered an issue under the

amendment of the code above cited, to try the question of the validity of the assignment.

The judgment of this court is, that the order of the Circuit Court be set aside without prejudice; that the case be remanded, with permission to the assignee to make "return" to the attachments, claiming the property as assignee for creditors, in order that "an issue" may be made up to try the question of the validity of the assignment of *M. Foot*, in accordance with the act of 1883.

In this case, the plaintiffs filed a petition for a rehearing, upon the ground that the alleged preference in the assignment for counsel fees and rents had been overlooked by this court.

December 10, 1886. The following order was passed

PER CURIAM. We have carefully considered this petition for a rehearing. We think there was no such omission as suggested. The Circuit Judge held "that the assignment upon its face was a good and sufficient instrument as a deed, and that it operated to transfer the right of property to the assignee." So far as the form of the assignment is concerned, this court concurred with the Circuit Court, holding as follows: "In the view of the Circuit Judge that he had a right to hear the motion and decide it on affidavits, we cannot say that he committed error in holding that the assignment is regular on its face and contains no provision which is inhibited by the act of the legislature (section 2014, General Statutes) or makes it void," &c.

The court did not consider that either the "proper fees for preparing the assignment" in favor of creditors, or "rents" enforceable by distress, are such debts as come within the purview of the statute against preferences. There is nothing in the assignment which necessarily indicates rents not enforceable by distress.

As it does not appear that any material fact or principle involved was overlooked in the decision, there is no ground for a re-argument. The petition is dismissed.

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*MUNRO v. HILL.

(April Term, 1886.)

[1. *Guaranty*, ¶70.]

The payee of a sealed note assigned it when past due, and under seal guaranteed "the payment of the same without demand or notice of nonpayment by the makers." *Held*, that the liability of the guarantor to the assignee was primary, and that the guarantor was not dis-

charged by want of due diligence on the part of the assignee in pursuing the original obligors.

[Ed. Note.—Cited in *Carroll County Savings Bank v. Strother*, 28 S. C. 516, 6 S. E. 313.

For other cases, see *Guaranty*, Cent. Dig. § 78; Dec. Dig. § 70.]

[2. *Limitation of Actions* § 6, 22.]

The guaranty having been given prior to the code, action thereon was not barred in four years, as under the former system of pleading the action would have been debt on specialty and not covenant.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 16, 103; Dec. Dig. § 6, 22.]

[3. *Appeal and Error* § 223.]

A question as to the proper form of a judgment cannot be considered in this court until it has been passed upon on Circuit.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1338-1342, 1344, 1346-1350; Dec. Dig. § 223.]

Before Witherspoon, J., Union, October, 1885.

The opinion states the case.

Mr. J. C. Wallace, for appellant.

Mr. J. H. Rion, contra.

August 10, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action commenced in September, 1884, by the plaintiff as administrator of W. J. Keenan, deceased, against John T. Hill as surviving administrator of Clough S. Meng, deceased, upon the following guaranty of the intestate Meng: "Union, S. C., February 4, 1861. On the first day of January next, we, or either of us, do promise to pay C. S. Meng or bearer, one hundred dollars, with interest from date, value received. Witness our hands and seals. (Signed) W. E. St. Clair, [L. S.], J. W. Hughes, [L. S.]" Endorsed: "I assign to William J. Keenan the within note and interest, and guarantee the payment of the same without demand or notice of non-payment by the makers. Given under my hand and seal the 28th July, 1866. (Signed) C. S. Meng, [L. S.]"

The execution of the note and guaranty were admitted, but the defendant administrator interposed two defences: first, that William J. Keenan, in his life-time, and his

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administrator after his death, were negligent in pursuing the remedies available and in not pushing a suit begun by William J. Keenan in his life-time against the original obligors on the note, St. Clair and Hughes; and, second, the statute of limitations.

Upon the trial the defendant offered a witness to show negligence on the part of plaintiff and his intestate in failing to demand payment of the makers, and in not notifying defendant or his intestate of non-payment. Judge Witherspoon ruled the testimony to be irrelevant, as the guaranty waived demand and notice of non-payment. The defendant's attorney then offered to put

in evidence the record of a judgment obtained by William J. Keenan in his life-time against the makers of the note, refusing to include a bundle of papers filed therewith, consisting of proceedings by the plaintiff Keenan for renewal of the execution in the case, which after contest was renewed. Plaintiff's attorney objected unless the whole of it was admitted together. The judge ruled that if the defendant could show by the record any positive act by the plaintiff or his intestate, he would admit it in evidence; but if it was designed to prove mere "negligence of a passive nature" on the part of the plaintiff or his intestate, he would not admit the record, as for that purpose it was irrelevant and inadmissible. He also overruled the defence of the statute of limitations. The plaintiff had a verdict, and the plaintiff entered up judgment and execution in the form usual against administrators, viz., "de bonis testatoris, si vel non, de bonis propriis," as to costs.

The defendant appeals upon the following grounds of alleged error: "I. In holding that the statute of limitations was not a bar to the action. II. In holding that the defendant could not prove laches and negligence of plaintiff and his intestate in pursuing the remedy against the principals, resulting in irreparable injury to his intestate's estate, in discharge thereof under the guaranty and rejecting evidence offered for that purpose. And will move the court on the errors to set aside the judgment and dismiss the complaint under the first exception; and failing that, to set aside the judgment and order a new trial under the second exception."

First. As to the point that the guarantor

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was discharged from liability for want of due diligence on the part of the assignee in pursuing the original obligors on the note. The single bill was not negotiable—was assigned for value after due, and its payment guaranteed in absolute and unconditional terms "without demand or notice of non-payment by the makers." It is quite clear, therefore, that the guarantor had no right to demand notice of non-payment as is necessary in the case of an ordinary indorsement of a promissory note. Brandt, on Suretyship and Guaranty, section 172, says: "The rule that no notice of the principal's default need be given in order to charge the unconditional guarantor of an existing demand, is specially applicable to the guaranty of a debt made after the debt is due. In such case the principal is in default when the guaranty is made, and the reasons requiring notice do not apply." &c. Besides, in this case demand and notice were dispensed with in the guaranty itself.

But it is insisted that the contract of guaranty is in its nature collateral and secondary, and involves necessarily the condi-

tion of due diligence in the collection of the note against the original obligors. It is true that in this case the guaranty was not made to the original payee at the time the note was given, and in that sense may be regarded as secondary; but it was entered on a single bill overdue and in its terms was absolute and unconditional, and as to the assignee (who may have purchased the note alone upon the faith of the guaranty), it was really primary. There does seem to be some conflict in the authorities as to whether, under such a guaranty, it is necessary, in order to maintain his suit, for the obligee to show greater diligence than is required in the case of an ordinary surety who signed with the original debtor. But without going into the argument it is enough, as we conceive, to say that in this State the precise point was decided in the case of *Foster & Judd v. Tolleson*, 13 Rich., 32.

That was a case precisely like this. The action was on a guaranty in the following words: "I assign the within note to Foster & Judd, and guarantee the payment thereof for value received." This was written on a single bill or note under seal then past due. The recovery was resisted on the ground of want of due notice to defendant of non-payment, and of proper diligence on the part of plaintiffs; and it was held that "when

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the assignor of a sealed note past due absolutely and unconditionally guarantees its payment, he will not be discharged from liability by the failure of the assignee to give notice of non-payment or to sue the maker of the note," &c. In delivering the judgment of the court Judge O'Neill said: "The question presented in the first ground is, whether the defendant was entitled to notice of non-payment. It was clear he was not. The guarantee was absolute and unconditional, on a sealed note, which is negotiable and was after it was due. This very question was made and decided (*The Bank v. Hammond*, 1 Rich., 285), that the guarantor of a bond (which in all respects is like a single bill except that it has a penalty) was not entitled to notice of non-payment. So, too, that case decides the second ground against defendant: for it rules that the guarantor would not be discharged from his liability on the supposed laches of the obligee, if there was no extension of time to the obligor, which bound the obligee, as by a valid contract," &c.

In the case at bar it was not claimed that the obligee had extended the time to the obligors. On the contrary, it appeared that he had sued them to judgment, and the execution thereon had been renewed. There was no allegation as to the condition of the original obligors as to their ability to pay, or of any want of due diligence except of "a passive kind"—indulgence. See *Carson v. Hill*, 1 McMull., 76; *Benton v. Gibson*, 1 Hill, 56.

Second. As to the statute of limitations. Both the original note and guaranty were given before the adoption of the code (in 1870), which changed the law upon the subject of the statute of limitations, and therefore the question must be determined by the law as it stood before that time. The old statute of 21 James I., our statute of limitations down to the code, imposed limitations on the different actions by name—that "all actions of debt grounded upon any lending or without specialty, all actions of covenant," &c. The statute imposed no limitation on an action of debt upon a specialty, but it did limit an action of covenant, and the question is whether this is an action of debt on specialty or of "covenant." All the old forms of action are now abolished, but we suppose the question must be considered now according to the nature of the obligation. Under

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the old practice would this action have been "covenant" or "debt on a specialty" or bond? It is remarkable that there is so little in our reports upon the subject, as technical "covenants" and "bonds" are both under seal. But it seems to us that a contract under seal to guarantee the payment of a note under seal, must, as to the time it may run, be construed to be of the same character as the note which it guarantees; that is to say, the note under seal being a specialty and exempt from the operation of the statute of limitations, the guaranty of the payment of that note being under seal is also a specialty and exempt from the statute, just as if the guarantor were another signer and surety.

The exact point that a guaranty under seal, of a single bill under seal, is a bond and assignable as such under the act of 1798, was decided in the case of *Folk v. Cruikshanks* (and in a note that of *Waring v. Cheeseborough*), 4 Rich., 243. In the first case cited Judge O'Neill said: "This is beyond all doubt a debt by specialty, and that is a bond. That it is payable upon a contingency to arise out of the default of another, can be no objection, if, as the declaration avers, that contingency has happened; for then it becomes absolute, fixed, and certain. The case of *Cay v. Galliot*, 4 Strob., 282, is conclusive against defendant." And in the case in the note it is said: "The legal effect of the guaranty is to make the guarantors collateral obligors in the bond. They undertake, if the first obligors do not pay, that they will. This makes them, in the event of non-payment, the same as sureties. Their guaranty is part of the bond, and must pass under the subsequent assignment. The assignee may maintain an action in his own name against the obligors of the bond, and why not against the guarantors? It is their bond as well as that of the first obligors. It is true that if the contract of guaranty was independent of the bond, then

the guarantors would not of necessity be liable to the same remedy; but when it refers to the bond, and adopts it as the contract, it is the same thing as if the defendants had executed a collateral bond to secure the payment. The guaranty here is, in legal effect, the bond of the defendants to secure the payment of the bond assigned to the assignee." &c.

We think it follows conclusively from the

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guaranty being a *specialty, a bond, that the action on it, according to the old forms, was debt on specialty and not an action of "covenant," and therefore the statute of limitations is not applicable.

The question as to the proper form of the judgment and execution has never been ruled upon by proper authority below, and therefore is not before this court in such manner that we can consider it.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 481

HENDRIX v. SEABORN.

(April Term, 1886.)

[1. *Homestead* ⇨136.]

A testator directed by will that his property (all personality) should be sold, and the proceeds applied to the payment of his debts. *Held*, that this bequest was not such an alienation in the sense of the statute as would defeat the widow's claim to an exemption under the homestead law.

[Ed. Note.—Cited in *Ex parte Allison*, 45 S. C. 343, 23 S. E. 62; *Bostick v. Chovin*, 55 S. C. 427, 429, 430, 33 S. E. 508; *Beatty v. Richardson*, 56 S. C. 173, 187, 188, 34 S. E. 73, 46 L. R. A. 517.

For other cases, see *Homestead*, Cent. Dig. § 250; Dec. Dig. ⇨136.]

[2. *Homestead* ⇨111.]

The modes provided by the homestead law of defeating a claim of homestead (alienation and mortgage) cannot be extended by implication.

[Ed. Note.—Cited in *Farmers' Mutual Ass'n v. Burch*, 47 S. C. 459, 25 S. E. 211, 34 L. R. A. 806, 58 Am. St. Rep. 899.

For other cases, see *Homestead*, Cent. Dig. §§ 177, 178; Dec. Dig. ⇨111.]

[3. *Homestead* ⇨136.]

A person may defeat his own right to homestead and that of his family after him by an alienation during his life-time; but a bequest cannot defeat it, because the bequest does not take effect until the right to homestead has become vested in the widow who survives him.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 249, 250; Dec. Dig. ⇨136.]

[4. *Homestead* ⇨141.]

It is the policy of the law to favor a homestead exemption, especially to a widow and children, against the creditors of the debtor.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 261-270; Dec. Dig. ⇨141.]

Before Pressley, J., Oconee, January, 1885.
The opinion states the case.

Messrs. Wells, Orr, Thompson & Jaynes, for appellant, cited *inter alia*, 100 Mass., 234; 34 N. H., 392; *Smythe Homest.*, § 364; *Thomp. Homest.*, § 544; 6 Cal., 72; 7 Id., 342; 12 Id., 327; 33 Id., 326; 30 Wise., 306; 14 Iowa, 567; 10 Mich., 291; 1 Nev., 568; 3 Minn., 53; 6 Bush, 448; 13 Texas, 71; 5 Kans., 597; 25 Ill., 221; 45 Miss., 409; 37 Texas, 269; Harp., 91; 17 S. C., 551.

Messrs. Murray & Shelor, contra.

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*November 22, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. Elias Hendrix died in November, 1884, possessed of a small personal estate and owing comparatively a considerable amount of debts. He left a widow and child as his family, and a will by which he provided as follows, viz., that all his property should be sold and the proceeds applied, first, to the payment of his debts; second, a bequest of \$200.00 to Lula Owens, a young girl whom he had raised; and third, the residue, if any, to go to his widow, Matilda Hendrix. James Seaborn, the defendant, was named as executor, and he qualified as such.

The widow, Matilda, applied to the master, Richard Lewis, Esq., claiming the homestead exemption of \$500, notwithstanding the will of her deceased husband, and the master, after taking testimony, made an order assigning her the constitutional exemption in the property of her deceased husband. The defendant, executor, excepted to the homestead set off by the commissioners under his order and appealed to the Circuit Court. The exceptions were heard by Judge Pressley, who reversed the order of the master allowing the plaintiff homestead in the personal property of her deceased husband, contrary to the provisions of his will, and set aside the same. From this order the plaintiff appeals to this court upon the following exceptions:

"I. Because his honor erred in his conclusion of law that the testamentary disposition of property by a debtor would defeat his widow's right to homestead exemption in his property against his creditors.

"II. Because his honor erred in refusing to confirm the order of Richard Lewis, master, assigning exemption in the personality of Elias Hendrix, deceased, to his widow, Matilda.

"III. Because his honor erred in directing the executor to wind up the estate of his testator according to the provisions of his will, when the estate is insolvent and his widow entitled to homestead exemption against his debts.

"IV. Because the creditors of the testator do not become legatees under his will, and the estate being insolvent, the homestead ex-

emption defeats the payment of the debts, and his honor should have so held.

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"V. Because the husband, under the law, has no right to direct by a testamentary disposition after his death that his widow cannot claim homestead exemption against his debts, and it should have been so held by his honor.

"VI. Because the right of homestead secured by the constitution and the acts in pursuance thereof, is not an estate, but a mere exemption; hence the only effect of an assignment of homestead is to ascertain and designate what particular property is covered by such exemption, so that the same cannot be applied to the payment of debts, and thus the homestead laws do not affect the statute of distribution, nor the right of the owner to dispose of the same as he may see fit.

"VII. Because the title to property is not changed by its being designated as a homestead for the family of one deceased, but such property remains subject to the payment of debts, the application to their payment to be made at the time of the death of the person entitled to such exemption, and said property also remains subject to the provisions of a will after the constitutional exemption has been enjoyed.

"VIII. Because the assignment of homestead in this case could have no other effect than to designate and set apart certain property of testator as exempt from his debts during the life of the widow, leaving the title to such property just where it was before, and leaving the property so designated as exempt, subject to the payment of his debts and to distribution at the death of Matilda Hendrix, according to the provisions of the will of testator; and his honor should have so held," &c.

The legacy to Lula Owens being a voluntary gift, cannot stand in the way of creditors, and therefore the only question in the case is, whether the widow is entitled to the exemption of \$500, as against the debts of the testator, to which he directed it to be paid by his will.

The constitution as amended in 1880 declares: "That the general assembly shall enact such laws as will exempt from attachment and sale, under any mesne or final process issued from any court, to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate; * * * and every head of a family residing in this State, whether enti-

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*tled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars," &c. In order to carry this provision into effect, the general assembly has passed laws directing as to the manner in which the debtor may claim his homestead exemption, and have the same set off to him, and in addition has made

the following provision: "If the husband be dead, the wife or children; if the father and mother be dead, the children living on the homestead, &c., shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living," &c. "No waiver of the right of homestead, however solemn, made by the head of the family, at any time prior to the assignment of homestead, shall defeat the homestead provided for by this chapter: provided, however, that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her, or their heirs or assigns." Gen. Stat., §§ 1997, 1998.

There is no doubt that the testator, Hendrix, in his life-time might have claimed the exemption; but not having done so, and had it actually assigned, he, as owner, had the right to alien or mortgage it so as to exclude his widow from claiming it after his death. See Homestead Association v. Enslow, 7 S. C., 19; Smith v. Mallone, 10 Id., 40, and subsequent cases. He did not, however, while living, execute a mortgage of his property to secure his creditors, but he left a will, by which he directed that his property should be sold and the proceeds applied to the payment of his debts; and the question is, whether that testamentary disposition was such an "alienation" of his property in the sense of the act as to exclude the widow's right to the exemption after his death. The question is one of construction as to the intent of the legislature.

It is true that, speaking in general terms, a disposition by will may be embraced in the word "alienation," used in a generic sense, as being one of the many ways in which it may be effected. But it seems to us that the accurate and specific meaning of the word is to pass an estate from one to another, involving the idea of a perfected conveyance of title

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inter vivos. Alienation has been defined to be "the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law." 2 Bouv. L. Dict. In conformity with this definition, our court has held that a mortgage not passing the title, but being a mere security for the debt, is not an alienation under the statute, 3 and 4 W. & M., chap. 14, General Statutes, section 1952. See Simons v. Bryce, 10 S. C., 354; Smith v. Grant, 15 Id., 150; Warren v. Raymond, 17 Id., 178.

The provisions of the homestead law, in the circumstances authorizing the exemption, are general in their character, specifying the cases in which the exemption is excluded, viz., alienation and mortgage by the debtor. These are clearly exceptions to a general rule, and therefore are not to be extended or enlarged by implication. It is to be assumed that, if other exceptions, such as a legacy

or devise, had been intended, they would have been added to the list. The point raised here has never before arisen in this State, but the great industry and research of the appellant's counsel have enabled him to cite numerous cases from the reports of other States to the point that no instrument, conveyance, encumbrance, lien, or charge, can affect the right to claim homestead, except such as are expressly mentioned in the enactment, constitutional or statutory, creating the exemption. It seems that in homestead cases, especially as to the causes of exclusion, there is a strict application of the maxim, *expressio unius est exclusio alterius*. See Pott, *Dwarris*, 321, where it is said: "An exception strengthens the force of law in cases not excepted; so, according to Lord Bacon, enumeration weakens it in cases not enumerated."

But in addition to this, while the husband is undoubtedly the absolute owner of his property, so far as concerns the right of alienation, it is manifest that in regard to homestead the provisions of the law above cited, taken together, limit that right and create something like an interest for life in the husband, with limitation over to the wife and children; that is to say, the husband has the right to claim the exemption during his life; but if he does not avail himself of that right, it is at his death transmitted to his wife and children. Looking at it in this light, the difficulty does not lie in the fact that a testamentary provision cannot be

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*carried into effect until after the death of the testator; for as to mortgages, it often happens that they are not foreclosed, and may not even fall due until after the death of the mortgagor. But as to its being an alienation, the great trouble lies further back, and has reference to the time when the testamentary provision really comes into existence; whether a charge by will, which is ambulatory and does not take effect until after the death of the testator, can be said to be "an alienation" in the life-time of the testator. The will may have been prepared and executed long before, but it was inchoate, and gave no rights whatever, until the death of the testator, which was the precise moment at which the husband's right of homestead ceased to exist and was transmitted to his wife and children. Under these circumstances, can it be said that the charge in favor of the creditors came into existence in the life-time of the testator, or did it not in fact become effectual after the husband's right for life had terminated, being an attempt to reach beyond and control the matter after his death? And if so, which right should be preferred, that of creditors or the homestead right of the widow?

It seems to us, in respect to this right of homestead exemption, the husband debtor is in a condition somewhat analogous to

that of the first taker in a fee conditional after issue born. He has the right in his life-time to alien by deed, but it is well settled that a devise by him is not an alienation within the meaning of the law. "If such an alienation do not take effect in the life-time of the testator, the estate must descend to the heirs of limitation per formam doni." *Postell and Potter v. Jones, Harper*, 92. In delivering the judgment of the court in this case, Chancellor Johnson said: "Alienation may be effected by devise; and when this question was first presented to my mind, its strong inclination was, that as one of the means it was embraced in the power given to the tenant of a conditional fee to alien on the birth of issue; but I am satisfied, on a more attentive consideration, that its meaning was intended to be restricted to alienation by deed. It will be recollected, that if the devisee had died without having been divested of the estate by some of the means authorized by law, it would have descended to the heirs of his body, and the devise would have taken effect per formam

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doni. *It is also clear that the devise could not take effect until after the death of the testator, so that the rights of the issue and the devisee devolved on them both at the same instant, and the question is, which of them is to be preferred? * * It is impossible to mistake the application of the principle, if we compare this estate with one held in joint tenancy, to which it has been made to apply. These estates, though different in the manner of their creation and duration and some of their properties, with respect to the powers which the tenants have over them, are strikingly analogous. A joint tenant, like a tenant of a conditional fee, may alien, forfeit, &c. (*Co. Lit.*, 180 a), and by this means defeat the *jus accrescendi*; and yet Littleton says, that if one joint tenant, by testament, devise lands held in joint tenancy, the devise is void; and the reason given is, that 'no devise can take effect till after the death of the devisor, and all the lands presently cometh by the law to his companion who surviveth,' &c. See *Barnett v. Barnett*, 17 S. C., 552.

We see no reason why the same principle should not apply here. No bequest can take effect until after the death of the testator, and all the personal property to the extent of the homestead exemption "presently cometh by the law to the widow of testator who surviveth." Mr. Thompson, in his work on "Homesteads and Exemptions," section 544, says: "The right thus secured to the widow and orphan children of the owner of a homestead, would in some cases be rendered nugatory, if he could deprive them of it by testamentary provision. The existence of such a right in them is clearly incompatible with the existence of such a power over it by him. And in this respect it seems to make no dif-

ference whether the widow takes a plenary title by descent, as in Vermont, or by survivorship, as in California, or whether she takes a mere right of occupancy during the continuance of certain contingencies, as in most of the States," &c. See also *Smythe Homest. Exemp.*, § 541; *Brettun v. Fox*, 100 Mass., 234; 10 Ill., 263.

We agree with the counsel for the respondent, that it is creditable in a debtor to make provision for the payment of his debts, and that no unnecessary impediments should be thrown in the way of such good purpose.

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But it is the duty of the court simply to administer the law as they understand it. And, as it seems to us, the very existence of the homestead laws shows that in a proper case it is the policy of the law to favor the right of homestead exemption, especially that of the widow and children, against the creditors of the deceased husband.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and the case remanded for such further proceedings as may be necessary to carry out the conclusions herein announced.

(1 S. E. 1)

25 S. C. 488

WIETERS v. TIMMONS.

(April Term, 1886.)

[1. *Trusts* ⇨131.]

Where a grantor conveyed land to C. in trust to hold the same during the life of the grantor, for the support and maintenance of his wife and her issue, he to be allowed by the trustee to receive and appropriate the income to that end, the trust was not executed during the life of the grantor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[2. *Trusts* ⇨131.]

Upon the death of the grantor the trustee was to hold as to the one moiety to the sole and separate use of the grantor's widow for life, with remainder to his issue, and as to the other moiety to the use of such issue and their heirs forever. *Held*, that upon the death of the grantor the trust was executed as to one moiety in the issue (his two sons) who survived him, but was not executed as to the other moiety in the widow.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 175, 175½; Dec. Dig. ⇨131.]

[3. *Trusts* ⇨191.]

Power of sale given to the trustee upon the written request of the widow, if she survived the grantor, could not have been intended to apply to the moiety of the two sons after it vested absolutely in them, at the death of the grantor.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 243; Dec. Dig. ⇨191.]

[4. *Partition* ⇨13.]

The interest of one of these sons having been sold under execution after the grantor's death, the purchaser was entitled to have a partition.

[Ed. Note.—For other cases, see *Partition*, Cent. Dig. §§ 36, 81; Dec. Dig. ⇨13.]

[5. *Descent and Distribution* ⇨11.]

Upon the death of a trustee, the legal title to the land held in trust devolves upon his eldest male heir.

[Ed. Note.—For other cases, see *Descent and Distribution*, Cent. Dig. §§ 40–44, 47, 180, 184; Dec. Dig. ⇨11.]

[6. *Trusts* ⇨131.]

[Cited in *Ayer v. Ritter*, 29 S. C. 137, 7 S. E. 53; *McNair v. Craig*, 36 S. C. 109, 15 S. E. 135; *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82; *Uzzell v. Horn*, 71 S. C. 436, 51 S. E. 253; *Pope v. Patterson*, 78 S. C. 344, 58 S. E. 945; *Breeden v. Moore*, 82 S. C. 538, 64 S. E. 604—to the point that a party by deed, after marriage, conveyed certain land in trust, during the life of the grantor, for the support and maintenance of the grantor's wife and her issue, and upon the death of the grantor, if his wife survived him, and there should also be issue, then as to one moiety in trust for the sole and separate use of such wife for life, and as to the other moiety to the use of such issue and their heirs, forever. The deed also provided that upon the joint request of the grantor and wife, or of the survivor, the said trustee should sell the whole or any part of the said property, and reinvest, etc. The grantor died, leaving his wife, and two children by said wife. *Held*, in an action for partition brought by a purchaser of the interest of one of the children under an execution sale, that the moiety given to the issue vested in them immediately upon the grantor's death, under the statute of uses, discharged from the trust, and the operation of the statute was not delayed by the provision in the trust for the sale of the whole or any part of the property on the joint request of the grantor and his wife, or of the survivor of them, the trust being extended thereby only as to the moiety given for life to the widow.]

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 175; Dec. Dig. ⇨131.]

Before Hudson, J., Marion, July, 1885.

This was an action that involved the construction of the following deed:

Know all men by these presents that I, J. Morgan Timmons, of the District of Darling-

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ton, in the State aforesaid, for and in consideration of the love and affection I have toward my wife, Josephine B. Timmons, and with the view to secure to my said wife and her issue a comfortable maintenance and support, &c., and for the further consideration of ten dollars, to me paid by Theodore J. Cannon, at and before the sealing and delivery of this deed, have granted, bargained, sold, and released, and by these presents do grant, bargain, sell, and release, unto the said Theodore J. Cannon all that plantation and tract of land containing four hundred and twenty acres, more or less. * * * Also the following named slaves, to wit: * * * To have and to hold the said land and slaves, and the future issue and increase of the said slaves, to the said Theodore J. Cannon and his heirs forever.

In the trust and confidence, nevertheless, that the said Theodore J. Cannon, and his heirs, shall stand seized of the said lands, and hold the said slaves and their increase, subject to and for the following uses and

purposes, trusts, and remainder; that is to say, after the full payment and satisfaction of all my just debts, the said trustee and his heirs shall suffer me to receive the income of said property, or to use and possess the said property during my natural life, the annual income of said property thus received to be appropriated by me to the support and maintenance of my said wife and her issue, either now living or which may hereafter be born, and to the education of said issue, free from the future debts, contracts, and liabilities of myself and said wife; if my said wife shall survive me, and at my death there shall be living issue of my said wife by me, then the said property shall be held as to one moiety to the sole and separate use of my wife for life, and as to the other moiety to the use of said issue and their heirs forever. * * *

The said Theodore J. Cannon and his heirs shall hold said property in the further trust and confidence, that upon the joint request in writing of myself and wife, or upon the request of the survivor, the said Theodore J. Cannon and his heirs shall sell the whole or any part of the said property, and invest the proceeds in other property, either real or slaves; and the property so purchased shall be held subject to the same uses and trusts, limitations and restrictions, as are herein expressed of and concerning that which is hereby conveyed, and on such sale the purchaser shall not be responsible for the proper application or investment of the proceeds of sale; also that the said Theodore J. Cannon and his heirs, upon the joint request in writing of myself and wife, shall convey by deed, in proper form, the whole of the property hereby conveyed to such other person or persons as myself and said wife may nominate and appoint, as a trustee or trustees, in the stead of the said Theodore J. Cannon and

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his heirs, and such substituted trustee or trustees shall have the same rights, powers, duties, &c., as are hereby vested in the said Theodore J. Cannon and his heirs.

In testimony whereof, I have hereunto set my hand and seal this the 28th day of December, in the year of our Lord eighteen hundred and fifty-eight, and in the 83d year of American Independence.

The Circuit decree was as follows:

The defence is that John has no estate subject to levy and sale under the terms of the deed, the legal title being alone in the trustee. The deed provides, among other things, that "if my said wife shall survive me, and at my death there shall be living issue of my said wife by me, then the said property shall be held as to one moiety to the sole and separate use of my wife for life, and, as to the other moiety, to the use of such issue and their heirs forever." Now, the donor did die leaving him surviving his wife, Josephine, and their issue, two sons, John and James. In these two sons, upon the death of their

father, one moiety of the land vested absolutely in fee—that is, to them and their heirs forever, according to my interpretation of the deed.

What duty has the trustee to perform in and about this moiety? If there was any contingency about these respective interests during the life-time of the father, there has been none since his death. At any time since their father's death in 1863, these sons could have demanded that their shares be set apart in severalty, free and discharged of the trusts of the deed. By silent operation of law, the fee, eo instanti the death of the father, passed from the trustee into them, severing their estate from that of the mother. The interest of John became subject to levy and sale. No duty of the trustee, no scheme of the trust, no right, title, or estate of the trustee, could be invaded by a transfer of his interest and a severance by partition. We hold that ever since 1863 he has had a right to enjoy his share in severalty and in fee, and that the plaintiff has become lawfully vested of this estate and is entitled to partition.

To Josephine B. Norwood, or to her trustee, must be allotted the one moiety to be held under the terms of the deed, and of the other moiety the one-half will be allotted in fee to the defendant, J. Maxey Timmons, and the

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other half to the plaintiff, as *the purchaser of John's interest. And it is so ordered, adjudged, and decreed. Whether the plaintiff upon the death of Mrs. Norwood will have a share in her moiety, cannot now be determined, but that question is for the future.

But I will not order the writ in partition to issue in the absence of a trustee to represent the legal title to the moiety of Mrs. Josephine Norwood. The defendants, in their answer, insist that the trustee is a necessary party to the action, and in this I concur. The legal title of the trustee, T. J. Cannon, who is now deceased, so far as the widow's share goes, is vested in his oldest male heir, who should be made a party defendant, in order that the partition shall be final and conclusive on all concerned. Let the living eldest male heir of T. J. Cannon be made a party defendant, and the final judgment be till then left open.

Messrs. Johnson & Johnson, for appellants.
Mr. C. A. Woods, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff demanded judgment below that a certain tract of land, situate in Marion County, and described in the complaint, be partitioned between himself and the defendant, James Maxey Timmons, the plaintiff claiming three-fourths during the life-time of the defendant, Josephine B. Norwood, and one-half in fee as

purchaser of the interests of the said Josephine and of the interest of defendant, John M. Timmons, and alleging that James Maxey Timmons was entitled to the remaining fourth of life interest of Josephine, and to one-half in fee after the death of the said Josephine, and he prayed partition according to their said respective rights. The rights of the parties depended upon the construction of a certain deed set out in the "Case," executed by one J. Morgan Timmons, now deceased, in 1858, who was the husband of the defendant, Josephine, and the father of the two Timmons, defendants. This deed conveyed the land upon certain trusts to one Cannon, for the use of the said Josephine, and to the issue of the said J. Morgan Timmons and of his wife, the said Josephine.

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*The plaintiff alleged in his complaint that the defendant, J. M. Timmons, had become the purchaser of the interest of his mother, the said Josephine, and that afterwards the interest of the said J. M. Timmons had been sold at sheriff's sale, at which he, the plaintiff, was purchaser; and, as stated, the action below was instituted for partition, the plaintiff claiming, as above mentioned, the interest of the said Josephine and of the said John M. Timmons. Purvis, the other defendant, was tenant of the other parties, and was made a party on that account. It appeared in the progress of the case, that John M. Timmons had never purchased the interest of his mother: the claim of the plaintiff, therefore, to that extent had no foundation. It was not denied, however, that the individual interest of John M. Timmons had been levied upon and sold to the plaintiff, but whether this was such an interest as could be levied upon and sold, was one of the questions in the case. It further appeared that the trustee, Cannon, was dead and his heir at law was not made a party.

The Circuit Judge construed the deed, adjudging that Josephine was entitled to one moiety to be held under the terms of the deed for her use, and that the other moiety belonged in fee, one-half to James Maxey, and the other half to J. M. Timmons, which latter interest had passed to the plaintiff at the sheriff's sale, this interest being, in his opinion, a leviable interest and passing under said sale; but whether the plaintiff, upon the death of Josephine, would have a share in her moiety under his purchase, he held could not now be determined, as this depended upon future developments. The Circuit Judge, however, declined to order the partition, holding, as he did, that the legal title of Josephine in the land had vested in the trustee under the deed, who being dead, this title was now in his oldest male heir, who should be made a party defendant, in order that the partition should be final and conclusive. He therefore suspended final judgment until the eldest male heir of T. J. Cannon, the deceased

trustee, be made a party, and left the case standing in that condition.

The defendants appealed upon two grounds: 1st. Because his honor erred in holding that the defendant, John M. Timmons, had an estate in the said tract of land

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subject to levy and sale *under the terms of the deed, and that the legal title was not in the trustee. 2d. Because his honor erred in hearing and deciding the case upon its merits before the trustee was made a party to the action. Since the hearing below, the eldest male heir of Cannon, the trustee deceased, has become a party, and has consented, upon the record, that the case may be heard here upon its merits, thereby waiving the second ground of appeal above. The only question, then, before us is the character of the estate of John M. Timmons in the land in question.

First, was the trust executed and has the legal title to one moiety of the land passed by operation of the statute to John M. and his brother? The Circuit Judge so held, and therefore adjudged that the plaintiff being the purchaser at sheriff's sale of the interest of John M. was entitled to partition. It has been frequently held that where the trustee has any duty to perform, to the complete performance of which it is necessary that the legal title shall remain in him, the statute does not apply. On the other hand, where the trustee is charged with no duty in reference to the property conveyed, there the statute does apply and silently passes the title through the trustee to the *cetui que trust*, or, to be more accurate, to the grantee. *McNish v. Guerard*, 4 Strob. Eq. 74; *Bristow v. McCall*, 16 S. C. 546.

Now, was there anything here for the trustee to do in reference to the interests of John M. Timmons and James Maxey Timmons? We see nothing. Under the deed, the property conveyed was to be held in trust during the life of the grantor, for the support and maintenance of his wife and her issue, the grantor to be allowed by the trustee to receive and appropriate the income to that end. During this time, there being something for the trustee to do, the statute did not apply. But the deed further provided that, upon the death of the grantor, if his wife survived him and there should also be issue surviving at his death, then the said property should be held as to one moiety to the sole and separate use of his wife for life, and as to the other moiety to the use of such issue and their heirs forever. The grantor died leaving his wife surviving and also his two sons, the defendants, John M. and James Maxey. Now, if there was no

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other *provision in the deed except as stated above, it could not be doubted, but that upon the death of the grantor the two sons took a vested legal interest in one moiety of the property, the other moiety being still held

by the trustee for the use of their mother during her life, and the interest of John M. in said first moiety having been levied upon and sold by the sheriff, and purchased by the plaintiff, the said plaintiff would be entitled to have that interest set apart to him.

There is, however, another provision in the deed. In a proviso thereto it is stated, "that the trustee, Theodore J. Cannon, and his heirs shall hold said property in the further trust and confidence that upon the joint request in writing of myself and wife, or upon the request of the survivor, the said Theodore J. Cannon and his heirs shall sell the whole or any part of said property." Under this proviso appellants claim that the legal title to the whole property has remained in the trustee so as to enable him to make sale thereof, in the event that a request in writing to that effect should be made by the grantor and his wife or the survivor of them—the appellants contending that in such an event there would be a duty devolving upon the trustee, in reference to the property, and consequently preventing the operation of the statute.

This would be conclusive in favor of the appellants, if the proviso above applied to the interests of John M. and James Maxey. But does it thus apply? Whether it does or not, is a matter of intention to be ascertained by a construction of the entire deed. The deed is somewhat peculiar in the fact that it conveys different interests to the same parties according to circumstances arising at different times. In the first place, and during the life of the grantor, the whole property was to be held in trust, the income thereof to be appropriated by the grantor himself for the support and maintenance of his wife and her then issue. Second, upon his death, his wife surviving, and issue surviving, one moiety was to be held in trust for the use of his wife and the other moiety for the issue; but in case there was no issue surviving, then the whole of the property to be held for the sole and separate use of the wife for life. And then after several other grants, conditioned upon the above failing, follows a gen-

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eral *proviso in which among others is included the one mentioned above, to wit: that the property might be sold by the trustee upon the joint request of the grantor and his wife or upon the request of the survivor.

During the life of the grantor he was to have control of the entire income of the property to be used by him in the support and maintenance of his wife and children, and the education of said children, and it was not unreasonable that he should attach thereto the proviso in question, permitting him and his wife to change the property if found necessary, subject to be reinvested for the same purposes as expressed in the original deed. Up to his death the interest of the issue, other than support and mainte-

nance, was contingent, and the proviso could in no way therefore affect them. Upon the death, however, of the grantor, the interest of the wife and the issue was separated by the terms of the deed, the wife being entitled to the use and benefit of one moiety for life and the other moiety to go to the issue in fee. The grantor died without making any request jointly with his wife for the sale of the property or any portion thereof, and for the reinvestment of the proceeds, and therefore it is no longer possible for such joint request to be made; and although it is true, the proviso empowered the survivor to make such request, yet it would be utterly inconsistent with the vested interests of the issue in the moiety to which they became entitled at the death of their father (the grantor) to suppose that this power extended to said interest.

Doubtless the widow by request might have the moiety of which she is still the cestui que trust sold and the proceeds reinvested, but she has no power over the moiety of the issue. That moiety, by operation of the statute, passed at the death of the grantor to said issue, investing them with the fee discharged of all trust.

It is the judgment of this court, that so much of the judgment below as has adjudged that to Josephine B. Norwood, or her trustee, one moiety must be allotted to be held under the terms of the deed, and the other moiety the one-half in fee to the plaintiff as the purchaser of John M. Timmons's interest, and the other half in fee to the defendant,

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James Maxey Timmons, be *affirmed, and that the case be remanded so that the partition sought may be had according to their rights herein above.

(1 S. E. 5)

25 S. C. 496

HUBBARD v. THE CAMPERDOWN MILLS.
(April Term, 1886.)

[1. *Attorney and Client* ⇨130.]

A claim for professional services, against persons sui juris or their property, must, like claims for other services, rest upon contract, express or implied, made with such persons directly or through their agent or representative; otherwise there is no legal foundation for a charge, even though the services may have enured to their benefit.

[Ed. Note.—Cited in *Wilson v. Kelly*, 30 S. C. 489, 9 S. E. 523; *Ex parte Fort*, 36 S. C. 25, 15 S. E. 332; *Park v. Laurens*, 68 S. C. 218, 46 S. E. 1012.

For other cases, see *Attorney and Client*, Cent. Dig. §§ 292, 293, 295, 296, 306, 307, 311; Dec. Dig. ⇨130.]

[2. *Costs* ⇨103.]

A minority of stockholders and creditors, suing for the benefit of themselves "and such other stockholders and creditors as have not confederated together," brought action against the defendant corporation and a large stock-

holder and creditor, charging a fraudulent combination to bring the property to a disadvantageous sale, and under this action, with defendant's assent, a receiver was appointed and the property sold, but there was no evidence of fraud. *Held*, that attorneys for the plaintiffs were not entitled to a counsel fee out of the fund realized from this sale.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 398; Dec. Dig. ☞103.]

[3. Costs ☞103.]

But the defendant corporation and the receiver were entitled to have the reasonable compensation of their counsel paid out of this fund.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 398; Dec. Dig. ☞103.]

[4. Appeal and Error ☞547.]

No fact can be accepted by this court unless it appears in the "Case," or is admitted by counsel. Statements incorporated into exceptions and arguments will be disregarded unless supported by the facts appearing in the "Case."

[Ed. Note.—Cited in *Welch v. Gleason*, 28 S. C. 250, 5 S. E. 599.]

For other cases, see Appeal and Error, Cent. Dig. § 2427; Dec. Dig. ☞547.]

[5. Reference ☞55.]

Nimmons v. Stewart (13 S. C. 445), explained and limited; and *held*, that a reference to ascertain the amount of a counsel fee should be upon notice to the parties interested or their counsel, and not ex parte.

[Ed. Note.—Cited in *State v. Port Royal & A. R. R. Co.*, 45 S. C. 467, 23 S. E. 380; *Connor v. Ashley*, 57 S. C. 314, 35 S. E. 546.]

For other cases, see Reference, Cent. Dig. § 83; Dec. Dig. ☞55.]

[6. Corporations ☞556.]

[In a suit by the minority of the stockholders of an insolvent corporation to enjoin the majority from executing a certain plan to pay debts, and to obtain a receiver and sale of corporate assets, the corporation is a necessary party.]

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2223; Dec. Dig. ☞556.]

[7. Trusts ☞312.]

[Cited in *Buist v. Williams*, 81 S. C. 502, 62 S. E. 859, to the point that a trust estate must bear the expenses of administration, especially those of receivership, including counsel fees.]

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 431; Dec. Dig. ☞312.]

Before Wallace, J., Greenville, December, 1885.

The opinion states the case.

[For subsequent opinion, see 26 S. C. 581, 2 S. E. 576.]

Messrs. Perry, Perry & Heyward and Stokes & Irvine, for appellants, cited 4 Rich. Eq. 233; 16 S. C. 621; 21 Id., 162; 24 Id., 238.

Messrs. Wells & Orr, for plaintiffs, cited 16 S. C. 621; 13 Id., 448; 21 Id., 179;

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Field Corp., § 398; High Inj., § 767; *2 Dan. Ch. P. & P., 1437; 2 Coll., 90; 15 Keen, 358; 1 P. Wms., 376; 4 Beav., 297; 4 Sim., 510; 2 Myl. & K., 320, 818; 3 Beav., 9; 4 Johns. Ch., 608; 13 Allen, 474; 7 Harris, 98; 4 Desaus., 394; 2 McCord, Ch., 73; 2 Hill Ch., 121; Rice Ch., 54; 4 Rich. Eq., 39; 19 Id., 204; 8 Id., 91; 105 U. S., 527.

Mr. T. Q. Donaldson, for the Camperdown Mills and the receiver, cited 1 S. C., 116; 11 S. C., 527; Field Corp., § 419; High Rec., §§ 188, 314; Rice Ch., 54; 4 DeSaus., 494; 4 E. D. Smith, 191; 93 U. S., 352, 97 Id., 146; 102 Id., 1; 105 Id., 532; 106 Id., 286; 107 Id., 591.

November 22, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The Camperdown Mills, a corporation duly chartered under the laws of this State, was for several years successfully engaged in the manufacture of cotton goods, running two mills, in or near the city of Greenville, South Carolina, known as Mill No. 1 and Mill No. 2. The company having contracted debts to a large amount, which it was unable to provide for from the income, the stockholders, at a meeting held on April 28, 1883, adopted a resolution authorizing the issue of coupon bonds to an amount not exceeding seventy-five thousand dollars. The bonds were accordingly prepared and made payable to the defendant, Hamlin Beattie, or bearer, and were secured by a mortgage on all the property of the company, executed to said Beattie as trustee for that purpose. This scheme not proving effectual for the relief of the company, only a few of the bonds having been sold and others pledged as collaterals, on January 21, 1885, a majority of the stockholders adopted a resolution for the sale of all the machinery in Mill No. 1, and the same was advertised for sale on March 11, 1885.

Thereupon this action was commenced, about March 1, 1885, by the plaintiffs, who are holders of a minority of the stock of the company, two of them being also creditors of the said company. The plaintiffs in their complaint, after stating the facts above mentioned, allege that the sale of the machinery out of one of the mills would be disastrous

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to the interests of the company, and *charge that the holders of a majority of the stock have wrongfully and fraudulently confederated together to get possession and control of the entire property of the company and buy it at a sacrifice, to the great prejudice of the other stockholders as well as the creditors of the company. They therefore demand judgment that the sale of the machinery in Mill No. 1 may be enjoined; that the trustee, Hamlin Beattie, be enjoined from further negotiating any of the said coupon bonds; that the creditors be enjoined from enforcing their claims against the company except under these proceedings, and that for this purpose they may be required to come in and establish their demands; that a receiver may be appointed, and that all the property of the company may be sold and applied to the debts of the company, and the remainder be

distributed amongst the stockholders according to their respective rights.

On March 5, 1885, a temporary restraining order, with an order to show cause why it should not be made perpetual, was granted. On March 7, 1885, sundry creditors of the corporation, including the defendant, Hamlin Beattie, and the plaintiff, Wm. Wilkins, issued attachments against the company, aggregating a sum exceeding thirty-seven thousand dollars, and on the same day considerable of the property of the corporation was levied on under said attachments. On or about March 21, 1885, the defendant, Hamlin Beattie, as president of the corporation, filed his answer, in which, amongst other things, he states that a large majority of the stock of the company is held by parties resident in the States of Massachusetts and Pennsylvania; that it has not been practicable, since the service of the summons and complaint in this case, to have a legal meeting of the stockholders, and that he is not advised as to the position which they desire the company to take; that while the statements in the complaint as to the condition of the company and the official action of the stockholders are substantially true, he has no knowledge or information sufficient to enable him to form a belief as to the truth of those allegations in which the majority of the stockholders are charged with improper motives and wrongful conduct, but he does know that the sale of the machinery in Mill No. 1 was indefinitely postponed by the officers of the

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company before the service of the *summons and complaint herein, and that, so far as he is advised, there is no desire or intention on the part of said stockholders to sell said machinery separately; that he concurs in the opinion that the property can be sold to the best advantage by selling it as a whole, and submits the rights of the corporation to the judgment of the court. The answers of the other defendants are not set out in the record, but it is simply stated that George F. Hall, as treasurer of the company, who seems to have been the chief manager of the affairs of the company, put in an answer, and that his answer, with that of the president, concurred in the prayer of the complaint.

On April 6, 1885, an order was granted appointing Hamlin Beattie receiver, in which it was stated that all parties agreed that one should be appointed; enjoining the creditors from enforcing their claims otherwise than under this proceeding, and requiring them to come in by a given day and establish their claims before the master; and enjoining Hamlin Beattie as trustee, as well as the officers of the company, from negotiating or hypothecating any of the coupon bonds which had not then been sold or used as collaterals. On April 8, 1885, the receiver was ordered to sell all the property of the company and

hold the proceeds of sale, after paying the costs and expenses thereof, subject to the further order of the court. From the report of the master as to claims proved and from the report of the receiver on sales, it appears that the debts of the company amount to something over one hundred and two thousand dollars, while the proceeds of sale are something over eighty-six thousand dollars. It is apparent, therefore, that the creditors cannot be paid in full, and the stockholders will get nothing. It is stated in the "Case," that on the application for the appointment of a receiver, the plaintiffs contended for the appointment of H. P. Hammett and the appellants for the appointment of Hamlin Beattie.

The funds in the hands of the receiver being ready for distribution, two orders were granted by Judge Wallace, referring it to the master to inquire and report what would be a suitable fee to be paid to Messrs. Wells and Orr, attorneys for the plaintiffs, for their services in this action, and also what would be a suitable fee for Messrs. T. Q. and A. H.

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Donaldson, attorneys for *the Camperdown Mills and Hamlin Beattie, as receiver. Under each of these orders the master reported, "that he had held a reference, and from the evidence adduced and herewith, filed, he finds" that twenty-five hundred dollars would be a reasonable and proper fee for Messrs. Wells and Orr, as attorneys for the plaintiffs, and that two thousand dollars would be a reasonable and proper fee for Messrs. T. Q. and A. H. Donaldson, as attorneys for the Camperdown Mills and Hamlin Beattie, receiver. Upon hearing these reports Judge Wallace, on December 4, 1885, granted orders confirming said reports and directing the receiver to pay these gentlemen the amounts reported as proper fees for them from the funds in his hands as such receiver.

It does not appear that Judge Wallace heard any part of the case on its merits, all the previous orders having been granted by Judge Pressley, except one which was granted by Judge Cothran. Nor does the testimony filed with the master's reports, which is all set out in the record, throw any light upon the nature of the case, or the kind or amount of the professional services rendered by the gentlemen to whom these fees were awarded, but consists simply of expressions of opinion from various prominent members of the Greenville bar of the value of the services, formed from their own knowledge of the nature and amount of such services.

From these orders of December 4, 1885, George F. Hall, as treasurer of the Camperdown Mills, and in his own right, Freeman & Vinton, the Massachusetts Loan & Trust Company, and the Nonantum Worsted Company appeal upon the following grounds: "1st. Because the fees allowed in said orders were excessive in amount, and granted upon

ex parte orders of reference obtained at chambers without the knowledge of defendants, appellants, or their counsel, and without an opportunity on their part to adduce evidence to show that fact. 2d. Because said fees were illegal, the court having no authority to direct the payment of said fees out of the funds in the possession of the receiver."

We will consider the second ground first, as that seems to be the most logical order—first to determine whether any fees could be legally allowed, before undertaking to inquire into the propriety of the mode adopted for

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the purpose of ascertaining the amount which should be allowed, or whether such amount has been correctly ascertained.

First, as to the fee allowed the plaintiffs' attorneys. This subject has been before the court in three recent cases—*Hand v. Savannah & Charleston R. R. Co.*, 21 S. C. 162; *Westmoreland v. Martin*, 24 Id., 238; and *Ex parte Lynch and others, In re Reeves v. Tappan*, ante p. 193, and we think it is there settled that a claim for professional services against persons who are sui juris, or against the property of such persons, must, like a claim for any other services, rest upon contract either express or implied, made directly with the persons so sought to be charged, or with some agent or representative of such persons, and that the simple fact that such services have enured to the benefit of others, with whom there is no contract relation, either directly or through some agent or representative, affords no legal foundation for a charge against such other persons. So that the simple question here is, not whether the services of the attorneys of the plaintiffs have enured to the benefit of the appellants, but whether any contract relation has been established between them.

It is not pretended that there was any contract, either express or implied, between the plaintiffs' attorneys and the appellants directly, and the only ground, therefore, upon which the claim could rest would be that the plaintiffs in employing these gentlemen to commence this action, were acting as the representatives of a class to which the appellants belonged. But this is negatived by the express terms used in their complaint, where they say: "That these plaintiffs bring this action for their own protection, and for the benefit and protection of the general creditors and stockholders who have not confederated as aforesaid," thereby in terms excluding the defendants, who had previously been charged with confederating together to wrong and defraud the other stockholders and creditors from the benefit and protection of the action which these gentlemen had been employed to institute. Now, in the face of this, the plaintiffs can be regarded as acting as the representatives of a class to which the appellants belong, when they employed these attorneys to bring the action,

we cannot conceive. On the contrary, it seems to us that the plaintiffs, constituting

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only a minority of the corporation, *becoming dissatisfied with the policy which the majority saw fit to adopt in the management of the affairs of the company, declared open war against them, and by charges of gross misconduct and fraud, of which, however, no evidence was offered, sought to wrest from the majority the control of the affairs of the corporation, the prime motive seeming to be to prevent what they regarded an unwise sale of a portion of the property of the corporation, which sale, however, the president of the company says in his answer, had been indefinitely postponed before this action was commenced, or at least before the service of the summons and complaint.

It seems to us clear, therefore, that the attorneys employed by the plaintiffs, in the outset, certainly could not be regarded, in any sense, as the attorneys of or acting for the appellants. If they were not so when the action was commenced, when did they become so? The nature of the allegations in the complaint rendered it necessary for the appellants to employ other counsel to defend themselves from charges which, if not unfounded, are certainly unsustained by any testimony whatever, and having thus been compelled to employ other counsel, whose fees they will, of course, have to pay, it would seem to be a hard measure of justice if they were also required to contribute to the payment of the counsel of their adversaries. The fact that they afterwards acquiesced in the appointment of a receiver and an order of sale, cannot affect the question. This might have been prompted by a desire to avoid tedious and expensive litigation, or the complications which might arise from the commencement of the attachment suits after this action was commenced. The fact still remains that by the course pursued by the plaintiffs they were compelled to employ other counsel, who represented their interests throughout these proceedings, and who seem to have succeeded in having the person of their choice appointed receiver in opposition to the person proposed by the plaintiffs.

It has been argued here that the plaintiffs "were in law and in fact trustees," and that having in that capacity brought this action, their expenses in so doing, including the fees of their counsel, are properly chargeable on the assets of the corporation, constituting the trust fund. We do not question

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the proposition *that a trustee is entitled to reimbursement out of the trust fund, for all expenses properly incurred in preserving or protecting that fund. But we are unable to understand how these plaintiffs can, in any sense, be regarded as trustees. They were simply stockholders in a corporation, holding only a minority of the stock, two of them

being also creditors to a comparatively small amount. Being in the minority they could not control, and therefore would not be responsible for the management of the affairs of the corporation. They certainly cannot be regarded as trustees for the other stockholders, and as to the creditors, they simply stood in the relation of debtors to the extent of their interest in the corporation. We are unable to see how, in any view of the case, the fee of the attorneys for the plaintiffs can be charged on the general fund in the hands of the receiver, but think that these gentlemen must look to those who employed them or recognized them as their attorneys for their compensation.

This view renders it unnecessary, so far as this claim is concerned, to consider the questions presented by the first ground of appeal. We do not for a moment doubt that this claim has been urged in the best of faith, and under a full conviction of its rightfulness, and there is as little doubt that Messrs. Wells and Orr rendered valuable services in the case for which they should be amply compensated, and it would give us pleasure to be able to award it to them; but we have no power to subject the fund in the hands of the receiver to such payment, unless we could find some legal ground upon which to base the charge, and this we have been unable to do.

As to the fee of Messrs. T. Q. and A. H. Donaldson, as attorneys for the Camperdown Mills and for the receiver, we think it was properly chargeable on the fund in the hands of the receiver. The corporation was a necessary party to the action, and as such had a right to employ and did employ these gentlemen as their attorneys, and certainly the assets of the corporation, now represented by the fund in the hands of the receiver, should be applied to the payment of such services as these gentlemen rendered as attorneys of the corporation. The authorities cited in the argument for these respondents fully show

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that the counsel fees of the *receiver are properly chargeable on the funds in his hands. The receiver has a right to employ counsel to advise him as to the management of the property placed in his hands and as to his duties in the premises; and in this case, judging from the expeditious manner in which this large business has been wound up, apparently to the satisfaction of all parties concerned, the receiver must have been well advised, and his counsel should be well paid for their services. The only question is as to the mode of ascertaining the amount of such compensation.

As is usual and proper in such cases, there was an order of reference to the master to inquire and report what would be a proper fee, but the complaint is that the order was ex parte, obtained at chambers, and the reference was held without notice to appellants

and without an opportunity on their part to adduce testimony or to be heard as to the matter referred. There is nothing in the "Case" to show that the order of reference was ex parte, obtained at chambers, or that the reference was held without notice, and but for the fact that it was admitted in the argument here that the reference was ex parte, this omission would have been fatal to the appellants so far as this point is concerned. For, as we have several times had occasion to say, and now repeat, this court cannot accept any fact unless it appears in the "Case" as prepared for argument here, or unless it is admitted upon the hearing in this court. It is true that the fact that this reference was ex parte is stated in the first exception or ground of appeal, but, as we have frequently held, that is not sufficient, for the very obvious reason that the exceptions constitute no part of the "Case," and while any erroneous statements contained in the "Case" may be corrected by amendment, such is not the case with the exceptions, which are entirely under the control of the appellant. Hence we can look alone to the "Case" for the facts, disregarding all statements of any other facts which may be incorporated in the exceptions or in the argument, unless such additional facts are admitted by the other side on the argument here. This matter is only alluded to for the purpose of calling the attention of the bar to the importance of observing the rule in this respect, for, as we have said, it was admitted

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on *the argument here that the reference was ex parte, and the question, therefore, is whether such a reference was proper.

Upon general principles, fully recognized by all courts in the administration of justice, it would seem to be clear that no order should be granted whereby the property of one man will be subjected to the payment of an alleged debt to another until the person whose property is so to be charged has had an opportunity to be heard as to the justice and amount of the charge so to be made. The case of *Nimmons v. Stewart* (13 S. C., 445) is, however, relied upon, in opposition to this view, and to sustain the course pursued in the case now under consideration, and we must admit that that case does seem to support the view for which it is cited. There is, however, this difference between that case and this. There the Circuit Judge had before him the whole case, and had, therefore, the means of knowing not only the nature of the case, but also of forming his own opinion of the value of the professional services there in question, and as this court then said, "he might also have fixed the amount of the fee without reference," but simply for his own satisfaction he desired to hear the opinion of a referee, which he could either adopt or not as he might see fit, and "this," it is said, "was not one of those references of

which the parties had a right to notice." In this case, however, the judge who ordered the reference, and who confirmed the master's report, had, so far as the record shows, no means of knowing anything about the nature of the case, or the amount or value of the services rendered, and was therefore dependent wholly upon the judgment of the master.

But while this may be sufficient to distinguish this case from *Nimmops v. Stewart*, we desire to take this occasion to express our dissatisfaction with so much of that case as gives countenance to the idea that a reference to ascertain the amount of a fee to be charged on a fund under the control of the court should ever be *ex parte*. The parties interested in the fund have a right to be heard both by evidence and argument, if they so desire, before the property or fund to which they are entitled is subjected to a charge of any kind, and hence notice of such a reference is always necessary. The case of *Nimmops v. Stewart* was very imperfectly presented to the court, and there-

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fore the point as to the character of the reference may not have received as full and mature consideration as would otherwise have been given to it. We think, therefore, that while the Messrs. Donaldson are entitled to a reasonable and proper fee out of the funds in the hands of the receiver, that there was error in the mode pursued to ascertain the amount of such fee, and that the reference for that purpose should be upon notice to the parties interested or their counsel.

The judgment of this court is, that the orders of the Circuit Court appealed from be reversed, and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

25 S. C. 506

HUMBERT v. BRISBANE.

(April Term, 1886.)

[1. *Frauds, Statute of* ¶110.]

A receipt in part payment for "thirty acres of land," containing a promise to "make good titles" on the payment of the balance due, does not sufficiently designate the land to satisfy the requirements of the statute of frauds.

[Ed. Note.—Cited in *Kennedy v. Gramling*, 33 S. C. 383, 11 S. E. 1081, 26 Am. St. Rep. 676; *Tant v. Guess*, 37 S. C. 496, 16 S. E. 472; *Peay v. Seigler*, 48 S. C. 496, 507, 511, 26 S. E. 885, 59 Am. St. Rep. 731; *Fore v. Berry*, 94 S. C. 77, 78 S. E. 706.

For other cases, see *Frauds, Statute of*, Cent. Dig. § 230; Dec. Dig. ¶110.]

[2. *Frauds, Statute of* ¶129.]

Payment of the purchase money unaccompanied with possession is not such part performance as will take a parol contract as to land out of the statute of frauds.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 311; Dec. Dig. ¶129.]

[3. *Specific Performance* ¶60.]

Held, under the facts in evidence, that an agreement for the purchase of a lot of land of 30 acres had been so modified as to embrace a lot of 23 9-10 acres, at a proportionate price; and that defendant having fully paid for it and taken possession, he was entitled to specific performance.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 182; Dec. Dig. ¶60.]

[4. *Pleading* ¶139.]

Defendant is not entitled to judgment for an overpayment, no such demand being made by way of counter-claim.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 287; Dec. Dig. ¶139.]

[5. *Vendor and Purchaser* ¶274.]

In action for the foreclosure of what was alleged to be an equitable mortgage, of two lots of land, defendant set up a counter-claim for damages for an eviction from a portion of one of these lots. *Held*, that this counter-claim did not arise out of the contract sued on, nor was it connected with the subject of the action, and therefore could not be pleaded.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 771; Dec. Dig. ¶274.]

Before Pressley, J., Berkeley, June, 1885.
The opinion states the case.

Mr. W. J. Whaley, for appellant.

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*Messrs. Mitchell & Smith, contra.

September 23, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. The plaintiff being the owner of a considerable body of land on John's Island had cut up a portion of it into small lots for the convenience of purchasers; and after selling a good many of these lots, the defendant applied to him to buy a lot at a certain designated place on that portion of the land not then divided into lots. Plaintiff agreed verbally to sell to defendant thirty acres, at the place indicated, at five dollars per acre, and ten dollars for papers and plat, making in all the sum of one hundred and sixty dollars. On January 23, 1874, in pursuance of said agreement, defendant paid to plaintiff ninety dollars and took from him a receipt in the following words: "Charleston, January 23rd, 1874. Received of James Brisbane \$90 on account of the purchase of thirty acres of land, the balance of \$70 is due January 1st, 1875, when I will make good titles. J. M. Humbert."

In a few days after this receipt was given, the lot, designated as No. 37 on the plat used on the trial of this case, was surveyed and laid off for defendant, and he was placed in possession by the plaintiff, and has ever since continued in possession, except of about ten acres of which he was dispossessed by the plaintiff in 1883, as will be herein-after more fully stated, and has made improvements of no inconsiderable value, considered in reference to the value of the lot. On the day of the survey defendant inquired

of the plaintiff how many acres were in lot No. 37, and was informed that this could not be precisely ascertained until the surveyor had made his calculations, though it was supposed the lot contained something less than thirty acres, whereupon defendant said this was not enough and that he wanted more land, and plaintiff told him he could have more off the adjoining lot, No. 34, which had previously been laid off.

At this point there is direct conflict in the testimony as to what further occurred between the parties, the plaintiff claiming that the defendant agreed to take the whole of lot No. 34, containing about thirty-nine acres, thus making the whole amount something

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*over sixty acres, while the defendant claims that he never agreed to buy lot No. 34, but that he bespoke it for his brother. Subsequently it was ascertained that lot No. 37 contained only 23 9-10 acres, and one of the material questions in the case is whether the contract was for the purchase of both lots, or for one only. While there is no dispute about the fact that defendant took and retained possession of lot No. 37, as before stated, there is no little conflict of testimony as to whether he ever went into possession of any part of lot No. 34. In the meantime defendant made further payments, to wit: twenty dollars on the day of the survey, twelve dollars on January 1, 1877, and thirty-seven dollars and twenty cents about January 1, 1880, which defendant claims overpaid the amount due for the 23 9-10 acres contained in lot No. 37. Plaintiff, on the other hand, insisting that the defendant had bought both of the lots, claimed that there was a very considerable balance due him, and in 1883, believing that defendant, by his failure to pay the purchase money, had forfeited his rights to the land, sold to John Waight a portion of lot No. 34, with ten acres off of lot No. 37, dispossessing defendant of said ten acres, and putting Waight in possession, who cultivated the ten acres for two years before this action was brought.

But, upon consultation with his counsel, plaintiff was advised that his rights were those of a mortgagee and not those of an absolute owner, and, therefore, this action was commenced to foreclose the equitable mortgage for the balance of the purchase money, in which judgment was demanded for the sale of both lots, in default of payment by the defendant of the balance due on the purchase money of the sixty odd acres embraced in the two lots. Defendant answered claiming that the contract was for the purchase of lot No. 37 only, and that he had paid and overpaid the purchase money for that lot, containing as it did only 23 9-10 acres instead of thirty acres, and he demanded specific performance of that contract. He also set up a counter-claim for damages in evicting him from ten acres of

that lot. The issues were referred to the master, who made his report, in which he adopted the view of the contract contended for by defendant, and that this contract, though not in writing, was relieved from the operation of the statute of frauds by part

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performance and was, therefore, *valid. He also ascertained by a calculation based upon data for which we find no warrant in the testimony, that the precise balance due for the purchase money of lot No. 37 had been paid, and he therefore recommended that the plaintiff be required to execute to the defendant good and sufficient titles, with warranty, for lot No. 37 as represented on the plat of O. P. Law, used on the trial of the cause.

To this report both parties excepted on the several grounds set out in the "Case," which need not be repeated here in detail. Upon this report and exceptions the case came before Judge Pressley, who held that the master's findings of fact were not supported by the testimony. On the contrary, he said: "My conclusion from that testimony is that in January, 1874, the parties made a written contract for thirty acres of land at \$160, on which \$90 was then paid and the remainder, \$70, was to be paid on January 1, 1875. When the surveyor laid off the said land he gave defendant only twenty-three acres, with which he was not satisfied. Not getting the thirty acres he had bought, he agreed by parol to take an additional lot, making in all sixty-three acres, but I find no satisfactory proof that he ever took possession in his own right of more than the thirty acres. His brother took possession of a portion of the additional lot, and plaintiff was to be responsible that said brother would take and pay for it, but that promise was by parol. After various payments on account by defendant and failure to pay in full, plaintiff, claiming a forfeiture, took possession of all of said land except 30 9-10 acres, and sold it to John Waight, who now holds the same. The thirty acres called for by the contract has never been properly laid off to defendant. I hold that a written contract for sale of land cannot be changed by parol, and that there is no sufficient proof of possession under that change to validate it. I further hold that if said change were valid, it was rescinded by plaintiff when he sold part of said land to John Waight. My judgment is that both parties must stand by the written contract. On that, after calculation of interest from January 1, 1875, to January 1, 1886, the balance due the plaintiff will then be twenty-four dollars and fifty cents." He therefore rendered judgment that the defendant pay to the plaintiff, by a day ap-

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pointed, that sum and the costs *of this case, and that plaintiff do, thereupon, make to defendant good and sufficient titles "to thirty acres of said land, excluding that which was

sold to John Waight," and that in default of such payment the thirty acres of land be sold and the proceeds applied to the payment of said debt and cost, and the balance be paid to defendant.

From this judgment defendant appeals upon numerous grounds which need not be set out here, as we propose to consider only such material questions as are presented by the record.

We cannot concur in the view that there was any such written contract between these parties as would satisfy the requirements of the statute of frauds. The only writing that we hear of which was signed by either of the parties is the receipt of January 23, 1874, of which a copy is given above, and in that there is no such description or designation of the land proposed to be sold as would enable a court to render a decree for its conveyance. There is nothing but a bare statement of the number of acres, but where it is located or what are its boundaries is left wholly uncertain. It seems to us that the authorities clearly show that such a writing is wholly insufficient. *Church of Advent v. Farrow*, 7 Rich. Eq., 378; *Hyde v. Cooper*, 13 Id., 250; *Mims v. Chandler*, 21 S. C., 480.

But as it is well settled that even a parol contract for the sale of land may be enforced when there has been such part performance as, under the cases, will take it out of the operation of the statute, it is necessary for us to inquire whether there has been any such part performance in this case. Mere payment of a part or the whole of the purchase money, without more, is not sufficient; but when such payment is accompanied with possession, acquired under the contract, and the purchaser has made improvements, it is sufficient. *Mims v. Chandler*, *supra*, and the authorities there cited. Assuming for the purpose of this inquiry, though the testimony leaves it in no little doubt, that after the original agreement for the purchase of thirty acres, the defendant also made a parol agreement to buy the other lot—No. 34—at the same price, let us inquire whether there was any such part performance of such additional contract as would take it out of the statute of frauds. We do not find any sat-

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isfactory proof that the defendant ever took possession of any part of lot No. 34. The testimony of some of the witnesses, contradicted as it is, that defendant cut and hauled wood from lot No. 34, can scarcely be regarded as sufficient proof of such possession as would constitute part performance. There is no evidence that any improvements were made on that lot by the defendant, and none that he ever made any payments on account of the purchase money, his payments, as he testifies, having been made on the other lot. We agree, therefore, with the Circuit Judge that the contract, as set up by plaintiff, em-

bracing the purchase of both lots, has not been established.

Next, as to the contract set up by defendant and of which he claims specific performance. There can be no doubt from the terms of the receipt that the original agreement was that defendant was to have thirty acres, but when this agreement came to be carried into effect by the surveying and platting the lot which he was to get, he only received twenty-three and nine-tenths acres. Now, whether the failure to give defendant the whole amount he contracted for would have warranted him in refusing to comply with the terms of the agreement, is a question which need not now be considered. The fact is, that he did accept the lot No. 37, although it contained a less number of acres than he contracted for, was put into possession of it by the plaintiff, in pursuance of the original contract, has ever since remained in possession, claiming it as his own, making improvements, and paying the purchase money. It seems to us that the legitimate inference is that the parties, by their acts, have modified the original agreement so that the defendant was to get lot No. 37, containing only 23 9-10 acres instead of thirty acres. That was the area of the land which the plaintiff, in pursuance of the original agreement had surveyed and laid off for defendant and put him in possession, and that was what the defendant accepted.

It is true that, at the time, the defendant expressed a desire to have more land, and the plaintiff expressed a willingness to let him have more, but this desire and this intention never ripened into any act. No more land was laid off for the defendant, and there is no evidence that either party ever expressed any wish or intention, much less

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ever took any step, to abrogate the contract on account of the deficiency in the number of acres laid off for defendant, and we think, after this lapse of time, the parties must be regarded as having, by their conduct, acquiesced in such a modification of the original agreement as that the defendant could only claim from the plaintiff lot No. 37, and the plaintiff could only claim pay for the number of acres contained in that lot, at the rate of five dollars per acre, to which should be added ten dollars for survey and papers. If, therefore, the evidence shows, as we think it does, that the defendant has paid in full the purchase money for lot No. 37, then he is entitled to a decree for specific performance.

We cannot adopt the statement embraced in the master's report, by which he has undertaken to show that the exact balance due on the purchase money was paid, when defendant made his last payment, for that statement is based upon certain assumptions for which there is no warrant whatever in the testimony. For example, he assumes that

the area of lot No. 37 is 23 92-100 acres, instead of 23 9-10 acres as shown by the undisputed testimony, and again he makes a second charge of ten dollars for survey and papers, without a particle of testimony to sustain such a charge. On the contrary, according to our view the account between these parties stands as follows:

To purchase money of lot No. 37, 23 9-10 acres, at \$5.00.....	\$119 50
To survey and papers.....	10 00
	129 50
By cash paid before due, \$90 and \$20	110 00
	19 50
To int. on \$19.50 fr. Jan'y 1, '75 to Jan'y 1, '77.....	2 72
	22 22
By cash January 1, 1877.....	12 00
	10 22
To int. on \$10.22 fr. Jan'y 1, '77, to Jan'y 1, '80.....	2 13
	12 35
By cash January 1, 1880.....	37 20
Amount overpaid January 1, 1880....	\$24 85

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*For this amount thus overpaid, counsel for appellant, in his argument here, and in one of his exceptions to the master's report as well as in one of his grounds of appeal, claims that the defendant is entitled to judgment against the plaintiff, but this is a matter which should have been set up by way of counter-claim, and we do not find that it was so set up in the answer. There is no allegation of any overpayment by mistake and no demand for judgment for the amount overpaid. No issue is raised by the pleadings in regard to such a claim, and hence no judgment for such amount can be rendered. Pom. Rem., § 718.

The only remaining inquiry is as to the counter-claim for damages which is set up in the answer. This claim arises *ex delicto* and not *ex contractu*, and therefore cannot be set up in an action like this, "arising on contract" (Code, § 171; Copeland v. Young, 21 S. C., 276), unless the cause of action constituting the basis of the counter-claim arises "out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim," or unless it is "connected with the subject of the action." This counter-claim certainly does not arise out of the contract or transaction set forth in the complaint, for that was a contract for the sale of the land made in 1871, and certainly the alleged trespass in 1883 cannot with any propriety be said to arise out of that contract. Was it connected with the subject of the action? Exactly what is meant by the words, "subject of the action," as used in the code does not seem to be very clearly defined in any judicial decision which has come under our notice. Mr. Pomeroy, who

is regarded as a standard authority in the construction of the code, in his valuable work on Remedies, at page 800, section 775, after stating some of the different constructions which have been placed upon these words, uses this language: "It would, as it seems to me, be correct to say in all cases, legal or equitable, that the 'subject of the action' is the plaintiff's main primary right which has been broken, and by means of whose breach a remedial right arises."

If this construction of the words in question be adopted, then it is clear that the counter-claim set up in this case is not connected with the "subject of the action." The plaintiff's main primary right was to have

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payment of the purchase money of the *land, and certainly the plaintiff's alleged trespass has no connection with that right. But if, on the other hand, the "subject of the action" is to be regarded as the thing sought to be obtained by the action, then it is equally clear that the counter-claim sought has no connection with that, for the thing sought to be obtained by the action is the purchase money of the land, and certainly the subsequent trespass has no connection with it. The land upon which the trespass is alleged to have been committed, cannot in any view be regarded as the "subject of the action," for to it the plaintiff has no primary right, and it is not the thing sought to be obtained by the action. It seems to us clear, therefore, that the counter-claim relied upon by the defendant, cannot be set up in this action. See also Sharp v. Kinsman, 18 S. C., 108; Simkins v. C. & G. R. R. Co., 20 Id., 258.

The judgment of this court is, that the judgment of the Circuit Court be reversed and that the case be remanded to that court for such further proceedings as may be necessary to carry out the views herein announced.

25 S. C. 514

CONNOR v. RENNEKER.

(April Term, 1886.)

[1. Contracts ⇨22.]


Plaintiff, acting as an agent, enquired of defendant whether \$20,000 cash would buy his land. Defendant said it would. The agent then said he would return to his principals and confer with them. *Held*, that this was not a contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 67, 82-92, 104-108; Dec. Dig. ⇨22.]

[2. Vendor and Purchaser ⇨16.]

Afterwards, at the instance of plaintiff, defendant wrote a letter to him, offering to accept \$20,000 cash, and allowing six weeks in which to conclude the sale, "provided other parties do not apply for the same in the meantime, in which case I will notify you and hold the offer open for your consideration for five days, in which time you must give me your answer." To

this letter there was no reply, and within three weeks defendant sold the land to another party without notice to the plaintiff. *Held*, that this was a mere offer, and without consideration, and therefore not binding on defendant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 17; Dec. Dig.  16.]

Before Cothran, J., Charleston, November, 1885.

This was an action by W. D. Connor, as

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agent, against Eliza^abeth C. Renneker, for damages for breach of a contract made by her through J. H. Renneker, jr., her husband and agent. The opinion states the case.

Messrs. Simons & Cappelmann, for appellant, cited 5 Stew. & Port., 264; 2 McCord, 298; 4 Bing., 653; 3 Humph., 19.

Messrs. Simonton & Barker, contra.

October 11, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action for damages for an alleged breach of contract, under the following circumstances. The defendant having a large body of timber lands for sale in the County of Colleton, the plaintiff, as the agent of certain parties, saw the defendant upon the subject of purchase. Renneker asked for the land one dollar per acre, viz., \$25,000. During the conversation the plaintiff said, "I suppose \$20,000 cash would buy the property; he (Renneker) studied a moment and said, 'It will. I (Connor) said, I am not purchasing for myself. I am only employed to see you. The gentlemen who want this land live North, and I will go back and confer with them.' * * * I returned and reported to these gentlemen what Mr. Renneker said and the offer I had ventured to make. They said, if the land was as represented, they would take it. I was ordered then to go back to Charleston and not to risk it on a mere verbal contract. They wanted a written contract, and said they would not venture to negotiate the sale unless they had some assurance that they would have time to examine the property and titles, and so on." &c. The following letter was then delivered: "Charleston, S. C., Nov. 28, 1882. Mr. W. D. Connor, agent, &c. George's Station. Dear Sir: In answer to your enquiries, I will sell you the land in Colleton County for twenty thousand (\$20,000) dollars cash, and will allow you six weeks in which to conclude the sale, provided that other parties do not apply for the same in the meantime, in which case I will notify you, and hold the offer open for your consideration for five days, in which time you must give me your answer. (Signed) J. H. Renneker, jr. Boineest."

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*This letter was never answered in any way, and on December 15, 1882, the land

was sold, without notice, to another person for \$20,500. Thereupon the plaintiff brought this action for damages for breach of alleged contract of sale. The cause came on for trial before Judge Cothran, who, upon motion for non-suit, ruled that there was in fact no complete contract of sale, that there was a lack of mutuality and consideration, and dismissed the complaint. The plaintiff appeals to this court upon the following grounds:

"First. Because his honor erred in holding that there was a want of mutuality in the contract sued on, whereas the evidence shows an offer to purchase on the part of the plaintiff, and an acceptance of this offer by the defendant, evidenced by the testimony and the written memorandum signed at the time.

"Second. Because his honor erred in holding that the matter was certainly open when this paper was signed, whereas the evidence shows that a positive offer of purchase had been made by the plaintiff and accepted by the defendant, and that the paper signed by the defendant was a memorandum of that offer and acceptance.

"Third. Because his honor erred in holding that he could not see where, at any time, the minds of these parties were 'at one,' whereas the evidence shows that when the defendant agreed to give the written memorandum asked for by the plaintiff, the conditions of the contract were mutually understood and agreed to by and between the plaintiff and the defendant."

The whole appeal is based on the idea that the plaintiff, as agent, made a distinct and positive offer of \$20,000 for the lands, which was accepted by the defendant. In our judgment this view is entirely unsupported either by the parol testimony or the written memorandum. We do not think that there ever was a positive unconditional offer by the plaintiff for the lands. It was not such an offer to say by way of enquiry, "I suppose \$20,000 cash would buy this property?" and when answered in the affirmative, to say, "I am not purchasing for myself. I am only employed to see you. The gentlemen who want this land live North, and I will go back and confer with them." &c. Up to this time certainly nothing had occurred which could amount to anything like a contract on the part of the plaintiff

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which the *defendant could have enforced against him in a court of justice. On the contrary, the plaintiff, being a mere agent to make enquiries about the matter, seems to have most carefully avoided entering into any such contract.

Then as to the written memorandum. Its very terms show that there had been no contract of sale, and that the memorandum itself was only an "offer" on the part of the

defendant, allowing six weeks in which to conclude the sale, provided that others did not apply in the meantime. This grant of time amounted to nothing, for other parties did apply. But it is insisted that in such case the plaintiff was entitled to have five days' notice in which to give his answer, and that the failure to give him such preference before sale was a breach of the contract, for which the plaintiff is entitled to recover damages. That must depend upon another question, viz., whether the declaration of the defendant that, in case of another offer, he would give such notice and preference, was a legal and binding contract on her part, for the breach of which the plaintiff may recover damages. As we understand it, such declaration when made was purely voluntary and without consideration.

It is certainly elementary that it takes two to make a bargain, and that all contracts not under seal must be supported by proof of sufficient consideration. So far as the question of consideration is concerned, the memorandum in writing was no more than parol. We cannot see that the plaintiff gave any consideration for the promise that, in a certain case, he should receive the notice claimed. It does not appear that he ever answered the letter or accepted the terms offered within the time allowed, or in any way paid money or incurred obligation in consideration of the aforesaid promise to give him notice and preference; and it seems to us that the declaration or promise of the defendant was without consideration, and might be withdrawn by him at any time prior to the acceptance by the plaintiff of the terms of sale offered. "A promise by one with nothing in return is void, as if he undertakes in writing to convey land to another, who neither agrees to buy nor pay anything for the premises; or to remain with and learn a trade of another who does not agree to teach." Bish. Cont., § 429; Chit. Cont., 17. "It is

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unquestionably true *as a general proposition that a contract cannot bind the party proposing it, and indeed that it is no contract until the acceptance of the offer by the party receiving it is in some way actually or constructively communicated to the party making the offer." Pars. Cont., 483; Burnet v. Bisco, 4 Johns., 235; Tucker v. Woods, 12 Id., 190; Boston & Maine R. R. Co. v. Bartlett, 3 Cush., 224.

In the last case cited the court say: "The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract; and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance. * * * A different doctrine, however, prevails in France and Scotland and Holland.

It is there held, that whenever an offer is made, granting to a party certain time within which he is to be entitled to decide whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity that a person who has been induced to rely on such an engagement should have no remedy in case of dis-appointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached. The authorities, both English and American, in support of this view of the subject are very numerous and decisive, but it is not deemed to be needful or expedient to refer particularly to them," &c. See Cooke v. Oxley, 3 T. R., 653, and Dickinson v. Dodds, 13 Eng. Rep. (Moak), 854; 2 Chan. Div., 463.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. *519

*MOSELEY v. HANKINSON.

SAME v. SAME.

(April Term, 1886.)

[1. *Estoppel* ⇨22.]

Parties in possession of land under a deed reciting a sale under order of the court, and showing the approval of its officer as required by the order, are bound by these recitals, without proof of the record under which the sale was made.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 30; Dec. Dig. ⇨22.]

[2. *Husband and Wife* ⇨70.]

Where a married woman (in 1845) executed a deed of conveyance of her land under the express order of the Court of Equity, it was not necessary to a conveyance of her interest therein that she should renounce her inheritance as prescribed by statute in cases where she joined her husband in a conveyance.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 301; Dec. Dig. ⇨70.]

[3. *Husband and Wife* ⇨70.]

A married woman's signature to a petition asking the court to authorize her trustee to sell land settled to her separate use, and her signature to the deed conveying such land, is sufficient evidence of her assent to the settlement.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 301; Dec. Dig. ⇨70.]

4. The decision of the court on the former appeal in this case (22 S. C., 323) stated,

[5. *Life Estates* ⇨8.]

Purchasers of the interest of a life tenant do not hold adversely to the remaindermen until the life estate terminates.

[Ed. Note.—Cited in *Rice v. Bamberg*, 59 S. C. 507, 38 S. E. 209; *Mitchell v. Cleveland*, 76 S. C. 449, 57 S. E. 33; *Breeden v. Moore*, 82 S. C. 539, 540, 64 S. E. 604.

For other cases, see *Life Estates*, Cent. Dig. § 26; Dec. Dig. ⇨8.]

[6. *Trusts* ⇨203.]

Defendants could not mature title by adverse possession against the remaindermen through the trustee, as he did not hold for the remaindermen, and as he could not maintain action for the recovery of the land during the life-time of the life tenant whose interest the defendants had purchased.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 274; Dec. Dig. ⇨203.]

Before Pressley, J., Aiken, September, 1885.

These were actions by certain remaindermen to recover two tracts of land sold under order of the Court of Equity in 1845, in a proceeding to which none of the remaindermen were parties, although some of them were then in esse. See 22 S. C., 323.

Mr. G. W. Croft, for appellants.
Messrs. Henderson Bros., contra.

October 11, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. These two cases, growing out of the same state of facts substantially and involving the same principles, were heard and will be considered together. This is the second appeal, and for a full

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statement of the facts reference may *be had to the cases as reported in 22 S. C., 323. The evidence submitted at the last trial was substantially the same as that offered at the first trial, but in addition to this testimony was adduced tending to show "that Milledge Hankinson for more than twenty years after the date of his deed and before the death of Rebecca Moseley, at various times in each year cut wood and cross-ties and hauled them to the railroad; that in this period none of the plaintiffs were in possession of the land, and that the defendants were at the time of the trial still in possession. There was also evidence that Stanley Hankinson (one of the defendants) soon after the trial first took possession of two hundred acres of the land and made some improvements upon the same. He took a deed on the 10th of September, 1885, from Milledge Hankinson for the two hundred acres in his possession."

The jury rendered verdicts for the plaintiffs, and the defendants appeal upon the following grounds, omitting the first and the seventh, which were abandoned at the argument here:

"2. Because his honor erred in ruling that it was not necessary for the plaintiffs to make proof of the judgment under which the trust deed to William Fortune was made.

"3. Because his honor erred in ruling that it was not necessary to make the deed to Fortune good that Rebecca Moseley should have renounced her inheritance thereon.

"4. Because his honor erred in charging the jury that Rebecca Moseley consented to

the decree of settlement would be inferred from her having signed the deed.

"5. Because his honor erred in charging the jury that the deed from the trustee conveyed only the life estate of Rebecca Moseley, and that at her death her children then living took a good title to the property in 1881.

"6. Because his honor erred in charging the jury that the possession of the defendants is presumed to be in accordance with his title, and that title was for the life estate of Rebecca Moseley;" whereas the title to the defendant was in fee, and he should have been presumed to hold in accordance to his own deed, and not in accordance with the trust deed.

"8. Because his honor erred in refusing to charge the defendants' 1st, 2d, 3d, and 4th requests."

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*There can be no doubt that the defendant, Milledge Hankinson, acquired title to, and went into possession of, the land in controversy under the deed from the trustee, William Fortune, and, therefore, upon well settled principles neither he, nor the other defendants claiming under him, are in a position to dispute the title of Fortune; and there is as little doubt that this court has already determined that such deed could only convey the interest of Rebecca Moseley, and could not divest the rights of the plaintiffs as remaindermen under the deed of settlement, as it is called, because they were not parties to the proceedings under which the trustee was authorized to make said deed. Now, however, the deed of settlement itself is assailed upon two grounds, as we understand it. 1st. Because there was no proof of the judgment of the court authorizing it. 2d. Because there was no renunciation of inheritance by Rebecca Moseley, a married woman. Even if the defendants were in a position to assail this deed, constituting, as it does, the foundation of the title under which they entered, we do not think that either of the objections raised to it can avail them. The recitals in the deed setting forth the proceedings for the partition of the real estate of Rebecca Moseley's father, giving in *hæc verba* the language of the decree directing the settlement, and expressly ordering "that the said parties execute deeds to be approved of by the commissioner of this court to proper persons as trustees, for the purpose of effecting the said settlements hereby ordered," followed up by the approval of that officer endorsed upon the deed, certainly superseded the necessity for the introduction of the record of those proceedings, at least so far as the parties and their privies were concerned (*Sims v. Meacham*, 2 Bail., 101; *Polson v. Ingram*, 22 S. C., 541), and the defendants claiming under this deed of settlement are

bound by its recitals. The second ground of appeal cannot therefore be sustained.

The second objection to the deed of settlement—the want of any renunciation of inheritance—does not impeach its validity in toto, but goes only to its effect. Appellants contend that in the absence of a renunciation of inheritance, the estate conveyed was only for the life of the husband, James Moseley, and that upon his death in 1861, Rebecca Moseley's right to the pos-

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session revived, and the defendants having been in possession adverse to such right for more than ten years have acquired a title by adverse possession. It is quite true that, under the law as it then stood, to bar a married woman of her estate of inheritance, a strict compliance with the statutory provisions enabling her to do so was necessary, as is shown by the cases of *McLaurin v. Wilson*, 16 S. C., 402, and *Wingo v. Parker*, 19 S. C., 9. But the act of 1795, by its express terms, applies to a case where a married woman "entitled to an estate of inheritance in real estate may be desirous of joining her husband in conveying away the fee simple of the same to any other person," and was never intended to interfere, and, so far as we know, was never supposed to interfere, with the power of a Court of Equity to order the sale of the real estate of married women as well as all others, when a proper case is made for that purpose. Any other view would not only invalidate all titles acquired under deeds settling the property of married women, as in this case, but also titles acquired under sales for partition where married women were interested.

The fact that the deed in this case was signed by the married woman, instead of by the officer of the court, as in case of sales for partition, cannot alter the case; for this was done under the order of the court, which, as we have seen, expressly required "that the said parties execute deeds," &c. It was therefore the act of the court itself, as much so as if the deed had been signed by the commissioner. That the court had the power, in the absence of any statute to the contrary, to direct any person to make a sale or conveyance ordered by it, may be seen from the cases of *Meetez v. Padgett*, 1 S. C., 127, and *Adams v. Kleckley*, *Ibid.*, 142. We agree, therefore, with the Circuit Judge that there was no necessity for a renunciation of inheritance.

So, too, we agree with him that the fact that she signed the deed was sufficient evidence of her assent to the settlement. And when to this is added the further fact that she was a party to the petition in which the court was asked to authorize the trustee to sell the land conveyed to the trustee by the deed of settlement, and that she endorsed upon said petition her request in writing for an order authorizing the trustee to sell her

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interest in the *lands, we do not see what further evidence of her assent to the settlement could have been demanded. *Graydon v. Graydon*, *McMull. Eq.*, 63.

The fifth ground of appeal cannot be sustained. The Circuit Judge did not charge the jury as is there imputed, but he instructed them that if they came to the conclusion that there were children of Mrs. Moseley in existence at the time the petition for the sale of the land was filed, then the deed from the trustee could only convey the life estate of Mrs. Moseley, and that was precisely in accordance with the former decision of this court in these cases.

We see no foundation for the charge of error imputed to the Circuit Judge in the sixth ground of appeal. If, as we have seen, the deed from the trustee, though purporting to convey the fee, could only in fact convey the life estate of Mrs. Moseley, then it follows necessarily that that was the only title which defendants could take, and having acquired possession under that title they must be presumed to hold possession under that title, and that possession being rightful so long as Mrs. Moseley lived, it, of course, could not become adverse until after her death.

It only remains to consider the eighth ground of appeal which imputes error to the Circuit Judge in refusing certain requests to charge, set out in the "Case" as follows:

"1. That Rebecca Moseley having never renounced her inheritance on the deed to Fortune, such deed only conveyed the land in question to Fortune during the life of James Moseley.

"2. That upon the death of James Moseley, Rebecca Moseley became *sui juris*, and if the jury find that the defendant, Milledge Hankinson, remained in open, continuous, and adverse possession of the land in dispute for upwards of ten years after the death of James Moseley, and during that period Rebecca Moseley did not bring her action to recover the land, then she and those now claiming under her are barred by the statute of limitations.

"3. That if the jury find that the plaintiffs, or Rebecca Moseley, under whom they claim, have not been seized or possessed of the premises mentioned in the complaint within ten years before the commencement of this action they cannot recover.

"4. That if the jury believe that Milledge

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Hankinson, since *the date of the deed from Fortune to him, held the premises described in the complaint for the period of ten years and upwards before the commencement of this action, and that his possession was open, notorious, continuous, and adverse, then the trustee would be barred by the statute of limitations, and so would the beneficiaries

under the trust deed, and in that case the verdict should be for the defendants."

The first request contains and is based upon a proposition which has already been rejected, and the second, which is based upon the first, must fall with it.

The third request is disposed of by the provisions of section 101 of the Code, which in express terms declares: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appears that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action." Now, as the plaintiffs have, as we have seen, established their legal title, they must, under the terms of the section just quoted, be presumed to have been in possession within the time required by law, and hence the Circuit Judge properly refused to charge as requested by the third request; for as the plaintiffs' right of action could not arise until the death of Rebecca Moseley in 1881, we do not see how the defendants could set up any possession adverse to such right. Up to that time their possession was lawful and could not be disturbed by any one. Adverse possession necessarily presupposes a trespass upon the rights of the lawful owner, and certainly the defendants could not be regarded as trespassers until after the death of Mrs. Moseley.

So, too, we think the fourth request was properly refused: for, to say nothing of the fact that the trustee was not a trustee to hold for the plaintiffs, but that by the terms of the deed the trust was simply to convey to them upon the termination of the life estate, we do not see how it could be said that the trustee was barred by the statute

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of limitations. He certainly could have had no right of action against the defendants until the termination of the life estate in 1881, even if then, and since that time the statutory period has not run out. So that we do not see how, in any view of the case, the plea of the statute of limitations could avail the defendants.

The judgment of this court is, that the judgment of the Circuit Court, in each of the cases above stated, be affirmed.

(1 S. E. 33)

25 S. C. 525

BRABHAM v. CROSLAND.

(April Term, 1886.)

[1. *Guardian and Ward* ¶53.]

The conduct of guardians and others dealing with Confederate currency must be reviewed in

the light of the then surrounding circumstances, when such currency was recognized as the only medium of exchange.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. ¶53.]

2. The Circuit Judge sustained in his findings of fact based upon the conflicting testimony of witnesses examined before him.

[3. *Executors and Administrators* ¶86, 103.]

Testator directed his estate to be kept together until two crops were made, and then divided, the income to be applied meantime to certain purposes. The executor, to avoid a sacrifice of one of these crops, collected an ante bellum note and applied the proceeds to such purposes, and afterwards sold the crop at a considerable advance, and made division at the time appointed. Held, that he was not liable for collecting this note in Confederate currency in advance of the time for division.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 378, 421; Dec. Dig. ¶86, 103.]

[4. *Guardian and Ward* ¶53.]

A guardian may be liable for calling in good investments when an executor would not be; for it is the duty of the former to keep his funds invested, and of the latter to collect and administer.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. ¶53.]

[5. *Appeal and Error* ¶854.]

If the conclusion of the Circuit Judge be correct, it is not material to consider the reasons which led him to such conclusion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. ¶854.]

[6. *Payment* ¶12.]

Money decreed in 1862 to be paid presently to minors for equality of partition was payable in Confederate currency.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 38, 42-54, 59-61, 128; Dec. Dig. ¶12.]

[7. *Guardian and Ward* ¶53.]

Where a guardian charged himself with money ordered to be paid by his wife for equality of partition, and invested it in Confederate bonds, the ward by suing on the guardianship bond elected not to follow the lien on the land, and, the investment being sustained, the accountability of the guardian is discharged. The investment in Confederate bonds, if justified, would be payment, and the lien on the land released.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 239; Dec. Dig. ¶53.]

[8. *Guardian and Ward* ¶53.]

Where money is ordered to be paid to an infant presently for equality of partition, the guardian is bound to receive the money, and is not thereby chargeable with calling in an investment secured by a lien on real estate.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. ¶53.]

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[9. *Guardian and Ward* ¶53.]


*The guardian is not liable for receiving such money in advance of the confirmation of the return in partition—the return having been afterwards confirmed.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 232-241; Dec. Dig. ¶53.]

[10. *Wills* ¶497.]

The vesting of the ward's share in her grandfather's estate, under the terms of his will,

was not postponed until her majority or marriage; and the executor properly paid to himself as guardian and invested her share of said estate. But even if not vested, it would have been his duty as executor to invest the funds eventually coming to her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1081; Dec. Dig.  497.]

Before Fraser, J. Aiken, April, 1885.

This was an action by R. C. Brabham, as administrator of Zilphia E. Brabham, his wife, against James E. Crosland and the sureties on his bond, for an accounting of his administration of the estate of his ward, the said Zilphia. The action was commenced in June, 1884.

The Circuit decree was as follows:

As I understood the argument of the counsel for plaintiff, who closed the case at the hearing, the administration of the guardian is questioned now only in reference to the special matters to be hereinafter considered, and that as to all else the alleged investments in Confederate bonds will not be challenged. I think this is a very proper view of the case, and will take up these special matters seriatim.

1. It is claimed that on December 19, 1863, the guardian invested \$12,000 of his ward's money in a tract of land purchased by him from Winchester Graham, and known as the "Stallings' Place": that he took the title in his own name and afterwards allowed the same to be sold by the sheriff as his own and to pay his own debt. If such an investment had been made, the guardian and his sureties would be liable either for the amount paid and interest on it, or for the value of the place and the rents and profits. George H. Bush, one of the witnesses for the plaintiff, says distinctly and positively that Crosland told him that he had put this ward's money into this tract of land. Crosland denies positively that he ever made any such statement, and denies that he ever made any such investment, and says that he bought the property and used it for himself.

There may have been some misapprehen-

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sion on the part of the *witness as to what was said, but there can be no misapprehension on the part of Crosland as to what he did. If he made such an investment, it is scarcely in the range of probability that he has forgotten it; and if he has not told the truth, there can be little excuse for not doing so. The plaintiff had a right to put his character in issue, and he has not done so. The testimony of Mrs. Amanda M. Bush is too shadowy. She says that she heard Crosland tell his ward when quite a child about this land being for her. She "thinks" it was at his house, but can't tell whether it was "before or after the war." May she not have heard this from some one else? The conversation with J. H. Bush when this land was about to be sold by the sheriff under an

execution against Crosland, I think, tends to confirm his statement. When a claim that such an investment was made was suggested as a means of saving the lands from sale by the sheriff, he said that he had money of his own, and of these two estates, and he could not say he put the estate money in the land. Nothing was said about Zilphia, but the question was about his "ward," or his "wards." The language of the witness is this: "I don't think he said 'estate,' but he said he couldn't say whether it was his ward's money or not, and that he had money enough of his own." The testimony shows that about this time the guardian did have money of his own and of his ward's on hand, and of his own ample to make that purchase.

The guardian had no right to make any such investment, and he must have known, even then, that whatever may have been the law as to investment in Confederate bonds, he made purchases of land with his ward's money at his own risk. If he bought this property with his ward's money and told it to her friends, it is not probable that he would have used it openly as his own, as he certainly did do from the time of the purchase. I have therefore come to the conclusion as a matter of fact that the guardian, Crosland, did not use his ward's money, but his own, in the purchase of the Stallings' Place.

2. On January 7, 1863, there was a large sale of personalty of the estate of Isaac Bush and the share of the ward turned over to the guardian by himself and his co-administrator. In December, 1862, and January, 1863,

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in pursuance of the terms *of the will there were sales of real and personal property belonging to the estate of David Bush, and the share of Zilphia was transferred by the executor, Crosland, to his account as guardian. There were other sales of both estates, but not mentioned here, as I do not understand that any funds arising from any of these sales are now claimed, if they were in fact invested in Confederate bonds, and even that, except as to the "Stallings' Place," seems to be admitted. I am satisfied, from all the testimony before me, that all the moneys which came to the hands of the guardian during the war were invested in Confederate bonds, and if he was guilty of any default, it was not in investing, but in receiving Confederate money for sums secured to his ward by liens on real and personal property, and growing out of the partition of the estates of Isaac Bush and David Bush.

The returns of the commissioners appointed by the Court of Equity to make partition of the estate of Isaac Bush was dated January 22, 1863, and by it the sum of \$4,642.62½ was charged in favor of the ward in the share of her mother, Mrs. Amanda M. Bush. She and the ward were the only distributees

of the estate, and either in settlement or in cash on the day of partition, or very soon thereafter, Mrs. Amanda M. Bush paid to the guardian the said sum of \$4,642.62²³ in Confederate money. The testimony in the case convinces me that all the transactions in reference to both of these estates in the latter part of 1862, and thenceforth until the close of the war, were in reference to Confederate money, the only currency then in use in this State. If the guardian had sold land, or if he had received Confederate money on an ante bellum claim, which was unquestionably due in legal tender, and well secured, then I do not see how, under the rulings of our Supreme Court, the guardian and his sureties could escape liability.

This, however, is a claim which originated during the war, and grew out of a proceeding in court having jurisdiction of the parties and of the subject matter, and stands on a different footing from any of the cases heretofore decided in this State and in which trustees were held liable for collecting and investing in Confederate securities bonds which were well secured and made before the Confederate war. I do not see that it can af-

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fect this *case, that the order confirming the returns to the writ of partition was not made until February 3, 1864, and after the investment was made by the guardian. In *Huson v. Wallace* (1 Rich. Eq., 1), the marital rights of a husband were held to have attached to the personal property of his wife, who died between the date of the returns and the order of confirmation. In *Jackson v. Jennings*, this point did not arise, for in that case the death of the slave occurred before the returns were made. 13 Rich. Eq., 172 [94 Am. Dec. 160].

If, however, we assume that the partition was not complete until February 3, 1864, as in case of the commissioner in the *State v. Norris* (15 S. C., 241), the order of confirmation was sufficient to make good the receipt and investment of money which had already come to the hands of the guardian, even if by some misapprehension of his duty he had received it before the date of the order. It is true, that trustees are not allowed to deal with trust funds in all respects as prudent persons may deal with their own. They hold these funds for investment and collection and reinvestment from time to time in good interest-bearing securities. They can invest in real estate bonds, in well secured personal bonds, and in government securities, and where a particular investment is prescribed by the terms of the trust they must follow the instructions. Where none of these can be obtained, a trustee is required to act as a prudent man would with his own.

The trustee in this case has accepted in payment the note of the government under which he lived and to which he rendered obedience, a government which the State of

South Carolina, whose law prescribed *his liability and duty as trustee, then, and always before, and while in existence held to be a rightful government, not only de facto but de jure. It was the only currency and was at that time of unimpaired credit, received by business men and the banks of the State and even by the officers of the court which appointed him guardian, and so received with the consent and in accord with the practice of the court at that time. This, then, being a case of obligations arising during the war and out of proceedings in the Court of Equity, and not of the guardian's own volition, and in which I think the transactions were in reference to Confederate money, I think that the guardian had a right to receive the money. While there is no direct

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*evidence except that of the guardian himself as to the basis of valuation, yet every article which was sold at that time, belonging to these two estates, where we have any testimony on this point, was valued in reference to the currency, and I cannot with any good reason escape the conclusion that this land was valued in the same way.

3. The commissioners appointed under the will of David Bush and in strict compliance with the terms of his will, on December 15, 1862, assigned to Mrs. Crosland, the wife of the guardian, James E. Crosland, lands, the "Harvey" or "Red Hill tract," and slaves, and charged on them in favor of his ward \$2,490.63, and also a large sum in favor of other legatees under the will. This is also an obligation arising during the war, and in the regular course of administration, and not by the mere volition of the guardian who was the executor of the estate. In addition to the other considerations which induce me to conclude that the valuation of the land was in reference to Confederate currency, one of the commissioners testifies that such was the basis of valuation.

I am by no means certain that there has ever been any payment of this sum by Mrs. Crosland. There is no proof of any separate estate and of its appropriation to this purpose by any competent authority. As to all personal property coming to her from the estate of her father, David Bush, or any other source, the marital rights attached as soon as reduced to the possession of her husband. He certainly had no right to discharge this lien by charging himself with the amount. If it had been his own debt, the law would have presumed payment to himself in his new capacity as guardian. It was only a lien on the land, and he could make no bargain with his wife in reference to this or any other matter. If this view be correct, then as to this amount there never has been any receipt of the money, and he never had so much money to invest. If, however, the guardian had a right to discharge this lien by the charge made against himself in his

accounts and returns in January, 1863, this matter stands as the above payment made by Mrs. Amanda M. Bush, and in both cases the collections and investment must be sustained.

4. If the notes of Dunbar, MacElhenny,

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and Wood belonging *to the estate of David Bush, which had been charged by James E. Crosland to himself as executor, had never in fact been paid, it may be that he would still be liable for the amounts under which he charged himself, and also his sureties, as guardian for his ward's share of them. If, however, the notes, or any part of them, were collected afterwards in good money, he is liable for the amount, and would be even if he had paid over the amount of them in Confederate money to another trustee. I think that he ought to account to the estate of his ward for her share of any money received on these or similar notes. The guardian and his sureties are also liable for any sums received as rent of the ward's land since the war. The ward's estate must account for all rents received for the "Red Hill" tract, held under the proposed compromise, and for any amounts she agreed to pay for surveying, and also for all money paid to her since the war.

It is therefore ordered and adjudged, that the defendant, James E. Crosland, and his sureties, do account before W. W. Williams, the master, for all money received by him as rent of the ward's land since the war, and for her share of any money received since the war on the notes of Dunbar, MacElhenny, and Wood, and any other notes of the estate of David Bush, deceased, which were in fact not paid, but charged to James E. Crosland as executor, and that the estate of the ward account for the rents, use, and occupation of so much of the "Red Hill" tract as was held under the proposed compromise, and for all money received by the ward from the guardian since the war; and it is ordered and adjudged that said accounting, when made and confirmed by the court, shall be in full of all demands in favor or against either guardian or ward, arising out of said guardianship. It is ordered that the defendant, James E. Crosland, pay the costs of the minors, and that as to the plaintiff and other defendants each party pay his own costs, and that any costs to accrue hereafter abide the further order of the court.

From this decree plaintiff appealed upon the grounds stated in the opinion.

Messrs. G. W. Croft and P. A. Emanuel, for appellant.

Messrs. Henderson Bros. and John J. Maher, contra.

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*October 12, 1886. The opinion of the court was delivered by

Mr. Justice McIVER. By this action the plaintiff, as administrator of the deceased

ward, demands an account of her estate from her guardian, Crosland, and his co-defendants, sureties on the guardianship bonds. Owing to the fact that one of the defences was in the nature of a plea in bar to the accounting demanded, it became necessary for the Circuit Judge first to determine the issue raised by that defence before any accounting could be ordered, and thus having the case before him he proceeded to determine all the issues involved, without any accounting before the master or a referee. The Circuit Judge, therefore, heard all the testimony in open court, as to the various questions presented, and his conclusions as to the facts were based upon the testimony so heard, and not as reported by the master or a referee. The defence in bar of the accounting having been overruled by the Circuit Judge, to which ruling no exception has been taken, no further notice need be taken of it. We will therefore confine our attention to the several matters presented by the exceptions to the Circuit decree.

The guardian in his answer admits that he received a large amount of money, something over twenty thousand dollars, for his ward, but that it was all in Confederate money and was invested by him in Confederate bonds, except some small amounts which came to his hands after the close of the "war between the States," but as the decree requires him to account for all money received since the war, and there is no appeal from that part of the decree, we may dismiss that from our minds and devote our attention to the transactions of the guardian during the war.

It appears that in January, 1863, the defendant, Crosland, was appointed guardian of plaintiff's intestate and duly qualified as such. The estate of his ward was derived from two sources—the estate of her father, Isaac Bush, and the estate of her grandfather, David Bush. The former died on January 11, 1860, and the defendant, Crosland, with one Edward B. Bush, administered on his estate; the latter died on November 3, 1860, leaving a will, of which the defendant, Crosland, was the sole executor. It is admitted in the "Case" that the personal estate of Isaac Bush was sold by his administrators

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under an order from the ordinary *of Barnwell County, and that on January 7, 1863, the share of the ward, amounting to upwards of twelve thousand dollars, was received by the guardian, "the only question being as to whether he did invest this amount in Confederate bonds." The ward was also entitled to receive from her mother, Mrs. A. M. Bush, the further sum of something over four thousand dollars, which upon the partition of the real estate of Isaac Bush, Mrs. A. M. Bush was required to pay to the ward for equality of partition; and this sum also the guardian claims to have received on Jan-

uary 7, 1863, but this is denied by the plaintiff, and is one of the points of controversy in the case. As to the estate of David Bush, the defendant, Crosland, claims that he, as executor, settled up that estate, and paid himself, as guardian of Zilphia E., the sum of twenty-three hundred and thirty-five dollars, her share thereof, on January 7, 1863, and that the further sum of twenty-four hundred and ninety dollars, which was directed to be paid to the ward by Mrs. Crosland, the wife of defendant, Crosland, for equality of partition, was also paid to him and by him charged on his account as guardian on January 7, 1863; but this likewise is denied by the plaintiff and constitutes another point of controversy.

The plaintiff, on the other hand, in addition to the points of controversy already mentioned as to the two amounts to which the ward was entitled on the partition of the two estates of Isaac Bush and David Bush respectively, contends that the guardian did not receive in Confederate money large amounts which he claimed to have received in that currency, but, on the contrary, that he received them in good money; that certain other amounts were improperly received by him in Confederate money; that there was no sufficient evidence that any part of the ward's estate was invested in Confederate bonds, and that, on the contrary, a large amount thereof was invested in the purchase of a tract of land, known as the Stallings place, for which the guardian took title in his own name on December 19, 1863.

The Circuit Judge found as a matter of fact that all the money which came into the hands of the guardian during the war was invested in Confederate bonds; that all the transactions of the guardian, in reference to

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both of the estates above mentioned in *the latter part of 1862, and thenceforth to the close of the war, were in reference to Confederate money, the only currency then in use in the State, and that the guardian had a right to receive the amounts above stated as coming to the ward in that currency; that as to the amount which the wife of the defendant, Crosland, was directed to pay to the ward for equality of partition, he was "by no means certain that there has ever been any payment of this sum by Mrs. Crosland;" but he held that if it had not been paid, it was still a lien upon Mrs. Crosland's land, for which the guardian and his sureties would not be responsible, and if it had been paid, then it was paid and properly paid in Confederate money and the amount invested in Confederate bonds, and therefore the guardian was not now liable for it; and that the testimony satisfied him that the guardian did not use the ward's money in the purchase of the Stallings place.

From so much of the judgment as is stated above the plaintiff appeals upon the following grounds:

"1. Because the evidence shows that the Stallings place was bought by James E. Crosland with the money of his ward, Zilphia E. Bush, and his honor erred in not so deciding.

"2. Because from the evidence it appears that the defendant, James E. Crosland, collected a large part of the money coming to his ward from the estate of David Bush in good money, and it was error in the presiding judge in not so deciding—among other debts and money collected, especially the note of Rothwell.

"3. Because it appears from the evidence that the defendant, James E. Crosland, collected in good money from the sale of the effects of the estate of David Bush and also from the sale of the effects of the estate of Isaac Bush large sums which were in part the estate of his ward, and his honor erred in not so deciding.

"4. Because there was no satisfactory evidence that the defendant, James E. Crosland, invested his ward's money in Confederate bonds, and his honor erred in finding that he had done so.

"5. Because there was no evidence that James E. Crosland and his wife had paid to the defendant, and as guardian, the amount coming to his ward for equality of partition in the real estate of David Bush, and it is further submitted that said amount being well secured by a lien upon real estate, and

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there being no necessity for the guardian to collect the same, the guardian would not be justified in making such collection, especially as the transaction, if allowed, would be in his own interest and against the interest of his ward's estate, and it is therefore submitted that his honor erred in allowing said guardian credit for said sum as if paid in Confederate money.

"6. Because it is submitted that if the lien upon Crosland and his wife's land was satisfied by payment, Crosland uniting in himself debtor to and guardian of his ward, such lien if satisfied was by presumption of payment, and the law presumes payment only in good money, and it was error in his honor not so deciding.

"7. Because the amount coming to the ward, Zilphia E. Bush, for equality of partition of the estate of Isaac Bush was well secured by a lien upon real estate, and there being no necessity to collect such sum, the defendant, James E. Crosland, was not justified in collecting such debts, and the defendant should therefore have been held liable for the same, and it was error in his honor not so deciding.

"8. Because it appears from the testimony that the defendant, Crosland, did not and could not have had in his hands the funds coming to his ward from equality of partition of the estate of Isaac Bush at the time he alleges that he invested the same in Confederate bonds, and it was error in his honor not so deciding."

It will thus be seen that this is another of those numerous cases which have been presented to the courts since the war, in which the transactions of guardians and other trustees during that period, when everything was in an abnormal condition, have been sought to be impeached. As has been well said in several cases, whenever we are called upon to review such transactions, it is not only important, but absolutely essential, that we should, as far as practicable, transport ourselves back to those troublous times, and look at the conduct of parties in the light of the circumstances by which they were then surrounded. See especially the very just and pertinent remarks of the present Chief Justice in the case of *Wilson v. Braddy*, 16 S. C., at page 521, and in the case of *Hyatt v. McBurney*, 18 S. C., at page 213. We must remember that Confederate currency was the only money in use, the only medium of ex-

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change; that it was universally so *recognized and treated not only by the people in their individual transactions, but by the government itself in all its departments. It was received in payment of taxes, it was received in payment of purchases made under the orders of the courts, and investments in the bonds of the government which issued it were authorized by statute and by the orders of the courts. We know that it is very difficult, after this lapse of time, even for those who were personally cognizant of the condition of things in this country during the war, to carry their minds back and look at a transaction then occurring solely in the light of the then surrounding circumstances, uninfluenced by the light of subsequent events. But to avoid injustice to those whose conduct during that period we are called upon to review, we must, as far as practicable, do so. Passing from, but not forgetting, these general considerations, which the nature of the case gives rise to, we propose to consider the several questions raised by the grounds of appeal.

The first, second, third, and fourth grounds present questions of fact only, and under the well settled rule of this court it is only necessary to inquire whether the conclusions of the Circuit Judge assailed in these grounds are without any evidence to sustain them, or are manifestly against the overbearing weight of the testimony. In considering this question it is important to bear in mind that the testimony was taken in open court, thus affording the Circuit Judge a full opportunity of both seeing and hearing the witnesses and observing their manner while under examination. This circumstance, always important, is peculiarly so when, as in this case, there is a conflict of testimony.

As to the issue raised by the first ground, it is quite clear that the testimony is, in one sense, conflicting, though possibly reconcilable with the theory that all of the witnesses intended to tell the truth. Crosland testifies

positively that he paid for the Stallings place with his own money, and there is other testimony tending to show that he had at the time means of his own sufficient to enable him to make the purchase. The testimony relied upon to controvert Crosland's positive testimony are certain alleged declarations made by Crosland years ago to several witnesses. Now, when it is remembered how difficult it is for a witness to repeat the language used in a conversation occurring

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*years before, and how the change of a few words will sometimes alter the whole sense, we cannot say that there was any manifest error on the part of the Circuit Judge in adopting Crosland's version, especially when to do so would involve the necessity of discrediting entirely a witness whose character, so far as the testimony shows, is not open to impeachment.

As to the second ground, it is quite clear that the share of the ward in the estate of David Bush could not be ascertained, and therefore could not have been paid, until the settlement of that estate, which took place in January, 1863, when the only money in use was Confederate money, and therefore her share must necessarily have been paid in that currency. We understand, however, that the real point of this exception is, that Crosland, as executor, was chargeable with the money on hand at the death of his testator, and with all ante bellum notes, notably that of Bothwell, in good money, and that for his ward's share of such assets the guardian is chargeable in good money. Whether the propriety of Crosland's conduct as executor is open to investigation in the present proceeding might possibly admit of question; but waiving that, let us inquire whether he has committed any devastavit, such as is charged, of the estate of David Bush.

The testator, who was a person of large fortune, with a considerable family, died November 3, 1860, leaving a will, a copy of which is set out in the record, though it is too long to be inserted here. It is sufficient for our present purpose to say that the will manifestly contemplated a division and settlement of the estate two years after the death of the testator, or as it is expressed in the will, "after two crops shall have been gathered." In the meantime it provided that the estate should be kept together, "and the income, as far as necessary, applied to the education of my minor children, to the support of the gospel and charitable objects, and the maintenance of my wife and such of my children as shall continue to reside with her (whether such children be of age or not), and the families of such of my children, if any, who may be married and reside with my wife by her consent. My purpose being that my family shall continue, during that time, to live in the same style, enjoy the same

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privileges, and make the same contributions

to the gospel and charitable objects as heretofore."

This plainly involved the expenditure by the executor of a considerable sum of money for each of the two years. To meet these expenditures for the year 1861, the executor used the cash on hand at testator's death, the proceeds of the cotton made in 1860, and the proceeds of certain notes collected by him early in the year 1861, all doubtless good money, and for the year 1862, instead of selling the cotton made in 1861, he collected the note of Bothwell and the notes of two other persons, stating, in the return made for that year, as well as in his testimony in this case, that his reason for so doing was that cotton was then bringing a very low price, only seven cents a pound, which cotton was afterwards sold for eighteen cents in January, 1863. From this condensed statement of the acts of the executor we are unable to see where he has committed any devastavit.

Plaintiff claims that by the terms of the will he could only use the income to defray the expenditures provided for during the two years the estate was to be kept together, and that the devastavit was in collecting the notes of Bothwell and others, and applying the proceeds to such expenditures. But what damage did the estate sustain by reason of the fact that the executor used money derived from one source rather than another to meet expenditures which the will required him to provide for? On the contrary, was not the estate actually benefited to the extent of the difference between eighteen cents and seven cents per pound for the cotton made in 1861? The fact that these notes were ante bellum notes and therefore payable in good money cannot alter the case; for, as we have seen, the will contemplated a division of the estate at the expiration of two years from the death of the testator, and to effect this it would be necessary to collect the assets of the estate, and what possible difference could it make whether these notes were collected in 1862 or 1863, the time when the division of the estate was to be made under the terms of the will and when it was actually made? As we have said, the will manifestly contemplated a division and settlement of the estate at the expiration of two years from the death of the testator, and as he died

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in November, 1860, the two years would expire in the latter part of 1862, and accordingly we find that the division was made on January 7, 1863, but a very short time after the expiration of the two years. Now, in order to effect this manifest purpose of the will, it was necessary to collect in the assets of the estate as preparatory to the division, and the fact that some of the assets were collected the year before for the purpose of avoiding a sacrifice of the cotton made in 1861, certainly could not be regarded as a devastavit.

It must be remembered that the duty of an executor is different from that of a guardian or other like trustee. The duty of the former requires him to collect in the assets of his testator's estate and administer them in accordance with the directions of the will, while the duty of the latter is to keep the funds of his cestui que trust securely invested. Hence, while it might be a breach of trust for a guardian or other like trustee to call in unnecessarily funds already well invested, and he might be made responsible for any loss occasioned thereby, the same rule would not apply to an executor, for the reason that the nature of their duties is altogether different. Any person interested in the estate of David Bush could, at any time after the expiration of two years from his death, have compelled the executor to divide the estate in accordance with the terms of the will; and to do this, he would have had to collect in the assets, which he could only do in Confederate treasury notes, that being the only currency in existence here at that time; and surely if he did voluntarily what he could have been compelled to do, he should not be charged with any default or breach of duty. We do not see, therefore, that there is any ground for the second exception in any view of the case.

As to the third exception or ground of appeal, which charges that the defendant, Crosland, collected large sums, in good money, from the sales both of the estates of Isaac Bush and of David Bush, we do not see how it can be sustained. In the face of the admission in the record at page 50, folios 195-6, we do not understand how such a claim can be made as to the estate of Isaac Bush, for there it is expressly admitted that the share of the ward in the proceeds of the sale of that estate was received by the guardian on January 7, 1863, and, therefore, certainly in Confederate money, and that the only ques-

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tion in reference to that matter was whether the money so received was invested in Confederate bonds. As to the estate of David Bush, it is equally clear that there is no foundation for that exception. The sales of that estate, under the terms of the will, were made in December, 1862, and January, 1863, when Confederate money was the only currency in use.

The fourth exception raises a simple question of fact, and certainly there is no ground upon which we can be expected to reverse the conclusion reached by the Circuit Judge. There was positive and direct testimony that the ward's money was invested in Confederate bonds, and there was no positive and direct testimony to the contrary. All that is relied upon by the appellant to overthrow this conclusion of the Circuit Judge, seems to be certain alleged declarations of Crosland, tending to show that a part at least of the ward's money was invested in the Stallings

place, together with all the circumstances of the case. The most that can be said is that the testimony and circumstances relied upon may raise a doubt as to the investment, but that is not sufficient to warrant us in reversing the conclusion of the Circuit Judge, especially in a case where there is a conflict of testimony.

The fifth and sixth exceptions are taken under a misconception of the decree of the Circuit Judge. We do not understand that he held either that the amount which Mrs. Crosland was directed to pay to the ward for equality of partition of the estate of David Bush, was actually paid by either Crosland or his wife, or that it was paid by operation of law by reason of Crosland uniting in himself the character of both debtor and creditor. On the contrary, the Circuit Judge rested his conclusion as to this matter upon an alternative view of the subject, without designating which alternative he adopted. As we understand his decree, his view was that this money was either paid, or it was not paid. If it was paid, then it was to be regarded as paid in Confederate money, just as he had previously held in reference to a similar debt due by Mrs. Amanda M. Bush, and the collection and investment should be sustained. But if it has not been paid, then it still remains a claim on Mrs. Crosland, secured by a lien upon her land, and the guardian is not chargeable therewith.

It is not important for us to determine

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whether the considerations which influenced the mind of the Circuit Judge in reaching his conclusion are correct, but the vital point is whether such conclusion is correct. We think it is. This claim originated during the war, and grew out of the settlement of an estate made during that period. The Circuit Judge has found as matter of fact, "that all the transactions in reference to both of these estates, in the latter part of 1862, and thenceforth until the close of the war, were in reference to Confederate money, the only currency then in use in this State;" and such, we have no doubt, was the understanding of all the parties concerned. The commissioners appointed under the will of David Bush to make partition of his lands and slaves, made their return on December 15, 1862, and in it they recommended a sale of a portion of both the land and slaves for cash, which, of course, could only have been in Confederate money, and that the proceeds of such sales should be divided amongst the minor children. It is scarcely possible to suppose that they intended that these minors should receive their shares in Confederate money, and that those to whom sums of money were awarded for equality of partition should be entitled to claim payment in gold. It is to be observed, also, that these sums were not directed to be paid at a future time—no credit given—as might have been done if such

had been the intention; but they were payable presently, that is, in cash, and therefore necessarily in Confederate money, as none other was then in use. We conclude, therefore, that this debt due to the ward by Mrs. Crosland for equality of partition was an obligation arising during the war; that it grew out of the settlement of an estate made during that period in reference to Confederate money; that being payable presently, it could be paid in Confederate money.

Was it paid? There is no evidence going to show that it was paid by Mrs. Crosland; but that is immaterial, if it appears that it was actually paid by any one. The fact that Crosland charged himself in his account as guardian, while it would not extinguish the lien on Mrs. Crosland's estate by which it was secured, might make him and his sureties chargeable with the amount. So, too, if the debt be regarded as Crosland's own debt and not that of his wife, the fact that he united in himself the character of both debtor and creditor would not operate as such payment

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as would *extinguish the lien on the land, though, possibly, it might make Crosland and his sureties liable to account for the amount. But in either event, the ward or her representative could have the election either to pursue the guardian and his sureties, or to claim the benefit of the lien. By this action the plaintiff has elected to pursue his remedy on the guardianship bond, and his claim must be based either upon the fact that the guardian received the money and has not accounted for it, or upon the fact that the debt has been lost by reason of the inexcusable negligence of the guardian in collecting it. If the former be regarded as the basis of the claim, then, as we have seen, the money has been accounted for by its investment in Confederate bonds. If, however, the latter be regarded as the basis of the claim, then there is no evidence that the debt has been lost. So that in neither view has the plaintiff established this claim against the defendants.

In addition to this, it seems to us that the testimony shows actual payment of this debt, and not payment by operation of law merely. According to the testimony of Crosland, the whole amount of his ward's estate, with which he has charged himself in his returns, including this identical amount now under consideration, was invested in Confederate bonds, and the Circuit Judge finds this to be the fact. Now, if this be so, unquestionably this amount must have been paid before it could have been invested in Confederate bonds. Suppose Crosland, with a view to relieve his wife's land from this statutory lien, had invested the amount in an unquestionably good bond, secured by a mortgage of real estate, and when called upon to account as guardian had produced such bond and mortgage as a part of the assets of his

ward's estate, would not this have been regarded as payment of the amount which his wife was ordered to pay to the ward for equality of partition, and would not the lien upon his wife's land have been extinguished thereby? This is practically what has been done, for instead of accounting for the amount in a personal bond secured by a mortgage of real estate, he accounts for it by an investment in Confederate bonds, which, if justified, as we have seen that it should be, is the same thing in principle, and should have the same effect.

What has been already said applies with

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increased force to the *question raised by the seventh ground of appeal, for there it cannot well be disputed that the amount which Mrs. Amanda M. Bush was ordered to pay to the ward for equality of partition of the estate of Isaac Bush was actually paid to the guardian in January, 1863, and of course paid in Confederate money. Such is the testimony of Crosland, which is fortified by the receipt of Mrs. Bush to the administrators for her distributive share of the estate, bearing date the same day as the return of the commissioners in partition. It is a mistake to regard this as an investment of the ward's funds secured by a lien on real estate, which it was improper for the guardian to call in, unless there was a necessity for it, which is not pretended to have been the case. This claim due the ward arose out of the partition of her father's estate, made under proceedings in the Court of Equity in 1863, the very object of which was to enable the heirs to enjoy in severalty their respective shares of the estate. This Mrs. Bush could not do until she had paid the amount decreed to be paid by her to the ward for equality of partition, for, until such payment, her title to the property allotted to her would not vest in her (*Burris v. Gooch*, 5 Rich., 1); and thus one of the main objects of the partition would have been defeated. It was a debt originating during the war, and payable presently; not on a credit, which might have been provided for if such had been the intention. All the transactions in reference to this estate, as found by the Circuit Judge, were in reference to Confederate money, and, therefore, the guardian had a right to receive payment of this debt in that currency.

The point of the eighth exception, as we understand it, is that, as the order for the confirmation of the return of the commissioners appointed to make partition of the estate of Isaac Bush was not signed until February 3, 1864, it was impossible that the guardian could, prior to that time, when he claims to have invested this amount in Confederate bonds, have had in his hands the amount which, by that return, Mrs. Bush was directed to pay to the ward for equality of partition, and, therefore, he could not have so invested this amount. We agree with the Cir-

cuit Judge that there is nothing in this point. It may have been somewhat irregular for the guardian to have received the amount before

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the *return was confirmed: but as there were but two parties interested in the partition—Mrs. Bush and her daughter, the ward—the person paying and the person receiving the money, there could hardly have been much risk in anticipating the confirmation of the return. But however that may have been, the fact is that the return was confirmed, and that ended the matter.

Another question has been raised in the argument here, growing out of certain provisions in the will of David Bush, for which we find no proper basis in the exceptions or grounds of appeal. It is contended in the argument here, that under the sixth and seventh clauses of that will the ward was not entitled to anything from that estate until she attained the age of twenty-one years or married, and that her interest was wholly contingent upon the happening of one of those two events, and that as neither of them occurred until long after the war—she having been married in 1876, and having attained the age of twenty-one years in 1880—her estate could not possibly have come to the guardian in Confederate money. So far as we can discover, this point does not seem to have been brought to the attention of the Circuit Judge, for he certainly has passed no judgment upon it, and there is, therefore, nothing before us to review. It is true that the counsel for the appellant state in the argument here that they brought this point to the attention of the Circuit Judge, "and he frankly declared his doubts as to the correctness of his judgment;" but upon turning to those folios of the judge's decree indicated in the argument of counsel, we find that Judge Fraser is there speaking of another matter altogether, viz., as to the fact of payment of the amount decreed to be paid by Mrs. Crosland for equality of partition, and whether such payment could arise by operation of law; but we nowhere find any allusion even to the question as to whether the interest of the ward under the will of David Bush was contingent or absolute; and we cannot suppose that so careful and conscientious a judge, in what is manifestly a well considered decree, would have either overlooked or ignored such a point. We must think, therefore, that counsel are mistaken in supposing that this point was brought to the attention of the Circuit Judge.

But as we may be in error in this, we will not decline to consider the point, even though

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not distinctly made in any of the *exceptions. By the fifth clause of his will, David Bush devises and bequeaths all the rest and residue of his estate "to my children and my grandchild, Zilphia E., the issue of any of them who may die before two crops shall be

gathered, and who may be their distributees to represent their parents as in case of intestacy," &c.—going on to provide that certain advancements shall be accounted for. Then follow the sixth and seventh clauses, relied on by appellant, which read as follows:

"6th. I desire that my children, or those who take as their substitutes, shall take an absolute estate under any and all the provisions of this will in their behalf, when and not till they arrive at twenty-one years of age or marry; and in case any of them shall die under age and unmarried, his or her property shall be divided between my then surviving children, the issue of children hereafter dying, who may be their distributees, to take their parents' share, as in cases of intestacy, the shares thus accruing to any one under age and unmarried to be subject to the same limitations over as the original shares.

"7th. If my grandchild, Zilphia E., shall die leaving no issue alive at her death, I desire that her devises and legacies be divided between my then surviving children. Such issue of deceased children, as may be their distributees, to take their parents' share, as in cases of intestacy; but in case she shall so die after she becomes of age, or marries, then the original property and natural increase only (excluding the cash income) is to be accounted for to the limitees over."

There does not seem to be anything in either of these clauses to postpone the vesting of Zilphia E.'s interest until she marries or becomes of age, which is the basis of appellant's whole argument upon this point. That idea is drawn from the terms used in the sixth clause, which, by its express terms, applies alone to the children of the testator, or their substitutes; and as Zilphia E. was neither a child nor the substitute of a child of the testator, that clause does not apply to her. This is conclusively shown not only by the use of the terms in that clause, "my children or those who take as their substitutes," but by the further fact that after the testator had, in the sixth clause, made provision for what was to become of the

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shares of his children in certain contingencies, he goes on, in the seventh clause, and, in very different language, makes provision for the disposition of Zilphia's share in the contingencies therein named; for while he provides, in the sixth clause, that his children are to take absolute estates "when and not till they arrive at twenty-one years of age or marry," there is no such language as that just quoted in the seventh clause, which deals with Zilphia's share alone. Why the testator should have made such a distinction, it does not concern us to inquire, though a reason might possibly be found in the fact of the extreme youth of Zilphia at the time

—about one year of age—and the testator might have thought it unwise to postpone the vesting of her estate for such a length of time as must necessarily elapse before she would either attain the age of twenty-one years or marry.

But be that as it may, our sole province is to determine the intentions of the testator, by an examination of the words which he has used, and not to find reasons for the disposition which he has seen fit to make of his property. Here we find that the testator, after having previously provided that his whole estate shall be kept together until after two crops have been gathered, in the fifth clause of his will, gives the residue of his estate to his children and his grandchild, Zilphia, providing that if "any of them," that is, either of his children or his grandchild, shall die before the two crops are gathered, then the issue of the one so dying shall represent their parent—take as their substitutes. Then, in the sixth clause he makes certain provisions as to the shares of his children, or those who take as their substitutes; and in the seventh clause he makes certain other and different provisions as to the share of his grandchild. It is true, that in the seventh clause the share of Zilphia E. is limited over upon a certain contingency, which has never happened and cannot now occur, but this certainly could not have the effect of postponing the vesting of her estate. It seems to us, therefore, that the position contended for by the appellant cannot be sustained.

But even if we are in error in this, then Crosland as executor would have been compelled to hold the share of Zilphia E. as a sort of quasi trustee until the event occurred which would vest it in her; and if, as we have seen, all the transactions of this estate

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*were in Confederate money, then the investment of the fund so held in Confederate bonds would be sanctioned, as it was in the case of *West v. Cauthen*, 9 S. C., 45.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

25 S. C. 547

CANADAY v. BOLIVER.

(April Term, 1886.)

[1. *Mortgages* ⇨481.]

A creditor, holding a joint and several bond secured by a mortgage of each of the obligors upon their lands respectively, instituted his action of foreclosure, in which each of the defendants claimed to be a mere surety. *Held*, that the court properly determined first the relation of the defendants towards each other, but such relation having been determined, the Circuit Judge erred in recommitting the cause to the

master for an adjustment of accounts between these defendants without decreeing a foreclosure.

[Ed. Note.—Cited in *Benjamin v. Drafts*, 44 S. C. 436, 22 S. E. 470.]

For other cases, see *Mortgages*, Cent. Dig. § 1400; Dec. Dig. ☞ 181.]

[2. *Mortgages* ☞ 151, 318.]

B having borrowed money from A for the use of C, to whom B paid it, both B and C giving their bond secured by a mortgage of their lands respectively, the lands of B should be first sold under a decree of foreclosure; but upon such sale, B would be entitled as equitable assignee to be reimbursed out of the lands mortgaged by C.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 315, 957; Dec. Dig. ☞ 151, 318.]

Before Cothran, J., Orangeburg, September, 1885.

The opinion sufficiently states the case.

Messrs. James F. Izlar and A. B. Sawyer, for plaintiff.

Mr. Samuel Dibble, for Boliver.

Mr. Abial Lathrop, for Livingston.

Messrs. Henderson Bros., for Mrs. Kitching.

October 22, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. On May 30, 1876, George Boliver and John H. Livingston gave a joint and several bond to E. S. Canaday for \$7,500, money borrowed—\$6,000 at the time the bond was executed, and \$1,500,

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which Boliver had previously *borrowed and given his note for—with interest from May 30, 1876, at the rate of 12 per cent. per annum. In order to secure the bond, Boliver mortgaged certain lands and lots in Orangeburg County, viz., "four lots with the buildings thereon in the town of Orangeburg," and six tracts of land in said county, imperfectly described in the "Brief" as follows: "Containing, respectively, about 1,800 acres (less 3 acres, more or less), 301¾ acres, 236¾, 263¾, 385 acres, 378 acres (less 15 acres), and 130 acres." And the said Livingston mortgaged a tract of land containing 4,114 acres, less 500 acres previously sold to C. A. Keel, and 100 acres previously bargained to George Corley.

The mortgagee, Canaday, in consideration of \$2,000 paid on the bond by Boliver, and with the consent of Livingston, released Boliver's mortgage on 1,314 acres of the 1,800 acre tract, and also on the tracts of 301¾ acres, 236¾, 385 acres, and 130 acres. On November 14, 1881, and April 21, 1884, Livingston, without the consent of Boliver, for value received, conveyed portions of the Aiken land covered by his mortgage, but without accurate description, to Harriet C. Kitching; and it does not clearly appear how much, if any, of the land mortgaged is still in the possession of the mortgagor, Livingston. The bond and mortgages were as-

signed to Annie I. Canaday, in trust for the use of her daughter, Annie E. S. Canaday, who intermarried with A. B. Sawyer and died intestate, leaving as her heirs at law her said husband and an infant son, Arthur, who is also now dead, leaving his father, the said A. B. Sawyer, the sole heir of the cestui que trust, Annie E. S. Canaday.

From time to time payments were made on the bond, but a large balance still remaining due, the trustee, Annie I. Canaday, as plaintiff, instituted this proceeding, an ordinary action of foreclosure of both mortgages, making parties defendant not only the mortgagors, but Harriet C. Kitching, the said purchaser of portions of the Aiken lands sold and conveyed to her by Livingston. The obligors of the bond answered, each claiming that he was only surety, and that the other was the principal debtor to Canaday, and therefore his lands should be first sold for the payment of the debt; and Mrs. Kitching concurred with Livingston that he was really only surety on the bond, and insisted

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that she had *good title to the lands conveyed to her by him. Besides, it was contended that there was a complicated settlement of accounts between Boliver and Livingston, and the foreclosure of the plaintiff's mortgages should be delayed until it could be ascertained how that account stood.

It was referred to the master, A. C. Dibble, Esq., to hear and determine the issues in the case. He ascertained that the balance due on the debt September 15, 1885, when he made his report, was \$5,743.44. As to the relative liability of Boliver and Livingston, there was much testimony, which is very well condensed in the Circuit decree, as follows: "On June 8, 1875, the county commissioners of Orangeburg County awarded the contract for building a new court house at Orangeburg to the defendant, J. H. Livingston, for the sum of \$28,900. The defendant, Boliver, was a bidder for the contract, but failed to get it. After the same was awarded to Livingston, Boliver proposed to go in with him, and was accepted as a partner. Boliver undertook to procure a suitable place for making brick, to be used in the construction of the building, and purchased some of the Treadwell lands near by for that purpose. A brickyard was established thereon, and about 100,000 bricks made. These were rejected by the architect, whereupon Livingston, who seems to have had charge of the active operations of the business, and Boliver of the financial, declared his purpose of attempting another kiln; to this Boliver objected, as he said they had already sunk \$1,000, and upon Livingston persisting, Boliver withdrew from the copartnership.

"They had both occupied, and were, perhaps, then occupying, offices in the court house, one as sheriff and the other as auditor

or treasurer; and upon Boliver's withdrawal from the copartnership, Livingston sought pecuniary aid from him to carry on his contract with the county commissioners, the annual levies which were provided by the legislature for raising the money being too slow to meet the exigency of the speedy completion of the building. For a certain consideration Boliver agreed to do this. He had already secured a loan (the \$1,500 note) from S. B. Canaday, for which he had given his bond and mortgage of land. But \$6,000 more was required, and Boliver undertook to obtain that sum from the same source. Canaday

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agreed to give up to Boliver the bond and mortgage for \$1,500, and to take a new bond, including that sum and interest, adding thereto an amount in cash sufficient to make up the \$7,500; but he demanded security in thrice the amount of the new loan. Up to this time the money borrowed seems to have been secured and obtained by Boliver alone, but he then said to Livingston, "that old codger (meaning Canaday) required a mortgage of his lands also." Livingston yielded his assent to join Boliver in putting up the additional security, and did mortgage his Aiken lands. As a premium to Boliver for this brokerage arrangement, Livingston agreed to construct for him, and did construct, a three-story brick building in the town of Orangeburg, and agreed, besides, to refund to Boliver the whole amount of money thus procured for him out of the first payments by the county commissioners on account of the building of the new court house," &c.

Upon this state of facts the master held: "That as between the defendants, Livingston and Boliver, the defendant, Livingston, must be regarded as the principal and the defendant, Boliver, as the surety, upon said bond for the principal sum thereof, with the interest that may be due thereon from November 20, 1877, when Livingston had collected sufficient funds from the court house contract to pay said bond, such interest to be computed in accordance with the terms of said bond. That the defendant, Boliver, must be regarded as the principal, and Livingston as the surety, for the interest that may be due on said bond from May 15, 1876, to November 20, 1877, in accordance with its terms."

To this report there were exceptions, and upon the hearing before Judge Cothran he reversed the ruling of the referee as to the relative liability of Boliver and Livingston; and thereupon, without making any decree of foreclosure, recommitted the report to the master, to make another report holding Boliver to be the principal and Livingston the surety. From this decree all the parties appeal the plaintiff on the ground that there was error in not adjudging the mortgaged premises to be sold and the proceeds

applied towards the payment of the amount reported to be due to the plaintiff on the bond; there being no question as to such amount, or as to the plaintiff's right to recover.

The defendant, Boliver, filed numerous ex-

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ceptions, which are *in the "Brief." In substance, they complain that it was error on the part of the Circuit Judge to hold that Boliver was the principal and Livingston the surety on the bond secured by their respective mortgages; and that, on the contrary, "he should have held that all the land mortgaged by Livingston was primarily liable for the mortgage debt, and, after paying that, then for the excess of Boliver's payments over and above his liability for interest on the plaintiff's bond, and that for these liabilities of Livingston the premises mortgaged by him should be first subject to foreclosure and sale; and that the lands mortgaged by Boliver should only be held subject to sale in case the land mortgaged by Livingston should be insufficient to satisfy the mortgage debt."

None of the many questions made and argued, except those which are here on appeal from the decree of the Circuit Judge, are really before us. The judge ruled nothing as to the correctness or incorrectness of the account stated between the defendants, but he held that, according to the circumstances of the case, Boliver was the principal and Livingston only surety on the bond to Canaday, and, as the report of the master had been made up on a different view of this fundamental fact, he thought it premature to decree a foreclosure, and recommitted the whole matter with instructions to make a report on the view held and expressed by him.

The plaintiff complains of error rather of omission than of commission—that the judge should have made a decree of foreclosure at least against one, if not both, of the mortgagors. It seems there was no objection to the report of the master as to the amount due on the bond, but that the only difficulty was as to how the amount should be paid, whether by first foreclosing the mortgage of Boliver or of Livingston. The amount due being satisfactorily ascertained, and the property mortgaged ample to secure it, the ordinary course would have been to give judgment for the amount due, and to proceed immediately to enforce its payment by decree of foreclosure. The terms of the bond are joint and several in the usual form, and, so far as the creditor was concerned, both the obligors and mortgagors were alike his debtors and bound to pay him. But, without denying the debt or their liability to pay it, they claim that as between themselves the

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bond does not *express their true relations, that, in fact, they are not equally bound, but,

on the contrary, one is principal and the other only surety, with all the rights and liabilities respectively incident to that state of facts. Brandt Sur., §§ 17, 18.

We agree that the consideration of the question as to the real relation of the parties naturally preceded foreclosure, as upon its decision depended the order in which the securities were liable. The judge below did consider and decide the question, reversing the master upon the point, and holding that Boliver was principal and Livingston surety. He did not, however, follow up that finding by a decree of foreclosure in conformity with it, but recommitted the whole case, with instructions upon that point alone. It is true that the matter of recommitting a report, being somewhat administrative in its character, is ordinarily left to the discretion of the Circuit Judge; but it seems to us that in this case the plaintiff should not have been delayed only because of the number of her securities, but that she was entitled to have a judgment for the amount of her debt and a decree of foreclosure in conformity to the ruling of the judge, that Boliver was the principal, and, as a consequence, that the property covered by his mortgage was primarily liable and should be first sold.

But was it error on the part of the judge to hold that Boliver was the principal and Livingston only surety? It strikes us that it is a very peculiar case, and not by any means free from difficulty. If both the obligors had originally negotiated the loan, each giving the separate security of a mortgage for the same money, which was delivered by the creditor to one of them, there can be little doubt that the one receiving the money, and for that very reason, would have been considered and treated as the principal and the other as surety. See Brandt Sur., § 25. But we think the rights of these parties, as between themselves, should not be determined alone by the fact that Livingston got the cash then raised, but that such fact must be considered in connection with the other circumstances, and the contract and intention of the parties.

It does not appear that this loan was negotiated by both parties. So far as we know, Canaday, the creditor, was not acquainted with Livingston. He did, however,

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know Boliver, and *had before lent him money (the \$1,500) upon the security of a mortgage of real estate. Boliver, for a consideration, undertook to obtain the money and "advance" it to Livingston, who, it seems, had nothing to do with the negotiations until there was a hitch on account of the creditor requiring additional security, when Boliver communicated to Livingston that Canaday "required a mortgage of his lands also," which was given. Livingston contracted to pay back the money thus raised, not to Canaday, but to Boliver, who at-

tached his name first to the note. Under these circumstances, we are constrained to hold that, as between themselves, Boliver was to borrow the money and "advance" it to Livingston; that Livingston got the money, not directly from the creditor, but indirectly through Boliver, to whom chiefly the credit was given; and, therefore, as to Canaday, the mortgage of Livingston was merely cumulative, and the lands mortgaged by Boliver are primarily liable and must be first sold in discharge of the debt to Canaday.

We do not, however, think that the contract of the parties had the effect of making Livingston nothing more than a mere surety for the whole debt, in the sense that its payment by Boliver, considered as the principal, must operate to discharge Livingston entirely. While Livingston was merely surety to the extent of the \$1,500, which Boliver had previously borrowed from Canaday and which was included in the bond, the whole transaction, considered together, made him something more than a mere surety as to the \$6,000, which he then received as the fruit of the arrangement. A Court of Equity will look at all the circumstances of a case, to determine whether or not a party is a surety and entitled to be treated as such. Assuming that the mortgage of Livingston was, as to Canaday, only cumulative, is it not manifest that it was intended as one of the securities for the money then received by him? "The general criterion is the continued existence of the debt." 3 Pom. Eq. Jur., § 1195.

If Boliver was the debtor of Canaday, Livingston was certainly the debtor of Boliver for the same money; and upon its being paid by Boliver, or out of his property, he will be entitled as equitable assignee to set up the mortgage of Livingston as to the lands, upon which it now has a lien, to secure any

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balance of the \$6,000 *advanced" on that occasion by Boliver to him. "Where there are two or more sureties for the same principal debtor and for the same debt or obligation, whether on the same or different instruments, and one of them has actually paid or satisfied more than his proportionate share of the debt or obligation, he is entitled to a contribution from each and all of his co-sureties, in order to reimburse him for the excess paid over his share, and thus to equalize their common burdens. The same doctrine applies, and the same remedy is given, between all those who are jointly, and jointly and severally, liable on contract or obligation in the nature of contract. The right, however, may be controlled or modified by express agreement among the co-sureties or debtors." 3 Pom. Eq. Jur., § 1418.

In order to carry out the view taken, there should be, first, a decree of foreclosure of so much of the lands covered by the mortgage of Boliver as may be necessary to sat-

isfy the balance of the mortgage debt, and if that is not sufficient, then the lands covered by the mortgage of Livingston should be sold; and, second, there should be an accounting ordered between Boliver and Livingston, in which Livingston should be charged with the \$6,000 which he received as then "advanced" to him by Boliver, but he should at the same time receive credit for all payments made by him and credited by the direction of Boliver and to his relief on the bond to Canaday. This to be an original accounting, entirely unaffected by the former findings of the master, under a different view of the facts; and especially as to who made the payments of \$1,410.75, November 15, 1877, and of \$100, May 3, 1878, credited on the bond to Canaday.

The judgment of this court is, that the cause be remanded to the Circuit Court for such further proceedings as may be necessary to carry out the conclusions herein announced.

25 S. C. *555

*EASON v. MILLER & KELLY.

(April Term, 1886.)

[1. *Mortgages* ⚡131.]

In 1866 plaintiff made a mortgage of his foundry "including the working implements, machinery, and tools therewith connected, now on the said premises." In 1879 this mortgage was foreclosed and the property sold, the complaint and decree, the advertisement and deed describing the property in the very language of the mortgage as above. *Held*, that the purchaser was entitled to all tools on the premises at the date of the sale, including such as were put there after the mortgage was given.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 255; Dec. Dig. ⚡131.]

[2. *Estoppel* ⚡94.]

The mortgagor having been present at the sale and not having objected, he is estopped from saying that property ordered to be sold and advertised for sale was not embraced in the mortgage.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 281; Dec. Dig. ⚡94.]

[3. *Mortgages* ⚡110.]

The Circuit Judge properly submitted to the jury the issue whether patterns were a part of the tools and implements of a foundry.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 269; Dec. Dig. ⚡110.]

Mr. Justice McIver dissenting.

Before Cothran, J., Charleston, November, 1885.

The opinion sufficiently states the case.

Messrs. Lord & Hyde, for appellant.

Messrs. Bryan & Bryan, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. James M. Eason, appellant, and his brother, Thomas D. Eason (since dead), doing business as

copartners, on April 2, 1866, executed a mortgage to one Hannah Enston of certain property known as "Eason's Foundry," situate in Charleston, including the working implements, machinery, and tools therewith connected. The language used in the mortgage with reference to the implements, &c., being: "All that lot * * * with all the working implements, machinery, and tools therewith connected, now on said premises." This mortgage was foreclosed by regular proceedings in 1879. The decree of foreclosure, which was made March 4, 1879, ordered the mortgaged property described in the pleadings as thereafter set forth to be sold upon certain terms. In this decree the property ordered to be sold was described in

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the following terms, to wit: "All that lot of land, with all the buildings thereon, including machine and workshops and foundry, with all the working implements, machinery, and tools therewith connected, now on the premises, situate and being on the north side of Columbus street, * * * Charleston * * *."

In accordance with this decree the property, after due advertisement, was sold by the master on April 24, 1879, defendants, respondents, being the purchasers, to whom a deed was executed on April 24, 1879, by which the property was conveyed to said defendants in the following language: "All that lot, * * * workshops and foundry, with all the working implements, machinery, and tools therewith connected, now on said premises," &c. Shortly after this sale the respondents took possession of the lot and machinery, including certain patterns, the subject of this controversy, whereupon the action below was instituted to recover the value of said "patterns," the plaintiff alleging that the patterns in question having been constructed and placed on the premises after the execution of the mortgage in 1866, were not embraced in the mortgage and constituted no part of the mortgaged property, and therefore could not have been the subject of the decree of sale in the foreclosure proceedings.

On the part of the defendants it was urged that the terms, "implements, machinery, and tools" embraced "patterns," and the order of sale having directed that all implements, &c., "now on the premises," be sold, and the deed of the master following the order, having conveyed all implements, &c., now on the premises, and these patterns being on the premises at the time of the order and of the sale and at the time of the execution of said deed, said patterns passed to the defendants as part of the implements, and especially so because of the fact that the defendants in that action were parties to the foreclosure proceedings, and were also present at the sale and bid-

ders for the property, having at no time interposed objection to any of said proceedings.

The jury rendered a verdict for the defendants. The appeal assigns error to the refusal of the Circuit Judge to charge certain requests of the plaintiff, and to his charge on certain requests of the defendants.

It will be seen from an examination of the

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replies made by his honor, the Circuit Judge, to the various requests to charge that he laid down the following propositions: First, that nothing passed to Miller & Kelly, the defendants, by the master's deed, except the property embraced in the mortgage. Second, that all the "tools" and "implements" connected with the plant on the premises at the time of the execution of the mortgage, at the time it was foreclosed, at the time the decree was made, and at the sale, passed under the decree of sale, and went to the purchaser. Third, he declined to charge at the request of the plaintiff, "that such 'patterns' as were placed on the premises since August, 1866, when the mortgage was executed, remained the property of the plaintiff, notwithstanding the sale and conveyance."

The leading legal principles by which the Circuit Judge intended the jury to be governed were: that all tools and implements connected with the foundry, on the premises at the decree of foreclosure and sale, should be regarded as embraced in the mortgage, and consequently as having passed to the purchaser; and whether the patterns in question thus passed, depended upon the further question whether these patterns were tools and implements, which he ruled was a question of fact for the jury; and after defining what was meant by the terms "tools and implements," he submitted this question, as a question of fact, to the jury.

The main questions raised in the numerous exceptions are, first, that his honor erred in holding that all the tools and implements on the premises at the decree of foreclosure and sale passed under said sale; and, secondly, that even if this was true, yet that in no event could patterns be regarded as tools and implements, and that his honor erred in not so instructing the jury as matter of law, instead of submitting that question to the jury as a question of fact.

We think the ruling below was correct on both of these questions. Passing by the question, whether the Circuit Judge was entirely correct in ruling that, under all circumstances, such additions as may be made to the original stock of property embraced in a mortgage of the kind before the court, would become embraced in the mortgage and pass at its foreclosure, we think that his honor was fully warranted in the general charge

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which he made, as applicable to the facts

of this case. Here a decree of sale had been obtained in a proceeding to foreclose the mortgage in question, in which decree it was expressly stated that all working implements, machinery, and tools therewith connected and then on the premises, were to be sold. Under this decree, after due advertisement, the property was sold, and a deed in pursuance thereof executed to the defendants, describing the property conveyed as all that lot of land * * including machine and workshop and foundry, with all working implements, machinery, tools therewith connected, and (then) now on the premises. To this proceeding the plaintiff had been made a party, and, as it appears, he was present or was represented at the sale, at no time interposing objection or raising a question as to the sale of such tools and implements as were on the premises at the date of this decree and sale. Under these circumstances we do not see how the Circuit Judge could have reached any other conclusion than that the tools and implements then on the premises were the tools and implements embraced in the mortgage.

The appellant complains that the Circuit Judge failed to construe the decree of foreclosure. We think he did construe it, and that his construction was in accordance with its terms, and that the conduct of the plaintiff estops him from denying that construction. He held that this decree ordered all the tools and implements on the premises at its date to be sold, and, as we have already said, this seems to us to have been the proper interpretation of the decree. He then left it to the jury to determine as matter of fact whether the patterns in contest, admitted to have been on the premises at the date of the decree, were tools and implements, &c. The jury found that they were, and consequently rendered a verdict for the defendants. Certainly, this last question which his honor submitted to the jury was a question of fact, pure and simple, one which his honor had no right to decide, and one which he could not have decided upon any principle of law. He defined the meaning of the term tools and implements, but whether patterns fell under this meaning depended upon evidence as to their character, nature, and use, the force and effect of which the jury alone had the right to determine.

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*We think it will be found upon examination that all of the numerous exceptions are met in the discussion of the questions hereinabove, and therefore it is useless to take them up in detail.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

Mr. Justice McGOWAN. I concur. Without going into the inquiry whether the mortgage itself of the foundry, "with all the working implements, machinery, and tools

therewith connected, now on the premises," &c., did not really mean the foundry in working condition as a whole, with all its incidents and appurtenances, including such working implements as might be procured in place of those worn out or abandoned in running the establishment as a foundry, it seems to me that the purchaser at the sale ordered by the court has the right to stand on the very terms of the decree and advertisement under which he purchased, as constituting his contract, without going back of that to inquire whether the decree of sale was not expressed inaccurately, or at least in terms wanting in precision. The terms of the decree were, "all that lot of land and all the buildings thereon, including machine and workshops and foundry, with all the working implements, machinery, and tools therewith connected, now on the premises," &c. The plaintiff was a party to the proceeding in which this decree was rendered and did not appeal. The sale was advertised accordingly, and it seems to me that it is now too late for him to claim that the words, "now on the premises," inserted in the decree, really meant, by a process of reasoning, the date of the mortgage, and not that of the decree in which the expression occurs. A purchaser at a judicial sale cannot be affected by mere irregularities in the proceedings.

Mr. Justice McIVER, dissenting. As I cannot concur in the conclusion reached by a majority of the court, I will proceed to state, briefly, the reasons which forbid my concurrence. While I agree with the Circuit Judge that one of the material questions in the case was, whether "patterns" were embraced in the terms, "all the working implements and machinery and tools" used in the mortgage under which defendants claim, and

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that this question was properly submitted to the jury as a question of fact, after instructions as to the meaning of those terms, it seems to me that there was another material question, to wit: assuming "patterns" to be embraced within those terms, whether all of the patterns which were on the premises at the date of the sale passed to the purchasers, or only those which were there at the date of the mortgage, upon which the jury were not properly instructed.

Assuming, as I shall do, throughout this discussion, that patterns are embraced within the terms of the mortgage, it seems to me quite clear that only those which were on the premises at the time of the execution of the mortgage were covered by it, and only those could be sold under it. Such was the conclusion of Judge Pressley at a former stage of this controversy, and such seems to have been the opinion of this court. For in 15 S. C. Reports, at page 203, the following language is found in the opinion of the majority of the court: "The Circuit Judge decided

at once the legal question, and held, no doubt correctly, that such portion of the patterns as were on the premises at the date of the execution of the mortgage belonged to the defendants, and such portion as was placed there after the execution of the mortgage belonged to the plaintiff."

If this be so, then I think the Circuit Judge erred in refusing to charge as requested by the plaintiff: "That such patterns as were placed there since April, 1866, when the mortgage was executed, remained the property of Mr. Eason, notwithstanding said sale and conveyance." The proposition of law upon which his honor based his refusal of this part of plaintiff's request, to wit: "That when a mortgage is taken on a railroad, machine shops, and property of that kind, having, at the time the mortgage was taken, certain chattels connected with the business, such as the cars and engines of a railroad, and such as the tools and working implements of a foundry, that as the times change, as the necessities for other tools exist, as the exigency arises for supplying the place of worn out tools, and for bringing into the plant other tools to meet the improvements in mechanics, such additions to the original stock pass under the original mortgage, and in a sale under foreclosure such articles would go to the purchaser," cannot be maintained as a general proposi-

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tion. It only applies where the mortgage contains such language as may be construed as evidencing an intention to embrace such after-acquired property, and it certainly cannot be applied in a case like this where the mortgage is in express terms limited to the property on the premises at the time of its execution.

The rule, as I understand it, established by the authorities cited by appellant's counsel is, that where an indivisible, entire thing, as a railway locomotive for example, is mortgaged, and subsequent to the execution of the mortgage new parts are added to it or substituted for others for the purpose of improvement or repairs, such additions constituting, as they do, essential parts of the thing mortgaged, will pass under the mortgage. So, too, where real estate is mortgaged, anything subsequently attached to it so as to acquire the character of a fixture, and becoming thus a part of the thing mortgaged, will be covered by the mortgage. But where, as in this case, the mortgage is on "all that lot of land, with all the buildings thereon, including machine and workshops and foundry, with all the working implements, machinery, and tools therewith connected, now on the said premises, situate," &c., I do not see how it can be so construed as to cover any such articles as were not on the premises at the date of the mortgage. For it will be observed that in designating the implements and tools which it was in-

tended to mortgage they are described not only as those connected with the foundry, but also as those now on the premises. So that unless they fulfilled both of these conditions, viz., that they were not only connected with the foundry, but also that they were on the premises at the time the mortgage was given, they could not be regarded as part of the property intended to be mortgaged.

It is contended, however, by the counsel for respondents that the mortgage is not before us, first, because it was not introduced in evidence, and, second, because it has been merged in the judgment of foreclosure, and therefore the court is not at liberty to inquire into the proper construction of the mortgage. As to the first objection, I do not see where there was any necessity for offering the mortgage in evidence, in view of the fact that it is distinctly alleged in the second paragraph of the complaint that the property mortgaged was the foundry, "with all the

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working *implements and machinery and tools therewith connected, which were on the said premises at the time the said mortgage was executed to one Hannah Euston," which allegation was expressly admitted in the answers of both of the defendants. As to the second objection, it is quite sufficient to say that it is permissible and sometimes necessary in construing a judgment to look into the pleadings under which such judgment was rendered. Here the whole record in the action for foreclosure was introduced in evidence, and in it we find that the complaint sets out in *hæc verba* so much of the mortgage as describes the property intended to be mortgaged, from which it clearly appears that the mortgage covered only the implements and tools on the premises at the date of the mortgage.

This brings us to the inquiry as to the proper construction of the judgment of foreclosure. Inasmuch as it is quite clear that property not embraced in a mortgage cannot properly be ordered to be sold under a proceeding to foreclose such mortgage, it seems to me that nothing but the clearest and most explicit language could justify the conclusion that the judgment in this case required or authorized the sale of any property not embraced in the mortgage. Instead of finding any such language either in the judgment or the pleadings upon which it was based, it appears to me that the language as used clearly evinces an intention to order the sale of nothing more than what could be properly sold, to wit: the property on the premises at the time of the execution of the mortgage. In the complaint for foreclosure the allegation is that, on the day named, the mortgagors "executed to plaintiff their deed and thereby conveyed to plaintiff, by way of mortgage, the following described real estate and other property, situate in the city of

Charleston, County and State aforesaid, to wit:" and then follows the description of the property, placed within quotation marks, in which the tools and implements intended to be mortgaged are designated as those "now on the premises." The manifest meaning of this is that the description of the property is copied from the mortgage, and hence that the word "now" in the phrase "now on the premises," must be read as referring to the date of the mortgage, and not to the date of the complaint.

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*So in the notice of pendency of action, the description of the property covered by the mortgage, though not placed within quotation marks, is in terms declared to be the same as that given in the mortgage, and hence there was no necessity for the use of quotation marks: for the language used in the notice of the pendency of action in reference to the description of the mortgaged premises is: "And are described in said mortgage as follows, to wit: all that lot of land, with all the buildings thereon, including machine and work shops and foundry, with all the working implements and tools and machinery therewith connected, now on the said premises," &c., showing plainly that the property referred to was the property covered by the mortgage, and for its description reference was had to the terms in which it was described in the mortgage.

Coming then to the judgment of foreclosure, we find that the following language is used: "That the mortgaged property described in the pleadings as hereinafter set forth be sold," &c., and when we come to that part of the judgment setting forth the description of the property, the following language is employed: "The following is the description of the property to be sold as hereinbefore directed," and then follows the description as copied from the complaint and placed within quotation marks. It seems to me, therefore, that the judgment cannot be construed as requiring or authorizing the sale of any property except that described in the mortgage, and that as it is clear that the description therein contained did not embrace any tools or implements except those on the premises at the time of the execution of the mortgage, there was no authority whatever for the sale of any such articles as were placed on the premises after the date of the mortgage. Under this view it is unimportant to inquire into the construction of the advertisement of the sale and the deed from the master, for unless there was authority for the sale of such patterns as were placed upon the premises after the execution of the mortgage, they could not pass under such deed, no matter what might be the terms used. It would not, however, be dillicult to show, if it was necessary, that the advertisement and deed from the master, properly construed, cannot be regarded as embracing

any property except such as is described in the mortgage.

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*It is contended by respondent that the plaintiff, by bidding at the sale and otherwise, is estopped from setting up any claim to such of the patterns as were placed upon the premises after the date of the mortgage. I do not see any ground for an estoppel. The fact that the defendants had authorized their agent to bid more than the amount for which the property was knocked down to them, shows very clearly that the conduct of the plaintiff at the sale did not induce them to do anything which they otherwise would not have done. But in addition to this, it is manifest from all the testimony, that the plaintiff, by bidding at the sale, did not intend to convey, and did not in fact convey, the impression that he was thereby assenting to the sale of such patterns as were placed on the premises after the mortgage. On the contrary, he had contended from the first that none of the patterns were covered by the mortgage, because, as he insisted, they were not embraced in the terms used in the mortgage. But even assuming, as we have done, that the terms used in the mortgage did embrace patterns, and assuming further that the plaintiff was bound to know this, his bidding at the sale cannot be regarded as an acquiescence in the sale of any other property than that which was ordered to be sold, and as the order of sale did not embrace any other property except that which was covered by the mortgage, and as the patterns placed on the premises after the execution of the mortgage were not embraced therein, the fact of his bidding at the sale cannot be regarded as an acquiescence in the sale of such patterns, and he is not estopped from setting up a claim to them.

It seems to me, therefore, that the judgment of the Circuit Court should be reversed and the case be remanded to that court for a new trial.

Judgment affirmed.

25 S. C. 564

HAIL v. SOUTH CAROLINA RAILWAY CO.

(April Term, 1886.)

[1. *Carriers* ⇐381.]

In action by a passenger against a railway company for ejecting him from its train after tender of the sum at which tickets were sold, and while on his way to a point beyond the State

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limits, the *report of the railroad company fixing rates was admissible in evidence, there being testimony that those rates had been accepted and acted upon by the company.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1476; Dec. Dig. ⇐381.]

[2. *Commerce* ⇐58, 61.]

The Railroad Commission of this State cannot regulate passenger fare to a point in another

State, but a regulation as to the hours for opening the ticket office is not a matter of inter-State commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 77, 82; Dec. Dig. ⇐58, 61.]

[3. *Carriers* ⇐357.]

There being some evidence upon all the points necessary to plaintiff's case, the Circuit Judge erred in granting a non-suit.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1433; Dec. Dig. ⇐357.]

[4. *Carriers* ⇐381.]

[A railroad report containing a regulation as to the hours of opening the ticket office was competent evidence, aside from the question of interstate commerce.]

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1476; Dec. Dig. ⇐381.]

Mr. Justice McIver dissenting.

Before Fraser, J., Aiken, April, 1885.

This was an appeal from an order of non-suit. In granting the order the Circuit Judge made the following remarks:

From the little time I have had to consider the authorities relied on by the plaintiff, I do not see that I am bound by these decisions out of the State. It seems to me that the decisions relied on are not founded upon a correct view of the relations of these employees to the railroad company and each other; although the decisions quoted are from eminent sources. What may be the rule ultimately adopted, I am not able to say; but if that rule is adopted which is contended for, it would amount to a virtual repeal of all the rules of the railroad company requiring passengers to buy tickets at places where tickets are sold. Take, for instance, a train with fifty or a hundred passengers, none of them having tickets and ignoring the regulations of the railroad company. The conductor would be called upon, at his peril or that of the company, either to pass them over the road or to put them out, and in that case the regulations would be of no avail, as there would be no practicable way of recovering the ten cents (as in this case) back again.

I do not think that the rule cited in those cases ought to be the rule in this State. The application for the ticket ought to have been made within office hours, and if the railroad company advertises its office hours from six until ten, as in this case, I think that the application for the ticket ought then to have been made. I think that if the train passed out of office hours, the ticket should have been purchased previously.

Again, this was a ticket for a ride from Aiken to Augusta. It is true that Augusta is just across the Savannah river, but the

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*principle is just the same whether it was outside of the State a half mile or a hundred and fifty miles, and whether it was to Augusta or to Atlanta, neither the State nor the railroad commission had a right to regu-

late inter-State travel any more than they have a right to regulate inter-State commerce. This purchase of a ticket, which I think is established to be one of the rules of the company, was merely one of the incidents of the trip from here to Augusta, and the commission had no more right to regulate the ticket than the fare itself.

I think the case might as well be reviewed by the appellate tribunal at this point as at any other, and I will grant the non-suit.

Mr. G. W. Croft, for appellant.
Messrs. Henderson Bros., contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. The plaintiff, being a passenger on the South Carolina Railway, travelling from Aiken, in this State, to Augusta, Ga., was ejected from the train by the conductor of defendant company; for this the action below was brought, demanding \$2,000 damages. In the course of the trial he offered in testimony the 5th annual report of the railroad commission, to show the rates allowed to charge passengers, and also to show the regulations requiring railway companies to have their depot open a reasonable time before the departure of the trains. This testimony was ruled incompetent, and therefore was excluded. At the close of plaintiff's testimony, the defendant moved a non-suit, which was granted. The appeal raises but two questions: 1st. Was the testimony referred to above, to wit, the report of the railroad commission, properly and legally excluded? 2d. Was it error to grant the non-suit?

The complaint alleged, in substance, that the price of a ticket from Aiken to Augusta was fifty-five cents; that he was unable to procure a ticket at Aiken, where he boarded the car, on account of the negligence of the

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ticket agent in not having the office *opened in time; that when the conductor called for his fare he tendered fifty-five cents, the ticket price, informing the conductor that, the office not being open, he could not get a ticket before leaving Aiken. The conductor refused the tender and demanded sixty-five cents, which the plaintiff refusing to pay, he was ejected.

His honor, Judge Fraser presiding, held the report of the commission incompetent testimony—we suppose upon the ground that the commission having no right to regulate inter-State commerce, and the plaintiff being on his way from a point in this State to a point in Georgia, its regulations could have no application here, as this was a case governed by the doctrine of inter-State commerce. Doubtless, this is a case involving inter-State commerce in some of its aspects, as that doctrine applies as well to the transportation of passengers as of goods, and the

railroad commission had no authority to fix rates for passenger fare from Aiken to Augusta. See [Railroad Commissioners v. Railroad Co.] 22 S. C., 236. But even an unconstitutional act, when adopted and acted upon by a party with reference to whom it has been enacted, may be binding upon such party. See *Hand v. S. & C. R. R. Co.*, 21 S. C., 179.

Now, the allegation of the complaint was that the ticket price between these points was fifty-five cents, and the object of the testimony offered was to show that this price was established by the railroad commission as a matter of fact, which seems to have been followed up by evidence from the ticket agent that that was the price adopted by the company. This agent said: "I sold tickets to Augusta for fifty-five cents, sir. That was after the rates had been inaugurated and fixed by the railroad commission, I believe." So whether the action of the commission was legal and binding on the company or not, yet if the company adopted the regulation made, and held it out to the community as the rate charged, until changed parties would have the right to demand a compliance therewith. In this point of view, we think this testimony should have been admitted as a statement of a fact, having more or less bearing upon the merits of the case, as the judge in his judgment might determine in the further progress of the case, and which he could explain in his charge.

But if we are wrong here, that portion of this report which referred to regulations in

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reference to having the depot open a *reasonable time before the departure of trains, we think was competent, under the principle of *Munn v. Illinois*, 94 U. S., 135 [24 L. Ed. 77], the case of the grain elevator erected in Chicago; also *The State Tax Case*, 15 Wall., 233 [21 L. Ed. 164], where it was said: "That it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution. The warehouses of these plaintiffs in error are situated, and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in State as well as those engaged in inter-State commerce, but they are no more necessarily a part of commerce itself than the dray or cart by which, &c. * * * Incidentally they may become connected with inter-State commerce, but not necessarily so. This regulation is certainly a thing of domestic concern * * *."

And in the *Railroad Commissioners v. Railroad Company*, 22 S. C., 236, this court said: "It may, as we think, also be taken as settled that, as a general rule, each State may control, as a matter of domestic concern, all railroads and other things, proper subjects of public control, which are located entirely within the borders of the State, al-

though such regulating control may affect incidentally general inter-State commerce, with which the subject may connect"—citing *Munn v. Illinois*, supra. Now, here the depot at Aiken was entirely within this State, its regulation was of domestic concern, and as far as we can see now, the regulations were not illegal; at least, this does not seem to us to have been so certain as to exclude the testimony offered. It should have been admitted subject to the charge of his honor.

But independent of these questions, did not the plaintiff have enough testimony to prevent a non-suit? The issues were: 1st. The price of a ticket between the points mentioned. 2d. That plaintiff was prevented from obtaining a ticket by the negligence of the company. And, 3d. That he was ejected after offering the ticket price and explaining to the conductor why he failed to procure a ticket. These were the material issues, and necessary to plaintiff's action. Was there a total absence of evidence as to any one of these points? If not, then the case should have gone to the jury. As to the first point, it makes no difference how the company come to establish a ticket price at fifty-five

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*cents; whether under the direction of the railroad commission or not. If it was established, and the community so informed by the company, whether this was upon its own judgment or by the illegal direction of the commission, passengers had the right to act upon it until changed. So that the only question as to this was, had a ticket price been established, as alleged, at fifty-five cents? Certainly there was some evidence on this point. We think, too, there was evidence as to the allegation that plaintiff was not furnished an opportunity to procure a ticket on account of negligence—weak it may be, but still some evidence which had to be weighed, the province of the jury. And there was evidence also that plaintiff was ejected, after full information of all the facts connected with the failure of the plaintiff to get a ticket, and after a tender of the ticket price. Under these circumstances we think the case was a proper one for the jury.

It is the judgment of this court, that the judgment of the Circuit Court be reversed, and the case be remanded for a new trial.

Mr. Justice McGOWAN. I concur. Common carriers, from the nature of their vocation, are bound to transport all persons who pay or offer to pay the established fare. For their own convenience they sometimes require a ticket to be purchased in advance, and to insure compliance with the requirement they charge a higher rate of fare if the ticket is not so procured. I assume that such regulation is allowable, on condition, however, that the company, from which alone tickets can be secured, affords an opportunity to purchase a ticket in advance.

If no such opportunity is afforded, and a ticket cannot be purchased in advance, it seems to me that the company could not resort to the extreme course of ejecting a passenger, only for the reason that he had not complied with a rule which they had made it impossible for him to do. Whether such opportunity was afforded the plaintiff was a question of fact. There was some evidence upon the subject, and the question is whether it was "pertinent, competent, and relevant to the fact in dispute." It seems to me that there was some such proof, and

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therefore the case should have been *submitted to the jury. *Davis v. C. & G. R. R. Co.*, 21 S. C., 93; *Couch v. R. R. Co.*, 22 Id., 561.

Mr. Justice McIVER, dissenting. It seems to me quite clear, under the case of *Railroad Commissioners v. Railroad Company*, 22 S. C., 220, that the railroad commissioners had no right to establish the rate of fare which should be charged for transporting a passenger from the town of Aiken, in South Carolina, to the city of Augusta, in the State of Georgia, and therefore that the report of the railroad commissioners was incompetent evidence for any purpose in this case and was properly ruled out. While it may be true that the railroad commissioners may be invested with power to regulate the hours for opening the ticket office of a railroad company, so as to afford passengers a reasonable time for the purchase of tickets, so far as travel within the State is concerned, I do not see how such a regulation can be allowed to affect inter-State travel, and hence the report of the commissioners was certainly irrelevant even for the purpose of showing the depot regulations, in a case like this, where the rights of an inter-State passenger are in question. It seems to me, therefore, that there was no error in excluding the report of the railroad commissioners.

The next inquiry is, whether the non-suit was properly refused. The defendant undoubtedly had a right to eject the plaintiff from the train if he refused to pay a reasonable compensation for his passage when demanded. The plaintiff certainly did refuse to pay the compensation demanded of him—sixty-five cents—but, as he alleges in his complaint, he tendered "the sum of fifty-five cents, which was a reasonable and just fare or toll for said passenger, and which was the fare as fixed under the law," which the defendant's agent refused to accept. Now, as we have seen that the amount of the fare could not be fixed by the railroad commission, and as it is not shown that the amount of such fare is fixed by defendant's charter, it is quite clear that the amount tendered could not be "the fare as fixed under the law;" and the only question is, whether there was any evidence that the amount

tendered was "a reasonable and just fare" for the transportation of plaintiff by that train from Aiken to Augusta. I am unable

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*to find any evidence upon that point. Certainly no witness has undertaken to say what would be a reasonable and just fare.

It is argued, however, that the testimony of the agent, Wigfall, that at that time the regular passenger fare from Aiken to Augusta was fifty-five cents, and that he sold tickets at that rate, together with the fact testified to by the plaintiff, that about ten days afterwards he was charged only fifty-five cents on the same train, was evidence tending to show that such was a reasonable and just fare, and therefore the question should have been left to the jury. I cannot so regard it, for it will be seen that the witness, Wigfall, was testifying to "the regular passenger fare," and not to what was a reasonable compensation for transporting a passenger from Aiken to Augusta, and that his testimony was that he sold tickets at fifty-five cents after the rates had been fixed by the railroad commission, which pretty clearly indicated that this amount was charged, not because it was a reasonable and just fare, but merely in compliance with a regulation which, though unauthorized, the company did not care to contest.

It will further be observed that the train from which the plaintiff was ejected was not advertised as a passenger train, and so far as appears from the evidence, no tickets were ever sold for that train at Aiken, as it passed that point at a very early hour, before the agent was required to open the office. Hence the fact that tickets by the regular passenger train were sold for fifty-five cents, does not, in my judgment, even tend to show that sixty-five cents was an unreasonable charge for passage by the train in question, for it not unfrequently happens that railroad companies are induced by a variety of reasons to charge less than reasonable rates on their regular passenger trains.

It seems to be assumed that the plaintiff was charged sixty-five cents because he had no ticket, but I am unable to find anything in the testimony to warrant such an assumption. The plaintiff certainly does not say that the conductor assigned any such reason for making the charge. On the contrary, the testimony of the plaintiff is this: "Soon after leaving the depot the conductor came round and asked for my fare. I offered him the money and said that fifty-five cents was the regular price. He said, No, it is sixty-five cents, and I said I wouldn't pay

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it." Not a word then said about tickets. The conductor did not ask the plaintiff for his ticket, but for his fare, indicating clearly that tickets were not sold for that train.

Even after the plaintiff had told the conductor that he had been unable to procure a ticket as the office was not open, nothing was then said to indicate that the sixty-five cents was demanded because plaintiff had no ticket. In fact, according to the plaintiff's own testimony, all that the conductor ever said about tickets was that "he had nothing to do with the tickets, that was none of his business," and he all the time insisted that the charge he made was required by his instructions contained in a little book, which he offered to show plaintiff, but which he declined to look at. Indeed, I am unable to find anything in the testimony showing that the railway company had ever established a regulation whereby an extra charge was to be exacted from passengers failing to procure tickets, and it seems to me to be an entire mistake to look at the case in that aspect. Certainly the fact that the plaintiff on a single occasion, some ten days afterwards, was only charged fifty-five cents on the train in question, affords no evidence that the charge of sixty-five cents on the occasion in question was an unreasonable charge.

In the absence of any law fixing the rate of compensation which the defendant had a right to demand for the service required by the plaintiff, he could only justify his refusal to pay the amount demanded by showing that such amount was unreasonable, and of this I think there was no evidence. It seems to me, therefore, that there was no error in granting the non-suit.

New trial granted.

25 S. C. 572

CAROLINA NATIONAL BANK v. SENN.

KOEGAN v. SAME.

BATEMAN v. SAME.

(April Term, 1886.)

[1. *Appeal and Error* ¶169.]

On exceptions to homestead, the Circuit Judge declined to consider any questions other than that of the homestead allowed, and therefore only that question can be considered on appeal. [Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 1634; Dec. Dig. ¶169.]

[2. *Homestead* ¶152.]

A person can claim homestead only against

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a debt of his own or of one *whose family he is a member of. Children of a deceased debtor cannot claim, each for himself, as the head of a family, a separate homestead out of the lands of the deceased debtor against his debt; but, collectively, they are entitled to one homestead, whether they be infants or adults.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 293; Dec. Dig. ¶152.]

[3. *Homestead* ¶150.]

Upon refusal to sustain the three homesteads set apart in this case, the Circuit Judge

did not err in omitting to order a reassignment of a single homestead to the claimants as a family.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 305; Dec. Dig. [§150](#).]

[4. *Costs* [§58](#).]

Where a petition for a homestead is refused, costs cannot be taxed against the petitioner.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 28; Dec. Dig. [§58](#).]

[5. *Costs* [§3](#).]

[The right to costs is dependent on statutory provisions, there being no right thereto at common law.]

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 1; Dec. Dig. [§3](#).]

[This case is also cited in *Ex parte Karish*, 32 S. C. 410, 11 S. E. 298, 17 Am. St. Rep. 865, and distinguished therefrom.]

Before Cothran, J., Orangeburg, October, 1885.

The opinion states the case. The Circuit decree was as follows:

It has already appeared from the nature of the proceedings, as well as from the statement of facts agreed upon, that the main question involved is that of homestead, pure and simple, and to that I propose to confine myself. It may be premised that the manifest construction by our Supreme Court of section 32, article 11., of the Constitution, is that it is broad enough in its terms to admit of more legislation than was contemplated by the act of September 9, 1868 (16 Stat., 19), which provides homestead only for debtors in execution. Besides these, two other classes of persons are now provided for, to wit, widows of husbands who would have been entitled, and all others being heads of families, against whom not even final process has been obtained. These provisions are about as ample as anything short of a total denial of all the rights of creditor in this behalf, or the boldest spirit of communism could demand.

Under which of these do the parties claim? Clearly not under the first or second. Then, are they entitled as standing in the third class? It will be borne in mind that the testator directed his debts to be paid, if possible, without the sale of property. Doubtless this inspired the removal of the widow and children from Columbia to the plantation in Orangeburg, and the dedication of the surplus income of the plantation and the proceeds of the sale of the Columbia property to the payment of debts. The sale, which seems to have been made at an unfortunate time, fell short of the purpose, and for which the executor had some receipts from the Orangeburg property. In the meantime the widow

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died. *At the death of her husband she had a constitutional right, as widow, to homestead, but there were no means then provided for the assertion of such right.

It appears, however, very clearly from the reasoning in *Norton v. Bradham* (21 S. C., 375), that she was within the purview of the

terms of the organic law. She was "the person entitled thereto." Could this personal right of hers have remained in abeyance from the death of her husband, to be brought into active exercise and fruition by subsequent legislation, as was had? I think so; and if so, did the right descend to her children? At the death of James Claffy, this was the only right of homestead in his lands. It was a constitutional right, but incapable of assertion for want of legislative provision to that end, and it inured to the widow. She died in 1875 without asserting it. It is needless to attempt to trace it further. But the parties here are not claiming the right to their mother's homestead. They set up their claims to three several homesteads! By what system of devolution (or evolution, either, as to that matter) can such result obtain?

Suppose James Claffy, at the time of his death, had owned four plantations worth \$1,000 each, and owed \$1,000 for money borrowed upon the faith of having \$3,000 more than the homestead exemption. Again, suppose that he left four sons as devisees of the four plantations, respectively, each son being the head of a family, and the sons had been let into their devises by the executor upon the understanding that they should, from the use of the lands, pay off the \$1,000, and afterwards some payments should be made upon the debt, the creditor indulging them, could it be seriously contended that after ceasing to pay, or to make further effort, that the creditor could be met successfully and his debt lost by the interposition of claims of homesteads to the whole estate? I cannot think so.

It is, however, insisted by the learned counsel for the claimants that this is a case of actual partition among the children, and that they are in exclusive possession, severally, of the parcels of land claimed as homesteads. I have already adverted to the fact that in the agreed statement of counsel this does not appear. It has been attempted, however, to maintain this by affidavits—always an unsatisfactory means of determining disputed facts.

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*The practice in this State, from the time of *D'Urphy v. Nelson*, as far back as 1st Bravard, down to *Huggings v. Oliver*, 21 S. C., 117, with numerous cases intervening, has been formulated into a rule by Justice McIver, in the last named case, as follows: "That while, as a general proposition, it is true that lands of an intestate may be sold upon a judgment recovered against the administrator upon a debt of the intestate, yet, if the lands have passed into the actual and exclusive possession of the heirs before judgment has been recovered, and before any lien has been fixed upon them, they can no longer be sold under such judgments," &c.

It will be observed, however, that this was a case of intestacy, as were, also, the cases

of Martin v. Latta, Bird v. Houze, Jones v. Wightman, &c. The case under consideration is one of testacy, with directions to the executor to hold the estate in hand until the debts are paid. It may be that the matter of partition and exclusive possession by the devisees, the claimants here, may avail them, if made out, as a means of holding the several parcels of land now in their possession, but it will be in a different right to that of homestead. Whenever the time comes for such assertion of right on their part, the court will move to its conclusion upon firmer ground than that which can be furnished by affidavit.

Wherefore it is ordered, adjudged, and decreed, that the plaintiffs' exceptions to the assignments of homestead in the said several cases be sustained, and that said assignments be, and the same are hereby, set aside. It is further ordered, that the plaintiffs have judgments, severally, against the claimants for their costs and disbursements.

Messrs. Izlar & Glaze, for appellants.

Messrs. T. M. Raysor and A. B. Sawyer, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. The points of this case will be sufficiently explained by the facts admitted on the record:

"That on November 6, 1873, James Claffy made and published his last will and testament, as follows: 1. Debts to be paid out

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*of income of crops, and, as far as possible, without selling property. 2. After payment of debts, all his property, real and personal, to go, one third to his wife, Eliza, her heirs and assigns forever; the remaining two-thirds to be equally divided among his four children, Michael Robert, James Henry, Anna Maria, and Francis Peter, share and share alike, to them and their heirs and assigns forever. 3. Rufus D. Senn named as executor. James Claffy, at the time of making his will and at the time of his death, resided in the city of Columbia. Said will was admitted to probate, in the County of Richland, December 22, 1873. Rufus D. Senn qualified as executor on same day, and is now such executor. The wife and children named in the will survived testator.

"At the time of his death, the testator was possessed of considerable personal property, which went into the hands of the said Rufus D. Senn, as executor, and was seized of certain valuable real estate in Richland and Orangeburg Counties. Judgments in the above entitled actions were obtained in Richland County against Senn, as executor, in the year 1878. The causes of action on which said judgments were obtained arose subsequent to the constitution of 1868, and were simple contracts not under seal. Executions were issued in the cases of Koegan and Bate-

man, and valuable property in the city of Columbia was levied upon February 8, 1878, as the property of James Claffy, deceased, to satisfy the same. Transcripts of said judgments were docketed in Orangeburg County August 18, 1884. Leave to renew executions was granted December 3, 1884. Renewal executions were issued December 3, 1884, and lodged with the sheriff of Orangeburg January 28, 1885. The sheriff of Orangeburg, under these executions, levied on all that tract of land, containing 362 acres, situate in Orangeburg County, as before stated, as lands belonging to the estate of James Claffy, deceased, on February 23, 1885.

"The lands so levied are the same now in the possession and occupancy of the claimants, Robert M. Claffy, James H. Claffy, and Anna M. Darby, and of Francis P. Claffy, and which were in their possession before and at the time of said levy. The said Robert M. and James H. Claffy are now, and were at the time of said levy, heads of families:

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and the said Anna M. Darby is now, *and was at the time of said levy, a married woman, whose husband has not sufficient property of his own to constitute a homestead. That the said Robert M. and James H. Claffy, and Anna M. Darby, with their respective families, resided on different portions of said lands at the time of such levy, and now reside thereon. Robert M. and James H. Claffy and Anna M. Darby each claimed a homestead in the portion of land whereon they resided with their families. On February 23, 1885, a homestead in said lands was duly set off and assigned by metes and bounds to Robert M. and James H. Claffy and Anna M. Darby, respectively, by appraisers duly appointed and sworn for that purpose. That the homestead so assigned to each of the said parties consisted of the dwelling house and out-buildings of said parties, respectively, and one hundred and ten acres of the lands appurtenant thereto."

To these homestead assignments the plaintiffs filed the following exceptions: "First. Because the heirs of James Claffy, deceased, are not entitled each to a separate and distinct homestead out of the estate of their father, against judgments obtained against his executor before the estate was settled. Second. Because the claim of separate parcels of land by the children of James Claffy, deceased, does not entitle each to a separate homestead out of their father's estate against judgment debts of their father. Third. Because the widow of James Claffy being now dead, in no point of view could the children have homestead in their father's estate, except that on which their mother resided previous to her death, being the family homestead of their father. Fourth. Because the children are not entitled to their distributive share, over and above the exemption allowed by law to the head of the family (being a family homestead), until the judgment debts

against their father have first been satisfied."

These exceptions came on to be heard by Judge Cottrah, when other evidence was offered in addition to the "agreed statement" of facts, principally, however, in reference to the time when the family left Columbia and went upon the Orangeburg land, and as to an alleged parcel partition of the same among the children after their mother's death (in 1875); that the children paid the taxes on the land, but always returned it as belonging to the estate of their father, &c. But the Cir-

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cuit Judge, holding that the issue *made by the pleadings and the agreed statement of facts was that "of homestead pure and simple," confined himself to that question, and, sustaining the exceptions to the three homesteads as set off, set the same aside; and he further ordered that the plaintiffs have judgments severally against the claimants for their costs and disbursements.

From this judgment the three claimants appeal to this court, alleging error on the part of the judge in sustaining the exceptions hereinbefore stated, and also upon additional grounds, as follows:

"I. Because his honor erred in holding that the several claimants were not entitled, under the constitution and laws of this State, to a homestead in the lands actually held, possessed, and occupied by them respectively, the same consisting of their dwelling houses and lands appurtenant thereto; and the said Robert M. Claffy and James H. Claffy being heads of families, and the said Anna M. Darby being a married woman, whose husband has not sufficient property of his own to constitute a homestead.

"II. Because his honor erred in not allowing a homestead to the claimants, they being entitled to a homestead as the children of James Claffy deceased, if not otherwise; and to have the family homestead exempted in like manner, as if their father were living, and to have the same appraised and set off to them.

"III. Because his honor erred in holding that although the widow of James Claffy was only entitled to the constitutional right of homestead at the time of his death, that this right 'was incapable of operation for want of proper provision of law to that end.'

"IV. Because his honor erred in not ordering a reappraisement of homestead to the claimants in the above stated cases."

There was argument at the bar to the point, that the judgments against Rufus D. Senn, as executor of the deceased debtor, James Claffy, could not levy and sell the land in Orangeburg, for the reason that it had, as alleged, been transferred by the executor to the exclusive possession of the children as devisees under the will, and therefore it was not liable to levy and sale according to the doctrine of *Huggins v. Oliver*, 21 S. C., 147, and the line of authorities therein reviewed.

It was also argued, that, as the debts were simple contracts of 1873, upon which judg-

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ments were *only rendered in Richland in 1878, and not lodged in Orangeburg until 1884, the claimants were protected in the possession of the lands by lapse of time and the statute of limitations. While, on the other side, it was suggested that there was really no absolute devise of the land to the children, but only "after payment of the debts," which was, in effect, to charge the land with their payment; that the executor, Senn, never gave unqualified assent to the devises but, being responsible for the payment of the debts, still kept control of the land for that purpose; and, therefore, the possession of the children was merely permissive, and neither adverse nor exclusive. See 2 Story Eq. Jur., § 1246; *Lupton v. Lupton*, 2 Johns. Ch. 614. But as the case was before the Circuit Judge simply on exceptions to the allowance of three homesteads, he declined to consider any other question except that of homestead as allowed; and, of course, there can be no other question before us on appeal from his judgment. Some of the matters indicated in argument may be important—too important, at all events, to be considered incidentally upon a mere question of homestead—but they are not before this court, and in order to prevent possible injustice, we take occasion to state that whatever is said here is intended to be entirely without prejudice, except as to the very points ruled.

Then as to the allowance of three homesteads in the Orangeburg lands, one to each of the applicants, children of the deceased debtor. Many new and difficult points have arisen under the constitution and laws giving the right of homestead; and it strikes us that the one made here is not only novel in its character, but ingenious. As we understand it, the proposition is, that, as against a debt of the ancestor, his children in possession of lands of his estate are each entitled to a homestead therein, provided such child happens to have a family of his own, and, therefore, may be said to be, in general terms "the head of a family"; thus multiplying homesteads in the lands of a deceased debtor, according to the number of his children who may happen to be on the lands and to have families of their own. Surely, such could not have been the intention either of the provision in the constitution or of the laws passed to carry it into effect.

The deceased contracted the debts upon

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which the judgments *were rendered in April and August, 1873, and soon after, in December of the same year, died. Although the judgments were only rendered in 1878, and not transcribed to Orangeburg until 1884, it is quite clear that the question of homestead in lands of the deceased must be determined by the law as it stood in 1873. See *Norton*

v. Bradham, 21 S. C., 381. At that time the original constitution (1868), without amendment, was of force, which (section 32 of article II.) declared as follows: "The family homestead of the head of each family residing in this State, such homestead consisting of the dwelling house, out-buildings, and land appurtenant, not to exceed, &c., shall be exempt from attachment levy, and sale on any mesne or final process issued from any court," &c. It is true that the terms of this provision are very general—"the head of each family residing in this State," and "any process from any court," &c.—but can there be a reasonable doubt that, as against the same debts, only one homestead was intended, and that for the protection of the debtor himself or, in the case of death, of his family? Who but the debtor himself, against whom there is process, can need "exemption from process," either for himself or, in certain circumstances, his family? It seems to us that any other interpretation would run counter to the whole spirit and object of the homestead provision.

But if there could have been any doubt arising from the very general terms of the provision in the constitution, we think they were entirely removed by the act of February 22, 1873 (15 Stat., 371), which was passed for the express purpose of carrying that provision into effect. In the first section of that act it abundantly appears that the homestead was intended, at least in the first instance, to exempt the property of the debtor. In providing for the appointment of appraisers to set off the homestead, it directs the sheriff to cause the appointment of three appraisers, "one to be appointed by the creditor, one by the debtor, and one by himself, provided, should the creditor or debtor refuse," &c. It also declares that when thirty days shall have elapsed after filing the return setting off homestead to the debtor, &c., and no good cause has been shown, &c., such debtor may have such return recorded," &c. It thus appears that the exemption was given, at least primarily, to the debtor against

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whom there is process. We cannot conceive of such a thing as an "independent homestead," simply on the ground that the party is on the land levied, and happens to be "the head of a family." Something more is necessary. Surely, a stranger, without privity with the debtor, could not set up the right; but to be entitled against "any process," the applicant must make the claim either as the debtor himself, or, after his decease, as a member of his family.

It is true that in the case of Norton v. Bradham, supra, it was held that "the legislature had full power to enact the act of 1874 (15 Stat., 589), which extends to a wife living with her husband, who owns no property, the protection of a homestead exemption as against her own debts." But in

delivering the judgment of the court, Judge Melver carefully stated the view thus: "Looking at the constitutional provision now under consideration in this light, it would seem to be a matter of small importance whether the head of a family, or any other member of the family, was the legal owner of the family homestead. That is the thing exempted, and if the sale of it would deprive the family of its home, the mischief, which it was designed to prevent, would ensue, whether it was sold for the debt of the head of the family, or for the debt of some other member of the family, to whom such family homestead legally belonged," &c. Here none of the claimants are the debtors. Although they are claiming exemption in their father's land and as against his debts, they yet claim "independently," each for himself. This, in our judgment, they cannot do. If they are entitled to homestead, it is as their father's family, to whom his right was transmitted, and not as the independent heads of their own families respectively.

Under certain circumstances, "the children" may claim exemption as against debts of the ancestor, but in such case they can only claim as a family. The words, "each family," clearly mean the family collectively as a unit; if the widow be living, "the widow and children," or, if she be dead, "the children" as a class and not severally; and that, too, without the slightest regard to the fact whether such children are still minors in the family homestead or grown up, emancipated, and having families of their own. This is conclusively shown by the fourth section of the act of 1873, which is the only provision

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of law under which the appellants as "children" could claim homestead, the father and mother both being dead. That section is as follows: "If the husband be dead, the widow and children, if the father and mother be dead, the children living on the homestead, whether any or all such children be minors or not, shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living; and the homestead so exempted shall be subject to partition among all the children of the head of the family in like manner as if no debts existed; provided that no partition or sale in that case shall be made until the youngest child becomes of age, unless, upon proof satisfactory to the court hearing the case, such sale is deemed best for the interest of such minor or minors." This would seem to be demonstrative that the grant of the exemption to "children," as such, was intended to be a single homestead, to them as a class and not severally. The family homestead is to be exempted to them "in like manner as if the husband or parents were living"; and, besides, such homestead is subject to partition.

But if we clearly understand it, the appel-

lants do not claim their separate homesteads as "children" of the debtor, but independently, in their own right. We confess we cannot so understand it. The debts against which they claim are undoubtedly the debts of their father, and he was also the owner of the land in which the exemption is claimed; and it seems to us that the application itself for homestead as against the debts of the father, is tantamount to an admission that so much of the lands as may not be carved out by the homesteads claimed, will still belong to his estate; and is, therefore, not quite consistent with their claim of absolute title in the lands. It cannot be said that the appellants are claiming "their own individual homestead rights," when there is no debt or process against them individually as the separate heads of families, and their applications are for homesteads against their father's debts, necessarily implying that the lands are also of his estate. If the lands belonged absolutely to the claimants, there would be neither need nor propriety in claiming homesteads as against any debts but their own.

Taking it as shown, that the claims could not be for "independent homestead rights,"

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as against debts of the claimants themselves, but for rights derived from the debtor as the head of the family—their deceased father—the applications might have been made under section 8 of the act of 1873 (now substantially re-enacted as section 2002 of the General Statutes), which provides, that "whenever the head of any family, married woman, widow, or children shall be entitled to any estate or right of homestead as hereinbefore provided, and no process has been lodged with any officer against such homestead, the party or parties entitled to such homestead may apply at any time by petition to the master of said county, or if there be no master therein, then and in that event to the clerk of the court for said county, to have the same appraised and set off," &c. We cannot say that it was error on the part of the Circuit Judge to sustain the exceptions to the assignment of homestead in the three several cases stated, and to set aside the same.

But, assuming this view to be correct, further exception is taken, that, having reached that conclusion, the Circuit Judge should have ordered a new assignment of one homestead, the family homestead, to the children as a class. We do not think that the judge erred in omitting so to do. He could only decide the question which was before him, the right of each of the three parties to the homesteads as assigned. That as to one homestead had not been made or considered in the tribunal where the proceeding was commenced. After deciding the question made, the judge had no right in his court, and of his own head, to originate a proceeding for the assignment of one in the place of the three claimed. When such application

is made in the manner and in the tribunal appointed by law, and it comes up regularly, then will be the proper time to consider whether, in this case, the children as a class are entitled to the family homestead in the Orangeburg lands of the testator, which he disposed of by his will. "The right of homestead is a statutory right, or rather a constitutional right, to be enforced by statutory proceedings under the statutes upon the subject of homestead. The Circuit Court is without original jurisdiction." *Myers v. Ham*, 20 S. C., 527.

One of the exceptions complains that it was error to adjudge costs to the plaintiffs against the claimants. It has been held in this State that there is no authority conferred by the code to tax

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as costs, in special proceedings, the allowances as costs in an action. *Columbia Water Power Company v. Columbia*, 4 S. C., 402. The code defines an action to be "an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence;" and declares all other remedies to be "special proceedings." We are not aware that it has ever been decided that an application for homestead under our constitution and laws is not an action, but a "special proceeding," in the sense of the code. It has been held in New York, under a provision in her code identical with ours, that a proceeding for the admeasurement of dower is an action (see *Wait's Ann. Code*, page 19, and authorities), and it would seem that an application for the admeasurement of homestead is not essentially different from that of dower.

But it is not necessary in this case to decide whether it is an action or a special proceeding; for the homestead law does expressly allow certain specified costs in such proceedings. See section 2004, General Statutes. It is true, there is a direction that the costs indicated must be paid "out of the property of the debtor, or in case the homestead is set off to the widow or minor children, out of the estate of the deceased." But it is manifest that this provision contemplated only the case in which the claimant was legally entitled to the homestead, and it was actually set off. But by whom should those costs be paid, when the application turns out to be unfounded and the petition is dismissed? We think the costs ought to be paid by some one. But inasmuch as costs are purely statutory, and the special act upon the subject of homestead makes no provision for costs in the case which has occurred, we know of no law that allows the costs to be taxed against the petitioners. We suppose that the master has received his costs, \$5, in each case under the last clause of the section 2004 of the General Statutes, which provides: "Whenever a homestead is laid off

as provided, the master or clerk, as the case may be, shall receive as compensation \$5 for all services, including the record of the proceedings, but excluding the advertising, which shall not exceed five dollars, and which fees and costs shall be paid in advance by the party claiming the homestead," &c.

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*The judgment of this court is, that the judgment of the Circuit Court, as herein explained, be affirmed, except as to the costs, which is reversed.

25 S. C. 585

REAGAN v. BISHOP,

(April Term, 1886.)

[1. *Appeal and Error* ⇨987.]

An action to set aside a sheriff's deed for fraudulent conduct at the sale, and to recover the land, is a case in chancery.

[Ed. Note.—Cited in *Du Pont v. Du Bos*, 33 S. C. 397, 11 S. E. 1073.]

For other cases, see *Appeal and Error*, Cent. Dig. § 3895; Dec. Dig. ⇨987.]

[2. *Judicial Sales* ⇨19.]

Purchasers at sheriff's sale, who were claiming an equitable interest in the property sold, did not avoid the sale by giving, in good faith, notice of such claim.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 43; Dec. Dig. ⇨19.]

[3. *Judicial Sales* ⇨19.]

Three persons owning an equal interest in property about to be sold under execution, may lawfully combine to purchase the property jointly, there being no intention to prevent free competition.

[Ed. Note.—For other cases, see *Judicial Sales*, Cent. Dig. § 43; Dec. Dig. ⇨19.]

4. Finding of fact by referee and Circuit Judge confirmed.

5. Petition for rehearing refused.

Before Hudson, J., Spartanburg, February, 1886.

The opinion states the case. The Circuit decree was as follows:

The plaintiffs were bound to prove the alleged corrupt combination of the sale and chilling of the bidding by a clear preponderance of evidence. Fraud when alleged must be proven satisfactorily. The evidence, in my judgment, does not justify the referee in finding that there was a contract with Grambling not to bid at the sale—in fact the great weight is against the conclusion; it is not even sufficiently strong to satisfy me that these defendants or any authorized agent ever agreed to let him have twenty-five or thirty acres of land in case they became the purchasers. But even if this were true, it would not vitiate the sale if there was no agreement by the defendants with Grambling not to bid, and if the purpose of the agreement was not to chill the bidding. I really think the plaintiffs have failed on this essential allegation of this complaint.

As to the announcement of Mr. Cleveland, attorney for defendants, at the sale, it was made in the best of faith, and he was in duty bound to make it, as otherwise his clients

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might have been *seriously prejudiced in the suit then pending between these plaintiffs and defendants about this same land.

Now, after this sale and purchase the present defendants under arbitration secured the renunciation of Mrs. Reagan's dower in her husband's estate in this land. This gave, as defendants claim, a perfect title to them in the whole land. And after this the appeal pending in the Common Pleas, involving the question of title to this land between these same litigants was marked on the calendar settled. A serious question might be raised whether that might not have been pleaded in bar to the present controversy. No such question is raised, and I do not say the plea would have been good.

It is ordered, adjudged, and decreed, that the plaintiffs' exceptions to the referee's finding of fact that an illegal agreement was made with Grambling by the defendants be reversed, and that his judgment be sustained, as well on the ground on which it is based as upon the grounds upon which it should further have been based. It is further ordered that the complaint be dismissed with costs.

From this decree plaintiffs appealed.

Mr. J. S. R. Thomson, for appellants.

Messrs. Bomar & Simpson and G. W. Nichols, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Justice McGOWAN. This was an action to set aside a sheriff's deed of a tract of land containing 250 acres, and for the recovery of the same. It was referred to Charles P. Wofford, Esq., as special referee, to hear and determine the issues, when the following facts appeared:

In 1860 the land in dispute was sold by the commissioner in equity. At that time Mark Reagan and his three sisters, Martha, Ailsy, and Harriet, were living on the land, which, as we suppose, had been the property of their father, and it was bid off by the brother, Mark Reagan, for \$960, payable in two equal annual instalments. The bond

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for the purchase money was signed by *Mark and the three sisters, who were all older than he was. It seems from the credits on the bond, that most of the payments were made by the sisters in Confederate bills, and by receipting for their shares of the purchase money, who had means of their own derived from the sale of homespun cloth and teaching school; but they were entered as made "for Mark Reagan," and the deed was made to him individually. The brother and

sisters continued to live together on the place as one family, until one after another the parties all married except Harriet. Martha married E. L. Pope, and Ailsy one Bishop. Mark also married in 1863 or '4, and died intestate in 1877, leaving a widow, Lavinia, and three infant children, James, Hattie, and Emma, the plaintiffs. The widow administered upon the estate of her deceased husband, and a judgment was recovered against her as administratrix, upon a debt of her intestate.

After the death of their brother Mark, the three sisters commenced suit in the Probate Court for partition of the land, claiming that they and their brother had paid equally for it, and each was entitled to one-fourth interest, although for convenience the deed had been made to the brother Mark alone. The probate judge ruled against the sisters, but they appealed to the Court of Common Pleas; and, pending that appeal, the judgment which had been recovered against Lavinia as administratrix, was levied upon the whole land, which was sold as the property of Mark Reagan, deceased. At the sale Mr. Cleveland attorney for the sisters in the probate suit announced that only one-fourth interest would go to the purchaser, and any one buying and attempting to hold the whole of it, would buy a law suit. Mrs. Bishop bid off the land for \$185, and the sheriff's deed was made to the three sisters. They obtained from Lavinia, the widow, the relinquishment of her dower for \$150, and she, with her children, left the place, and the probate appeal was marked "settled."

Afterwards Lavinia, the mother, died, and the children of Mark Reagan brought this action for the land, alleging that the whole legal title was in their father, Mark, and descended to them; and charging that the sheriff's sale should be set aside as void, upon the ground that the sisters fraudulently and illegally combined to chill the biddings,

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both by causing notice to be *given of their claims in the pending probate proceedings and by making an alleged agreement with one Grambling to sell him a small part of the land—some thirty acres—as an inducement for him not to bid at the sale, which enabled them to get the land at a sacrifice. The defendants positively denied the alleged agreement with Grambling.

After much testimony, the referee found that there was "an understanding among the sisters that one should buy for herself and the others, and that Grambling should have the benefit of the purchase to the extent of twenty-five or thirty acres; but that it was not shown that the low price of the land could be attributed to that arrangement; that under the circumstances the land brought as much as a prudent man would be willing to pay," &c. To this report the plaintiffs filed exceptions, and the defend-

ants also gave notice that if the report of the referee could not be maintained on the grounds on which it was placed, they would ask that it should be sustained on the following grounds: first, that the proof showed no such agreement as that set out in the complaint; and, second, if made, it was not such as to avoid the sale, and the referee erred in finding that it was sufficient.

The cause came on to be heard by Judge Hudson, who held that "the announcement of Mr. Cleveland, attorney for the defendants, at the sale, was made in the best of faith, and he was in duty bound to make it, as otherwise his clients might have been seriously prejudiced in the probate suit then pending about the same land; and that the evidence did not justify the referee in finding that there was a contract with Grambling not to bid at the sale—in fact, the great weight is against such conclusion." And so holding, he sustained the referee's report, both on the grounds upon which it was based, as well as others, and dismissed the complaint.

To this decree the plaintiffs filed numerous exceptions, which are in the "Brief" and need not be restated here. The questions made are substantially these: I. Was the announcement made at the sale by the attorney of defendants sufficient to avoid their purchase, and the sheriff's deed to them? II. Was there any agreement between defendants and any other person as to not bidding at the sale? And if so, did it have

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the effect of making *the land sell for an under value? III. Was the decree based on any testimony which was improperly admitted?

Is this an action at law or a case in chancery? Considered simply as an action to recover the land, it is clearly the former—nothing more nor less than trespass to try titles. In this view, the Circuit Judge having found as matter of fact, that the defendants did not make a contract with Grambling not to bid at the sale, nor combine in such a manner as to prevent fair and full competition, this court would have no right to review the evidence, as in that case our jurisdiction would be confined solely to the correction of errors of law, assuming the facts to be as found. But looking to the matters charged as the grounds of recovery, we find the prayer is, that the sheriff's deed to the defendants may be set aside as void, the defendants, as alleged, having purchased the land for less than its value, caused by a fraudulent combination on their part to chill the biddings, both by having it announced at the sale that each of the sisters claimed a fourth interest in the land, and also by making an agreement with one Grambling not to bid at the sale. These are matters cognizable only on the equity side of the court, and would seem to characterize it as a case in

chancery. So considering, this court, sitting as an appellate tribunal, has the right to review the whole evidence and to determine all the questions in the case, whether of fact or of law.

First, as to the announcement at the sale. As we understand it, the defendants had nothing to do with levying and selling the land under execution. They were prosecuting their appeal from the Probate Court to establish their claim that they paid part of the purchase money of the land, and were entitled to equitable rights therein, when it was advertised to be sold under execution as the property of their deceased brother Mark. What could they do but give notice of their claim or abandon it, as an innocent purchaser without notice of their alleged equities would have been entitled to hold it against them? As the sale under execution could carry nothing more than the interest of Mark, whatever that might be, we can have no doubt that the notice given, tending to limit that interest, did reduce the price at which the land was sold. But we cannot see

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that for that reason it was illegal and sufficient to avoid the sale. Mr. Cleveland made no false statement. What he said as to the pending appeal from the Probate Court was in fact true, and everything else he said about buying a law suit, &c., was, of course, mere matter of opinion, as to which all persons were at liberty to form their own judgments.

Such notices at sheriff's sales are not at all uncommon. In this case, of course, the court could not hear and determine the appeal from the Probate Court. It is not known, and probably never will be, whether the opinion of Mr. Cleveland was well founded or not, and therefore we are not authorized to assume that the sisters had no interest in the land, and that the notice was pretentious merely to chill the biddings. On the contrary, without regard to whether that opinion was or was not sound, we concur with the Circuit Judge that "the announcement of Mr. Cleveland was made in the best of faith, and he was in duty bound to make it, as otherwise his clients may have been seriously prejudiced in the suit then pending between the plaintiffs and defendants about this same land," &c.

Second. As to the alleged combination to prevent free and full competition. It has been settled in this State, "that the principle which governs all sales at auction, and especially judicial sales, is, that there should be full and fair competition. Any agreement or combination, therefore, the object and effect of which is to chill the sale and stifle competition is illegal, and no party to the agreement or combination can derive benefit from the sale," &c. See *Hamilton v. Hamilton*, 2 Rich. Eq., 355 [46 Am. Dec. 58]; *Bar-*

rett v. Bath Paper Company, 13 S. C., 156, and authorities cited. We do not understand that every agreement of parties to buy together will avoid a sale. Several persons may unite in making a purchase, one bidding for all, provided there is no intention thereby to prevent free competition. As was said in *Hamilton v. Hamilton*, supra, "It is shown in that, as in other cases, that persons may properly unite for the purpose of making a bid among themselves, where no one of the associates was able to purchase or desired to own the entire property exposed to sale, the effect of such an agreement is to advance the object which the policy of the law favors, a fair price to the parties interested in the article sold," &c.

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*It was not shown that the sisters agreed beforehand for one to bid for herself and the others. As it turned out, however, Mrs. Bishop did bid for all. But if there had been a previous understanding to that effect, we do not think it would have been sufficient to avoid the sale. There is no principle or rule of law, which requires every one at a sale to become a bidder or even all of those who may desire a part of the property sold. The sisters were claiming in the same right as tenants in common—each wanted a part, but neither wanted the whole of the land, and we cannot see that the fact that one of them bid for the land and had it set down to all of them was any violation of the salutary principle adopted for the purpose of securing full and fair competition at auction sales. See *Carson v. Law*, 2 Rich. Eq., 307.

But it is urged that the defendants combined with Grambling, a stranger, and induced him not to bid at the sale, by agreeing to sell him 25 or 30 acres of the land at the price which it might bring at the sale, and that they reaped advantage from this agreement in the reduced price at which they purchased the land. This was a question of fact, as to which the referee, after full and careful consideration, found that there was some agreement with Grambling about selling him a part of the land, but that it was not shown that such agreement had any effect in reducing the price at which the land sold; while the Circuit Judge went further and found that "the evidence did not justify the referee in finding that there was a contract with Grambling not to bid at the sale; in fact, the great weight is against this conclusion. It is not even sufficiently strong to satisfy me that the defendants or any authorized agent ever agreed to let him have twenty-five or thirty acres of the land, in case they became the purchasers," &c.

The rule of this court, when the Circuit Judge concurs with the referee upon a question of fact, is well known. We have read the testimony carefully, and we cannot say that the finding of the Circuit Judge is without evidence to support it. The allegation

was that the illegal agreement was made by Grambling with Elijah Pope, the husband of one of the three sisters, in going to the court house on the morning of the sale, and was afterwards ratified by the sisters (Harriet was not at the court house that day), in the office of Mr. Cleveland. No one but Gramb-

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ling himself says that the sisters made any contract about his not bidding at the sale. Mr. Cleveland says there was some agreement in his office, but he did not know with whom it was made, and he does not think there was any understanding that Grambling was not to bid at the sale—thought the sale was fair. All the other parties positively deny that there was any such agreement or understanding. Besides, if the notice given by Mr. Cleveland at the sale touching the claim of the sisters, was taken as showing a serious cloud upon the title except as to one-fourth, as the referee found, the land was not sold at a sacrifice.

As the appeal from the probate judge, involving the merits of the sisters' claim, was not before the Circuit Judge for adjudication, the testimony of Eliza Bolling and Mrs. Bishop upon that subject was irrelevant to the issues in the case, and not having been considered, we do not think it necessary to go into the subject of its admissibility. In the view taken it did not in the least affect the decree rendered.

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

The plaintiffs filed a petition for rehearing, claiming that they were entitled certainly to three-fourths interest, and asking "that an issue be allowed between plaintiffs and defendants as to what interests or what equities, if any, the defendants had in said land at the time of sale." Upon this petition,

January 19, 1887. The following order was passed:

PER CURIAM. We have carefully considered this petition. The judgment of this court did not undertake to rule that the interest sold was only one-fourth, but that the sale carried the interest of Mark, whatever that might be. As it does not appear that any material fact or principle involved was overlooked in the decision, there is no ground for a rehearing, and the petition is refused.

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*COOKE v. POOL.

(April Term, 1886.)

1. Finding of fact by the Circuit Judge from testimony reported by the master, approved.

[2. *Champerty and Maintenance* ¶5.]

An innocent assignee of a judgment is not affected by a champertous purchase of the judg-

ment by his immediate assignor, but is entitled to enforce his judgment against the judgment debtor.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Cent. Dig. § 47; Dec. Dig. ¶5.]

Mr. Justice McIver dissenting.

Before Wallace, J., Greenville, November, 1885.

The opinion sufficiently states the case. The Circuit decree was as follows:

After an attentive consideration of the testimony reported in this case, and the argument of counsel, I am satisfied with the master's report. It is alleged that the plaintiff cannot bring this action, because he is not the legal holder and owner of the Crotwell judgment against Seth Pool, and no other creditor of Seth Pool has joined in the action. The grounds of this allegation are, that Thompson H. Cooke, plaintiff's attorney, bought the Crotwell judgment for the purpose of bringing this action; that he is an attorney at law of this court; and that such a transaction between a creditor (and) an attorney of this court is void under section 2165 of the Revised Statutes of 1882. That section provides, in substance, that any attorney of this court who shall buy any demand for the purpose of putting it in suit, when the owner would not sue the same, shall pay a fine of one hundred dollars, and be incapable of practising in any court until restored by the Supreme Court.

It is insisted that as the statute provides a punishment for such conduct, the transaction is void; that the assignment transfers no right of action, even in the hands of innocent holders. I think the Crotwell judgment was purchased by Thompson H. Cooke for the purpose of bringing an action to set aside the deed attacked in this action, and that such an action would not have been brought by Crotwell, and if Thompson H. Cooke had brought the action, it would have been dismissed under section 2165 supra. But the action was not brought by Thompson H. Cooke, but by Henry P. Cooke, the as-

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signee of Thompson H. Cooke, and there is no evidence to show that he was aware or had notice of any unlawful purpose upon the part of his assignor. Whatever may be the actual truth of the facts, Henry P. Cooke stands before the court as the bona fide holder of this Crotwell judgment, and is not to be turned out of court for a transaction for which he is not responsible under the statute.

It is ordered and adjudged, that the report of the master herein be confirmed and made the judgment of this court.

Mr. Geo. Westmoreland, for appellant.
Mr. T. H. Cooke, contra.

November 22, 1886. The opinion of the court was delivered by

Mr. Chief Justice SIMPSON. One J. M. Crotwell held a judgment on Seth P. Pool for the sum of \$164.50, which he assigned to Thompson H. Cooke, attorney at law. Cooke assigned the same to his brother, Henry P. Cooke, the plaintiff in this action. Henry P. Cooke instituted the action below to set aside a certain deed of the said S. P. Pool to certain of the defendants as fraudulent and void, it having been executed, as alleged, to defraud creditors. The defence set up in the answer of defendants denied the fraud in the deed, also the assignment of the judgment from Crotwell to T. H. Cooke, and claimed that the deed from Seth P. Pool to S. H. Pool was bona fide and for a valuable consideration.

The case having been referred to the master, he reported the following facts: That on April 6, 1878, J. M. Crotwell obtained a judgment by default against Seth P. Pool for \$164.50, with \$23.05 costs. This judgment was assigned by said Crotwell to T. H. Cooke, attorney, on July 3, 1882, and by said Cooke to H. Powell Cooke, the plaintiff in this action, on August 8, 1882. As to the illegality of the transaction between Crotwell and Cooke he reported: "That Crotwell mentioned having a judgment on Pool, but did not tell him that he wanted him to try and make the money. After this Cooke went to see Crotwell, and asked him to assign said judg-

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ment to him, which was done, with the *understanding on the part of Crotwell that he would have nothing more to do with it, and that he was not responsible for costs. * * * At the time of the assignment nothing was said about what Cooke was to pay for the judgment, but some time afterwards, a month or two, Cooke agreed to pay \$100 for the judgment, and gave his note for that amount, with the understanding that he was not to pay until the case was settled. Cooke admits that he bought the judgment expecting to make something out of it, and he expected to make it by bringing a suit like this, if he did not make it otherwise. He assigned the judgment to his brother, the plaintiff, on account of a debt he owed him. Crotwell told Cooke before and after he assigned the judgment to him that he did not intend to have any more litigation about it." After the master's report was filed, T. H. Cooke's note to Crotwell was found, which by consent was admitted in evidence. It was dated July 3, 1882, the day of the assignment of the judgment to him.

His honor, Judge Wallace, who heard the report of the master upon exceptions, confirmed said report, and made it the judgment of the court, holding that notwithstanding T. H. Cooke could not have brought the action himself, in view of the fact that the

evidence showed that he purchased the judgment for the purpose of bringing an action to set aside the deed attacked, which Crotwell, the assignor, would not have done, and which, under section 2165, General Statutes, an attorney at law could not do; that section providing in substance, that an attorney of the court who shall buy any demand for the purpose of putting it in suit when the owner would not sue the same, shall pay a fine of one hundred dollars, and be incapable of practising in any court until restored by the Supreme Court—yet, that the plaintiff, "standing before the court as a bona fide holder of the judgment, could not be turned out of the court for a transaction for which he was not responsible under the statute." He therefore, as stated above, confirmed the report and made it the judgment of the court.

The defendants' exceptions on appeal raise three questions. 1st. That the assignment from Crotwell to Cooke was void. 2d. Being void, T. H. Cooke had no right to assign to his brother, the plaintiff. And, 3d. That

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his honor erred in holding that the *plaintiff, H. P. Cooke, was a bona fide holder of the judgment without notice of the unlawful purposes and acts of his assignor.

As to this last point. This was a question of fact, depending upon the force and effect of the testimony. Upon examination of the evidence directed to this point we find no ground, under the law applicable to such questions, to disturb the finding of the judge. This exception is therefore overruled.

The plaintiff, then, being as a matter of fact a bona fide holder of the judgment without notice, if his honor was right in ruling that, notwithstanding the transaction between T. H. Cooke and Crotwell may have been illegal, yet that this fact would not turn the plaintiff out of court, standing as such bona fide holder, then the appeal must be dismissed. The important, and in fact the only legal, question therefore involved in the appeal is, was his honor right in such ruling? If he was, it could make no difference, so far as the rights of the plaintiff are concerned, whether or not the assignment of the judgment in question from Crotwell to T. H. Cooke was champertous at common law, or was in violation of section 2165 of the General Statutes, he being a bona fide holder without notice.

Having reached the conclusion that his honor was correct in his ruling, we have deemed it unnecessary to follow the argument of the appellants as to the effect of section 2165, General Statutes, *supra*, or of the common law, upon a transaction like that between Crotwell and T. H. Cooke, by which it is alleged that the judgment in question was assigned by Crotwell to the said Cooke, and we have therefore confined ourselves in this opinion to the support of his honor's ruling as to the rights of the plaintiff. It is ad-

mitted that the assigned judgment is a valid judgment, unpaid and indefensible. There is no inherent defect therein, like a gaming note, void wherever (Mordecai v. Dawkins, 9 Rich., 262), or like an usurious contract, still usurious in whatever hands found (Martin v. Petit, 11 Rich. Eq., 416), and there is really no defence to the judgment.

But it is claimed that the plaintiff is not a legal holder thereof, because his assignor, T. H. Cooke, received no title from Crotwell, the transaction between them as to the said Cooke being, as alleged, in violation of

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section 2165, General Statutes, *and champertous at common law, and this is the only defence. If the contest below was between T. H. Cooke and Crotwell as to the ownership of the judgment, or as to the enforcement of the agreement to assign, then the questions raised would be pertinent. But the judgment, it is admitted, was transferred from Crotwell to T. H. Cooke, and from the latter to the plaintiff, and Crotwell and Cooke are quiescent. Crotwell no longer claims the judgment, nor does T. H. Cooke. The plaintiff, however, claims it, and is in possession without protest or objection on the part of any one, and as a bona fide holder under what purports to be a regular and valid assignment, down from the original owner, and without notice of any taint in his title.

Now, can the judgment debtor, having no defense thereto, nor questioning in any way the validity thereof, or his heirs or representatives, under the facts of this case, resist the enforcement of said judgment, on the ground that the plaintiff has no title? If Crotwell was suing the plaintiff for this judgment, would not the title be adjudged against him on the doctrine of estoppel? However illegal it may have been for him to transfer said judgment to T. H. Cooke, yet, having done so, and having remained quiet until Cooke had transferred it to an innocent and bona fide holder, would the court allow him even to offer testimony impeaching his transfer? Would not the doctrine of estoppel close the door upon any investigation preceding the act of transfer to the plaintiff, and make the plaintiff's title complete? We think so. And if the plaintiff would thus be protected against Crotwell or T. H. Cooke, equally so must he be protected as against these defendants. They have no defence to the judgment, and it can make no difference to them by whom it may be enforced, so that when enforced, it shall be done by one whose act will end and extinguish it. The Circuit Judge was right in holding that the plaintiff could not be turned out of court on the defences set up.

As this determines the case, we express no opinion as to the questions whether the purchase by T. H. Cooke of this judgment was in violation of section 2165, General Statutes; nor, if so, whether that fact

would render said purchase absolutely void; nor whether said purchase was champertous

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at common law. *These questions are not really involved in the appeal, and it would not be proper for this court to prejudice them, when the parties most interested therein are not before the court.

It is the judgment of this court, that the judgment of the Circuit Court be affirmed.

Mr. Justice MCGOWAN. I concur. I do not understand that the Circuit Judge refused to dismiss the plaintiff's action for the reason that he was a purchaser for value, in the sense of the equitable plea upon that subject, to sustain which it is necessary to show that the consideration was actually paid in money. Such plea is interposed by way of defence, as a shield against all claims except the legal title. As I understand, his view is that the plaintiff, having purchased the judgment bona fide, under an unbroken chain of assignments, regular upon their face, has the right to enforce it against the defendant in execution, notwithstanding the peculiar hidden vice alleged to exist in one of the intermediate assignments, with which the defendant in execution had no connection, and of which the plaintiff, when he took his assignment, had no notice. Section 2165, of the General Statutes, does not expressly declare void the "speculative practices" therein referred to, but imposes penalties upon an attorney who shall enter into them.

But assuming that the court would not enforce such a contract between the parties in *pari delicto*, it seems to me that until the hidden vice which affects the contract is made to appear, it may carry title to an innocent purchaser; or, at least, that such alleged vice may not be shown collaterally by one in no way privy to it, so as either to indict the penalties imposed, or avoid the contract as against a third person, who in the meantime has purchased bona fide and without notice of any defect. As was said in the case of *Verdier v. Simons*, 2 McCord Eq., 388: "As to champerty, contracts of this kind, if fairly made, have not been considered in modern times to be champerty. At any rate, it is for the party aggrieved and not for strangers to take advantage of these objections." The question in *McConnell v. Kitchens* [47 Am. Rep. 845] was between the parties to the contract assailed. See *Torrence v. Shedd*, 112 Ill., 477, where it is

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said in a case somewhat similar *to this: "But even conceding the agreement to be champertous, we do not think appellees can avail themselves of it as a defence to this suit. While the cases are not all in accord on this question, we think the decided weight of authority sustains the position that champerty cannot be made available as a defence in a collateral proceeding, as is sought to be

done here. *Fetrow v. Merriwether*, 53 Ill., 275; *Boone v. Chiles*, 10 Pet., 219 [9 L. Ed. 388]; *Hilton v. Woods*, L. R. 4 Eq., 432; *Knight v. Bawyer*, 2 DeG. & J., 444; *Coleman v. Billings*, 89 Ill., 187. This question cannot properly arise except in a controversy between the parties to the alleged champertous agreement or their privies," &c.

Mr. Justice McIVER, dissenting. I dissent. One of the issues in the action was whether plaintiff was the owner of the judgment originally recovered by John M. Crotwell against Seth P. Pool. To maintain his allegation of ownership the plaintiff must trace his title through the assignment from Crotwell to T. H. Cooke. It therefore becomes a material inquiry whether such assignment was a valid or void transfer. It seems to me that it is illegal and void under section 2165, of the General Statutes (*McConnell v. Kitchens*, 20 S. C., 430 [47 Am. Rep. 845]), and that T. H. Cooke could not by an act

expressly forbidden by statute acquire a legal title to the judgment, and could not, therefore, transfer any such title to the plaintiff, who consequently stands before the court claiming under a judgment in favor of a third person, to which he has shown no title whatever. He cannot claim as the innocent holder of a negotiable security, for the judgment is not such a security; nor can he invoke the protection afforded to a bona fide purchaser for valuable consideration without notice, for he has neither acquired the legal title (*Bush v. Bush*, 3 Strob. Eq., 131 [51 Am. Dec. 675]), nor has he paid any purchase money, the sole consideration of his purchase being an antecedent indebtedness, which is not sufficient. *Williams v. Hollingsworth*, 1 Strob. Eq., 103 [47 Am. Dec. 527]; *Zorn v. Railroad Company*, 5 S. C., 90; *Haynsworth v. Bischoff*, 6 S. C., 159.

I think, therefore, that the judgment appealed from should be reversed.

Judgment affirmed.

NOTES OF CAUSES

Decided during the period comprised in this Volume, and not reported in full.

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*No. 1892. COVAR v. SALLAT. April Term, 1886. This was a consent order settling matters of controversy involved in the appeal. Filed June 2, 1886.

No. 1917. WOOD v. WOOD. April Term, 1886.

[1. *Appeal and Error* ⇨1009.]

While this court is not absolutely bound by the findings of fact by the Circuit Judge, sustaining the referee, in an equity cause, "yet the rule is, as we have often stated, that there must be in every such case some very strong and potent reason appearing otherwise, or this court will feel itself bound by such findings. The findings must either be without testimony, or its manifest weight must be to the contrary, or the facts as found below will stand. And especially does this rule apply in a case like that before the court, where the Circuit Judge fully and unequivocally sustains and adopts the findings of the referee."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. ⇨1009.]

[2. *Witnesses* ⇨139.]

In a contest between two claimants under the obligee in a bond for titles, section 400 of the Code does not prevent the obligor from testifying to communications between himself and the deceased obligee, as such witness, though a party to the cause, has no interest in the action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 586; Dec. Dig. ⇨139.]

Decree of Hudson, J., Spartanburg, affirmed. Opinion by Mr. Chief Justice SIMPSON, July 14, 1886. J. S. R. Thomson, for appellants. Bobo & Carlisle, contra.

No. 1918. HILL v. WALLACE. April Term, 1886.

[*Executors and Administrators* ⇨470.]

An administrator having paid all the debts of his intestate this brother, except a large one of his own, not then barred, retaining only a small sum of money and a watch, in action brought years afterwards by the administrator de bonis non of the first intestate

against the representative of the first

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administrator, the court *refused to apply the statute of limitations to this unpaid debt, or to charge annual balances, or to require an accounting for the watch.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2014; Dec. Dig. ⇨470.]

Decree of Witherspoon, J., Union, affirmed. Opinion by Mr. Chief Justice SIMPSON, July 14, 1886. J. C. Wallace, for appellant. William Munro, contra.

No. 1937. ROLLINS v. CLEMENT. April Term, 1886.

[1. *Rewards* ⇨15.]

Plaintiff sued to recover a reward offered for information sufficient to convict the persons who burned defendant's mill. It was competent to prove by a witness the fact that he had previously given to defendant information received from another as to the guilty parties.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. § 23; Dec. Dig. ⇨15.]

[2. *Rewards* ⇨15.]

A witness could testify as to a message carried by him from defendant to plaintiff, upon which the plaintiff acted.

[Ed. Note.—For other cases, see Rewards, Cent. Dig. § 23; Dec. Dig. ⇨15.]

Judgment of the Circuit Court of Spartanburg (Hudson, J.) affirmed. Opinion by Mr. Justice McGOWAN, September 15, 1886. Bobo & Carlisle, J. S. R. Thomson, for appellants. Stanyarne Wilson, contra.

No. 1939. MORGAN v. WRIGHT. April Term, 1886.

[*Dower* ⇨14; *Estoppel* ⇨78.]

This case involved the same points, and was argued by the same attorneys, as the case of Morgan v. Smith, ante, 337, which is referred to and adopted as the decision of this appeal.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 17; Dec. Dig. ⇨14; Estoppel, Cent. Dig. § 206; Dec. Dig. ⇨78.]

Opinion by Mr. Justice McIVER, September 23, 1886.

No. 1937. *HAILE v. MORGAN & CO.* April Term, 1886.

[For subsequent opinion, see *Harle v. Morgan & Co.*, 29 S. C. 258, 7 S. E. 487.]

Defendants agreed to sell guano for Rasin & Co. on commission, taking cotton option notes payable November 1, which were to be sent to Rasin & Co. by May 15 of the same year, 1881, guaranteeing said notes to the extent of their commissions. The agreement contained this further stipulation, as written by Rasin & Co. to the defendants: "If for any cause or reason full and complete settlement, in accordance with the stipulations hereinbefore contained, should not be made by you to us or to our order before the 1st day of June, 1881, then or after that, provided only that we should request it, but not otherwise, you must promptly, upon such request from us so to do, give to us or to our order your own note, properly made out upon

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our regular *form of cotton option note, for such amount or balance as may be unsettled at the time that we make such request."

On June 7, 1881, defendants gave to Rasin & Co. their cotton option note for \$1,636.80, payable November 1, "with interest from maturity, if not paid at maturity, also ten per cent. counsel fees and other expenses of collecting, if sued." In the summer of 1881, this note was transferred to one L. who afterwards transferred it to plaintiff. The action was on this note.

The Circuit Judge (Wallace) admitted in

evidence letters from Rasin & Co. to defendants, written in October and December, 1881, in which they claimed the notes taken by defendants for guano sold. Under the charge of the Circuit Judge, the jury found for plaintiff only to the extent of defendants' commissions, \$113.44. *Held*,—

[1. *Contracts* ⇨54.]

That the letters written by Rasin & Co. after their transfer of the note sued on was not competent evidence against plaintiff.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 234; Dec. Dig. ⇨54.]

[2. *Bills and Notes* ⇨28.]

That the paper sued on lacked "at least one of the essential features of" a note.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 40; Dec. Dig. ⇨28.]

[3. *Bills and Notes* ⇨92.]

That the instrument of June 7, 1881, had a sufficient consideration in the stipulations of the original agreement, under the express terms of which it was given; and that plaintiff was entitled to recover the amount called for by the instrument of June 7, together with the counsel fees therein provided.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. ⇨92.]

Judgment reversed. Opinion by Mr. Justice McIVER, November 29, 1886. J. S. R. Thomson, for appellant. Bobo & Carlisle, contra.

⇨ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

